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Commentary of Article 63 of the Statute of the ICJ

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THE STATUTE OF
THE INTERNATIONAL
COURT OF JUSTICE

A COMMENTARY
THIRD EDITION

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Article 63

(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.

(1) Lorsqu'il s'agit de l'interprétation d'une convention à laquelle ont participé d'autres Etats que les parties en litige, le Greffier les avertit sans délai.

(2) Chacun d'eux a le droit d'intervenir au procès et, s'il exerce cette faculté, l'interprétation contenue dans la sentence est également obligatoire à son égard.

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A. Introduction

- 1 Article 63 of the Statute of the ICJ provides a procedure whereby a State party to a convention that is under consideration in proceedings before the Court between other States can intervene to present to the Court its construction of the convention in question. The rationales of Articles 62 and 63 of the Statute are different: the former is a procedural device for protecting the concrete and individualized interests of third States, which may be affected by a decision of the Court, while the latter is based on the assumption that States are the natural guardians of their conventions. In the *Wimbledon* case, the PCIJ described the relationship between the two articles:

The first of these forms of intervention is that dealt with in Article 62 of the Statute and Articles 58 and 59 of the Rules of Court; it is based on an interest of a legal nature advanced by the intervening party and the Court should only admit such intervention if, in its opinion, the existence of this interest is sufficiently demonstrated.

On the other hand, however, when the object of the suit before the Court is the interpretation of an international convention, any State which is a party to this convention has, under Article 63 of the Statute, the right to intervene in the proceedings instituted by others and, should it make use

of the right thus accorded, the construction given by the judgment of the Court will be equally binding upon it as upon the original applicant parties.¹

The functions of Article 63 can be apprehended in light of the theory of interpretation and of the coexistence and interaction between multiple interpreters. If the parties to the conventions remain their authentic interpreters, the World Court's interpretations are undoubtedly authoritative. While there is no doctrine of *stare decisis* in international proceedings and only the parties are bound by a decision in a case, in reality when a treaty provision is interpreted and applied by the Court, decision-makers in other States are influenced by that decision.² And the Court's interpretation of a treaty will be adopted and used by other actors in international or domestic arenas. The *res interpretata* effect of the Court's judgments and advisory opinions is well-established, though not unproblematic.³ The problems arising from the blurring of the lines between law-interpretation and law-making go beyond the scope of this commentary. But Article 63 appears to build bridges between the interpreters, foster uniform interpretation of a convention, and thus promote the harmonious development of international law. Article 63 also provides that the intervening State is bound by that part of the decision that relates to the purpose of intervention—the interpretation of the convention in question. It is appropriate that parties to a treaty should have the opportunity to present their views on its construction to the Court, but that having done so they must accept the interpretation as authoritative.

B. Historical Development

The idea of providing a procedure whereby States parties to a convention that is under consideration in litigation between other States can intervene in those proceedings has its origins in international arbitration.⁴ It appeared in one of the first projects undertaken by the Institut de Droit International. Article 16 of its Draft Regulation for International Arbitral Procedure, adopted in 1875, stated:

Ni les parties, ni les arbitres ne peuvent d'office mettre en cause d'autres Etats ou des tierces personnes quelconques, sauf autorisation spéciale exprimée dans le compromis et consentement préalable du tiers. L'intervention spontanée d'un tiers n'est admissible qu'avec le consentement des parties qui ont conclu le compromis.⁵

The Netherlands' delegation introduced the concept at the 1899 Hague Peace Conference, where it was accepted as Article 56 of the First Hague Convention for the Pacific Settlement of International Disputes:⁶

The award is only binding on the parties who concluded the compromis.

¹ *Wimbledon*, Question of Intervention by Poland, PCIJ, Series A, No. 1, pp. 11, 12.

² Cf. also Brown on Art. 59, especially MN 81–87.

³ Cf. *inter alia*, Boyle/Chinkin, *The Making of International Law* (2007), pp. 263–312; Besson, 'Legal Philosophical Issues of International Adjudication', in *The Oxford Handbook of International Adjudication* (Romano *et al.*, eds., 2014), pp. 413–34, 420–6.

⁴ Rosenne (1993), p. 2. Cf. also *Whaling in the Antarctic*, Declaration of Intervention by New Zealand, Sep. Op. Cançado Trindade, ICJ Reports (2013), pp. 14, 23–7, paras. 24–34.

⁵ *Projet de règlement de la procédure arbitrale internationale*, *Annu. de l'Inst. de Droit Internat.* 1 (1877), pp. 126, 131.

⁶ *Hague Convention No. I for the Pacific Settlement of International Disputes*, 29 July 1899, 1 Bevans 230, 187 CTS 410.

When there is a question of interpreting a Convention to which Powers other than those concerned in the dispute are parties, the latter notify to the former the compromise they have concluded. Each of these Powers has the right to intervene in the case. If one or more of them avail themselves of this right, the interpretation contained in the award is equally binding on them.

The provision was adopted with little change in Article 84 of the 1907 First Hague Convention for the Pacific Settlement of International Disputes:⁷

The award is not binding except on the parties in dispute.

When it concerns the interpretation of a Convention to which Powers other than those in dispute are parties, they shall inform all the Signatory Powers in good time. Each of these Powers is entitled to intervene in the case. If one or more of them avail themselves of this right, the interpretation contained in the Award is equally binding on them.

4 In both Hague Conventions, the first paragraph of the relevant Article deals with the principle of *res judicata*.⁸ Reiteration that the arbitral decision is binding only upon the parties to the proceedings is followed by the introduction of a procedure allowing third States to put their construction of a convention before the tribunal. Although Articles 62 and 63 of the Statute do not explicitly link the two, the relationship between the concepts of *res judicata* and both forms of intervention continues to be the subject of analysis.⁹

5 The procedure that was formulated in the context of international arbitration was adapted during the drafting of the Statute of the PCIJ.¹⁰ The Dutch government submitted to the League of Nations draft rules for the proposed Permanent International Court, including Article 49 in the same terms as Article 84 of the 1907 Hague Convention for the Pacific Settlement of International Disputes. Article 23 of the text prepared by the drafting Committee of the Advisory Committee of Jurists read:

Whenever the construction of a convention, in which States other than those concerned in the case are parties, is in question, the Registrar, upon receipt of the application opening the proceedings, shall notify all such States forthwith. Every State so notified has the right to intervene in the proceedings, but if it uses this right, the judgement will have the force of *res judicata* concerning the intervening party.

In the discussions within the Advisory Committee, this proposed text was linked with the question of intervention. It was agreed that a new procedure of intervention should be introduced and be provided for within a separate provision to be placed immediately prior to what was then Article 23. The new procedure of intervention became Article 62 of the Statute of the PCIJ. Article 23 was redrafted as Article 61:

Whenever the construction of a convention in which States, other than those concerned in the case are parties, is in question, the Registrar shall notify all such States forthwith.

Every State so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgement will be as binding upon it as upon the original parties to the dispute.¹¹

⁷ Hague Convention No. 1 for the Pacific Settlement of International Disputes, 18 October 1907, UKTS 6 (1907), 1 Bevens 577, 205 CTS 233.

⁸ Rosenne (1993), pp. 14–8. For the procedure of intervention in subsequent instruments governing international arbitral proceedings *cf. ibid.*, pp. 9–13. *Cf. also* Brown on Art. 59 MN 2–4, 30–33; Zimmermann/Thienel on Art. 60 MN 15–18.

⁹ *Cf. Miron/Chinkin on Art. 62, MN 72–74 and infra, MN 62–65.*

¹⁰ Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), p. 745.

¹¹ Draft Scheme for the establishment of the Permanent Court of International Justice, *ibid.*, pp. 673, 685.

The Advisory Committee acknowledged that its proposed Article 61 was 'borrowed from Mr Asser [of the Netherlands] and inspired by Article 84 of the 1907 Convention'.¹² The draft was adopted with little discussion or amendment as Article 63 of the Statute of the PCIJ. The French version of Article 63 of the Statute is reminiscent of the arbitral origins of this provision, since it uses the word 'sentence' instead of 'arrêt' or 'décision', which are the equivalent for the English term 'judgment'.

As with Article 62, there remain ambiguities and inconsistencies within the text and between the English and French texts. Beside the accidental use of 'sentence', the most important difference concerns the potential interveners (the *ratione personae* scope of Article 63): the English version refers to 'a convention to which States ... are parties', whereas the French version uses '*une convention à laquelle ont participé d'autres Etats*'. According to the English version, States *parties* to a convention have standing under Article 63. According to the French version, States *participants* can use this procedural device. The concept of 'participants to an international convention' is neither consecrated nor defined in international law. And, as will further be seen, the PCIJ held from the beginning that it must be understood as referring to 'parties'.¹³ Another inconsistency in translation is to be found in para. 2: the English version specifies that Article 63 can be used by 'Every State *so notified*' (by the Registrar), a qualification absent from the French version, which recognises a right to file an intervention à 'Chacun d'eux ...', the pronoun 'eux' referring to the States identified in para. 1, meaning the States participants to the convention. This addition in the English version explains why commentators writing in English wonder whether the notification by the Registrar is a condition for introduction of a declaration under Article 63, whereas this kind of inquiries are absent from the literature that is published in French. Only the negative answer is compatible with the two official versions.¹⁴

The almost non-existent application of Article 63 by the PCIJ meant that there was little experience to draw upon for the drafting of the Statute of the ICJ in 1945. There was almost no discussion of Article 63 by the Committee of Jurists that prepared the Statute for the new Court and the article was adopted in the same wording, but with numbered paragraphs. The inconsistencies between the two official versions persist in the Statute of the ICJ.

C. Practice of Intervention under Article 63

There have been very few occasions where a State has made a declaration of intervention under Article 63.¹⁵ In the PCIJ, Poland applied to intervene under Article 63 in the *Wimbledon* case.¹⁶ Before the ICJ, declarations of intervention under Article 63 have been made in:

- the *Haya de la Torre* case, by Cuba;¹⁷
- the *Nicaragua* case, by El Salvador;¹⁸

¹² Rosenne (1993), p. 23.

¹³ Cf. *infra*, MN 30–33. Cf. also Couvreur, in Piernas (2007), p. 10, fn. 9. The PCIJ had always been aware of this inconsistency (Acts and Documents concerning the Organization of the Court, PCIJ, Series D, addendum to No. 2, 1926, p. 160).

¹⁴ Cf. *infra*, MN 24–29.

¹⁵ See the table published in the *ICJ Yearbook* (2014–2015), p. 144.

¹⁶ *Wimbledon*, Question of Intervention by Poland, PCIJ, Series A, No. 1, pp. 11 *et seq.*

¹⁷ *Haya de la Torre*, Judgment, ICJ Reports (1951), pp. 71, 76.

¹⁸ *Nicaragua*, Declaration of Intervention of the Republic of El Salvador, ICJ Reports (1984), pp. 215–7.

- the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, by the Solomon Islands, the Federated States of Micronesia, the Marshall Islands, and the Samoa Islands.¹⁹ Australia made an application to intervene under Article 62, but no declaration of intervention under Article 63.
- the *Whaling in the Antarctic* case, by New Zealand.²⁰

The Court admitted Poland's, Cuba's and New Zealand's declarations, while it dismissed the other.

D. Comparison between Articles 62 and 63

I. Commonalities

- 9 Though Articles 62 and 63 establish two distinct forms of intervention, the two procedures have nonetheless been closely associated throughout the drafting of the various Rules of Procedure.

Like intervention under Article 62, intervention under Article 63 is an incidental procedure and 'the rule of law that "every intervention is incidental to the proceedings in a case" ... applies equally whether the intervention is based upon Article 62 or Article 63 of the Statute'.²¹

Consequently, the relevant provisions of the 1978 Rules of Court (Articles 82, 83-85) appear in Part III ('Proceedings in Contentious Cases'), Section D ('Incidental Proceedings').

- 10 Like Article 62, Article 63 is restricted to contentious proceedings and only States may intervene, although, under Article 34, para. 3, a public international organization shall be notified if its constituent instrument, or an international convention adopted under it, is in question in a case before the Court.²² The 2005 amendment of the Rules led to the addition of two paragraphs in Article 43 of the Rules, stating that:

2. Whenever the construction of a convention to which a public international organization is a party may be in question in a case before the Court, the Court shall consider whether the Registrar shall so notify the public international organization concerned. Every public international organization notified by the Registrar may submit its observations on the particular provisions of the convention the construction of which is in question in the case.

3. If a public international organization sees fit to furnish its observations under paragraph 2 of this Article, the procedure to be followed shall be that provided for in Article 69, paragraph 2, of these Rules.

¹⁹ *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, Order of 22 September 1995, ICJ Reports (1995), pp. 288, 306-7, para. 67.

²⁰ *Whaling in the Antarctic*, Declaration of Intervention by New Zealand, ICJ Reports (2013), pp. et seq.

²¹ *Land, Island and Maritime Frontier Dispute*, Application for Permission to Intervene, Order of February 1990, ICJ Reports (1990), pp. 3, 4, quoting *Haya de la Torre*, Judgment, ICJ Reports (1951), pp. 76. The Court has made similar statements about the incidental nature of proceedings under Art. 62: cf. *Miron/Chinkin* on Art. 62 MN 16-24.

²² Cf. *Dupuy/Hoss* on Art. 34 MN 10-17.

As explained by Couvreur, '[t]he new provision is inspired, *mutatis mutandis*, by the procedure permitting the intervention of States parties to a convention whose construction is at issue in a dispute (Article 63 of the Statute)'.²³ However, since 2005, this procedure has never been used.

Although Articles 62 and 63 refer to two distinct forms of intervention, there is now a virtually complete unification, or consolidation of the procedure for the two types of intervention²⁴ under Articles 81–86 of the 1978 Rules of Court, which, on a purely formal level, underlines the commonalities of the two forms of intervention. The procedures for consideration of a request for permission to intervene were analysed in the commentary on Article 62²⁵ and the present contribution will only dwell upon the procedural aspects specific to Article 63.²⁶ 11

As far as the substantial commonalities go, some authors, like Hudson, suggested that Article 63 could be regarded as a special instance of the general principle of intervention laid down in Article 62. He said that 'the fact that a State is a party to a convention to be construed may be regarded as establishing that State's legal interest so that a judgment by the Court will not ordinarily be required'.²⁷ Rosenne continues this analysis. He asserts that hints were given during the drafting of the Statute of the PCIJ that 'intervention under Article 63 is a form of intervention to protect an interest of a legal nature, not which may be affected by the decision in the case but in the more limited sense that it may be affected by the interpretation given by the Court to the multilateral treaty in question'.²⁸ However, the approaches to interest are different in the two cases: States are generally interested in the law determination process by the Court—Article 63 was adopted on this basic presumption—but this general interest is not enough for the purposes of Article 62.²⁹ On the other hand, if interveners under Article 63 certainly defend a particular construction of a convention which is in harmony with their own interests, they cannot directly defend their particular interests during the proceedings. Finally, Article 63 is applicable only to conventions, meaning that participation of third States to the assessment by the Court of other sources of general international law is not admissible under this provision. This explains why, in the *Jurisdictional Immunities of the State* case, Greece had to frame its application in order to meet Article's 62 requirements, although its motivation for participating to the proceedings was primarily related to the development of customary international law on immunities.³⁰ 12

The kinship between the two forms of intervention is revealed by the simultaneous invocation of both provisions. In the *Wimbledon* case, Poland filed its application under Article 62. The Court nonetheless considered that, though not expressly referred to in the application, Article 63 was implicitly invoked by the would-be intervener, who referred to its participation to the Treaty of Versailles. At the hearings, the Polish Government, 13

²³ Couvreur, in Piernas (2007), p. 50. For instance, in the *Whaling in the Antarctic* case, 'the Registrar also addressed to the International Whaling Commission (. . .) the notification provided for in Article 34, paragraph 3, of the Statute. The Commission indicated that it did not intend to submit any observations in writing under Article 69, paragraph 3, of the Rules of Court' (Judgment, ICJ Reports (2014), pp. 226, 234, para. 3).

²⁴ Rosenne (1993), p. 72.

²⁵ Cf. Miron/Chinkin on Art. 62 MN 115–120.

²⁶ Cf. *infra*, MN 51–60.

²⁷ Hudson, *PCIJ*, p. 422.

²⁸ Rosenne (1993), p. 73.

²⁹ Cf. Miron/Chinkin on Art. 62 MN 52–53.

³⁰ Cf. Miron/Chinkin on Art. 62 MN 71.

'abandoning the exclusive course which it seemed in the first instance to have adopted, [declared that it intended] to avail itself of the right conferred upon it, as a party to the Treaty of Versailles, by Article 63 of the Statute'.³¹ The case shows that, conceptually, the two forms of intervention overlap to some extent. It also evidences a lack of formalism on the part of the PCIJ, in addressing the very first request for intervention, since it accepted the substitution of legal basis at the hearings. In the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, the Federated States of Micronesia, the Marshall Islands, the Samoa Islands, and the Solomon Islands (but not Australia) filed their application on these double grounds. Unlike Poland's, their position was based on a double object, clearly identified in their requests to intervene: the risk posed by nuclear testing to their environment justified an application under Article 62, whereas the invocation by New Zealand of the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region of 25 November 1986 justified the use of Article 63.³² Simultaneous invocation of Articles 62 and 63 is not problematic, in particular when it corresponds to a double object, like in the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*. The Court would simply assess each ground according to its own conditions for admissibility.

II. A Different Margin of Appreciation

14 But the Court's margin of appreciation for assessing the admissibility of the requests to intervene is different under the two provisions.³³ Intervention under Article 62 was labelled 'discretionary or discretionary', and the one under Article 63, intervention 'as of right'.³⁴ For a long time, this was interpreted as an obligation for the Court to automatically grant a declaration regularly filed under Article 63. Under the 1978 Rules, the focus shifted from the right of intervention, to the Court's power to assess the regularity of the intervention.

15 This evolution is apparent in the modification of the Rules. The Report of the Advisory Committee of Jurists stated that 'there is one case in which the Court cannot refuse a request to be allowed to intervene; that is in questions concerning the interpretation of a Convention in which States, other than the contesting parties, have taken part; each of these is to have the right to intervene in the case'.³⁵ The Rules of the PCIJ reflect this understanding, since under Article 60, as adopted in 1922, the only duty of the third State was to inform the Court in writing of its desire to intervene and the only power of the Court was to record the declaration of intervention:

Any State desiring to intervene, under the terms of Article 63 of the Statute, shall inform the Registrar in writing at latest before the commencement of the oral proceedings.³⁶

³¹ *Wimbledon*, Question of Intervention by Poland, PCIJ, Series A, No. 1, pp. 11, 13.

³² *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, Application for Permission to Intervene under Article 62 of the Statute—Declaration of Intervention under Article 63 of the Statute submitted by the Government of the Solomon Islands, 24 August 1995, para. 1.

³³ Cf. also Miron/Chinkin, on Art. 62 MN 28–29.

³⁴ The distinctive terminology was used up for instance in *Whaling in the Antarctic*, Declaration of Intervention by New Zealand, Sep. Op. Cançado Trindade, ICJ Reports (2013), pp. 14, 23, para. 24.

³⁵ Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), p. 746.

³⁶ Preparation of the Rules of Court of January 30th, 1922, PCIJ, Series D, No. 2, p. 573.

In 1926, it was decided that Article 60 of the Rules would not contain any reference to the power of the Court to reject the intervention.³⁷ Hence, Article 60 of the 1926 Rules deals only with the Registrar's obligation to notify the third States, and with the practical arrangements for their participation.³⁸ On the occasion of the 1935 revision of the Rules, it was added that '[a] Member or State desiring to avail itself of the right conferred ... shall file a declaration to that effect with the Registry'. According to the Registrar's explanation, the declaration was merely 'a formal act by which a State desiring to avail itself of Article 63 would inform the Court of its intention. That act would have the advantage of fixing a point of time as from which the State would become an intervening party, as would be done by a decision of made the Court admitting a State's intervention under Article 62 of the Statute'.³⁹ Thus, Article 66 of the 1936 Rules confirmed the quasi-automaticity of intervention under Article 63: intervention was presumed admissible and would take effect by a simple declaration filed with the Registry. The presumption could however be challenged by an objection by the Parties,⁴⁰ or exceptionally, by the Court *proprio motu*, in which case, the Court needed to adopt a judicial decision. But the residual power of the Court seemed to be limited to determining whether the third State was indeed a party to the convention and whether that the convention was invoked in the instrument seizing the Court.⁴¹

The language used by the PCIJ in *Wimbledon* naturally reflects this original understanding according to which States have an unconditional right to intervene under Article 63, the Court having an administrative duty to register their decision to intervene. A minimal check of the conditions set out in Article 63 was made necessary by Poland's changing basis for intervention.⁴²

the Court records that the Polish Government intends to avail itself of the right to intervene conferred upon it by Article 63 of the Statute.

For these reasons,

the Court accepts the intervention of Poland in the case of the S.S. 'Wimbledon'.⁴³

³⁷ von Stauffenberg, pp. 446-7; Acts and Documents concerning the Organization of the Court, PCIJ, Series D, addendum to No. 2, 1926, pp. 157-62.

³⁸ 'Article 60: The notification provided for in Article 63 of the Statute shall be sent to every State or Member of the League of Nations which is a party to the convention relied upon in the special agreement or in the application as governing the case submitted to the Court. The Court, or the President if the Court is not sitting, shall fix the times within which States desiring to intervene are to file any cases. The Registrar shall take the necessary steps to enable the intervening State to inspect the documents in the case, in so far as they relate to the interpretation of the convention in question, and to submit its observations thereon to the Court. Such observations shall be communicated to the parties, who may comment thereon in Court. The Court may authorize the intervening State to reply.' (Article 60, Modification of the Rules, PCIJ, Series D, second addendum to No. 2, 1931, p. 43).

³⁹ Elaboration of the Rules of Court of March 11th, 1936, PCIJ, Series D, fourth addendum to No. 2, 1943, p. 271.

⁴⁰ Consequently, para. 3 of Art. 66 added indeed: '3. Such declarations shall be communicated to the parties. If any objection or doubt should arise as to whether the intervention is admissible under Article 63 of the Statute, the decision shall rest with the Court.'

⁴¹ Cf. the discussions held on the occasion of the 1936 revision of the Rules (PCIJ, Series D, fourth addendum to No. 2, 1943, pp. 271-5).

⁴² Cf. *supra*, MN 13.

⁴³ *Wimbledon*, Question of Intervention by Poland, PCIJ, Series A, No. 1, p. 13 (italics in the original). Cf. also Elias (1983), p. 86; *Nicaragua*, Declaration of Intervention of the Republic of El Salvador, Diss. Op. Schwebel, ICJ Reports (1984), pp. 223, 233.

- 18 In 1946, when the Rules of the ICJ were adopted, Article 66 remained unchanged.⁴⁴ The 1972 Revision brought no substantial change either (Article 66 became Article 71).⁴⁵ By contrast, the 1978 Revision brought significant changes on several points. Among them, Article 84, para. 1, a provision which reunites, under the same umbrella, the Court's decisional power in respect to the admissibility of both forms of intervention:

The Court shall decide whether an application for permission to intervene under Article 62 of the Statute should be granted, and whether an intervention under Article 63 of the Statute is admissible ...

Like all the other provisions relating to intervention, Article 84 has remained unchanged since 1978.

- 19 Article 84, para. 1 makes clear that the Court enjoys a decisional power in both cases, with a different margin of appreciation nonetheless, which is reflected in the use of 'granted' for intervention under Article 62 and 'admissible' for intervention under Article 63. It also clarifies that the Court shall take a separate decision on the admission of intervention. The Court adopted a different approach in *Haya de la Torre*⁴⁶ and in the *Nuclear Tests (Request for Examination)* case, but they were both conducted under the 1972 Rules. In the *Haya de la Torre* case, after having 'heard observations ... on the admissibility'⁴⁷ of the intervention, the Court decided to admit it. The refusal of the ICJ to allow El Salvador to intervene in the jurisdiction phase of the *Nicaragua* case⁴⁸ showed that the Court's power goes beyond the mere registration of the third State's declaration of intervention. It is indeed a decisional power, which implies that the Court can reject the request to intervene if it concludes that the conditions for admissibility are not met. The order on intervention in the *Whaling in the Antarctic* case sets out clearly that the right of intervention under Article 63 is subject to the admissibility conditions, whose guardian is the Court itself:

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

⁴⁴ Art. 66 of the 1946 Rules:

1. A State which desires to avail itself of the right conferred upon it by Article 63 of the Statute shall file in the Registry a declaration to that effect. This declaration may be filed by a State even though it has not received the notification referred to in that Article.

2. Such declarations shall be communicated to the parties. If any objection or doubt should arise as to whether the intervention is admissible under Article 63 of the Statute, the decision shall rest with the Court.

(ICJ, Acts and Documents No. 2 (1947), p. 76).

⁴⁵ ICJ, Acts and Documents No. 2 (1972), p. 25.

⁴⁶ *Haya de la Torre*, Judgment, ICJ Reports (1951), pp. 71, 77. This judgment is particular in the sense that the Court took a decision on intervention on 16 May 1951, without recording it into a specific judgment or order. As explained in the special study by the ICJ Registry, 'the Court's decision on the request to intervene (. . .) was simply communicated to the States concerned at a public sitting' (*ICJ Yearbook* (2014-2015), pp. 98-9). It is the judgment on the merits which specifies, not in the *dispositif* but in its motives, that the Court 'decided to admit the intervention' (*ibid.*).

⁴⁷ *Haya de la Torre*, Judgment, ICJ Reports (1951), pp. 71, 74.

⁴⁸ *Nicaragua*, Declaration of Intervention of the Republic of El Salvador, ICJ Reports (1984), pp. 215-7.

the case before accepting a declaration of intervention as admissible ... whereas it also has to verify that the conditions set forth in Article 82 of the Rules of Court are met.⁴⁹

This being said, the Court has continued to emphasize that intervention under Article 63 is a right of the third State. In the *Territorial and Maritime Dispute* case, the Court insisted upon the differences between the two provisions: 20

In contrast to Article 63 of the Statute, a third State does not have a right to intervene under Article 62. It is not sufficient for that State to consider that it has an interest of a legal nature which may be affected by the Court's decision in the main proceedings in order to have, *ipso facto*, a right to intervene in those proceedings. Indeed, Article 62, paragraph 2, clearly recognizes the Court's prerogative to decide on a request for permission to intervene, on the basis of the elements which are submitted to it.⁵⁰

In the *Whaling in the Antarctic* case, it stressed again that 'intervention based on Article 63 of the Statute is an incidental proceeding that constitutes the exercise of a right'.⁵¹

The shift of philosophy from the PCIJ epoch is also apparent in the terminology used: the verbs 'records/accepts' from the *Wimbledon* judgment⁵² disappeared in the following ones. Since the *Haya de la Torre* decision, the Court has constantly used the word 'decides' in the *dispositif* of judgments or orders irrespective of the basis for intervention.⁵³ This evolution eroded the oft-repeated assumption according to which intervention under Article 63 is as of right, meaning automatically accepted. What may seem a revolution was however foreseen long time ago. In the words of Sir Gerald Fitzmaurice, '[a]lthough intervention under this article is as of right, provided the conditions stated in it are fulfilled, it is naturally for the Court to decide whether they are actually satisfied or not'.⁵⁴ At present, the discussion revolves around the Court's margin of appreciation in considering the admissibility of a request to intervene. It is true that its margins of appreciation are objectively different, due to the open-texture of Article 62. 21

As in intervention under Article 62, neither the Parties' consent nor some other form of jurisdictional link is required.⁵⁵ Under Article 63 the required nexus between the intervenor and the parties is supplied by the common membership in the relevant treaty. Objections from the parties carry even less weight than under Article 62, where the Court held that 'opposition of the parties to a case is, though very important, no more than one 22

⁴⁹ *Whaling in the Antarctic*, Declaration of Intervention by New Zealand, ICJ Reports (2013), pp. 3, 5–6, para. 8.

⁵⁰ *Territorial and Maritime Dispute*, Application by Honduras for Permission to Intervene, ICJ Reports (2011), pp. 420, 433–4, para. 36. In the same vein, Judge Abraham asserted that the debate on the Court's power to admit or dismiss a request to intervene 'does not concern intervention under Article 63 of the Statute, which is indisputably a right, according to the very terms of its second paragraph' (*ibid.*, Diss. Op. Abraham, ICJ Reports (2011), pp. 447, 448, para. 6).

⁵¹ *Whaling in the Antarctic*, Declaration of Intervention by New Zealand, ICJ Reports (2013), pp. 3, 5, para. 7.

⁵² *Cf. supra*, MN 17.

⁵³ *Cf. for instance Jurisdictional Immunities of the State*, Application by the Hellenic Republic for Permission to Intervene, ICJ Reports (2011), pp. 494, 503, para. 34–1; *Whaling in the Antarctic*, Declaration of Intervention by New Zealand, ICJ Reports (2013), pp. 3, 10, para. 23.

⁵⁴ Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–54: Questions of Jurisdiction, Competence and Procedure', *BYIL* 34 (1958) pp. 1–161, 127. In the same vein, *Nicaragua*, Declaration of Intervention of the Republic of El Salvador, Sep. Op. Ruda, Mosler, Ago, Jennings, and Lacharrière, ICJ Reports (1984), p. 219, para. 1.

⁵⁵ *Cf. Miron/Chinkin on Art. 62 MN 25–27, 91–102.*

element to be taken into account by the Court'.⁵⁶ In the *Haya de la Torre* case, Cuba made a declaration of intervention with respect to the 1928 Havana Convention on Asylum.⁵⁷ The Government of Peru argued that the declaration was inadmissible.⁵⁸ The Court restricted the object of intervention, but nonetheless decided to grant it. In the *Nicaragua* case, the applicant stated that it did not object to intervention, but it called 'the Court's attention to certain deficiencies, both as to form and substance, in the Declaration of Intervention'.⁵⁹ Nicaragua's attitude raised questions as to the necessity to organize hearings on the admissibility of El Salvador's declaration,⁶⁰ but was not mentioned in the Court's order rejecting the request to intervene. In the *Whaling in the Antarctic* case, the Court simply recorded the absence of objection from the two parties without any further comment.⁶¹

E. Requirements for the Admissibility of Intervention under Article 63

- 23 Article 63 of the Statute is supplemented by Article 82 of the Rules. While the special notification to third States has an important place, it does not constitute an actual requirement for the admissibility of intervention. These requirements concern the status of the third State in relation to a convention, which has to be in question in the proceedings.

I. Notification to Parties to the Convention: A Non-Requirement

- 24 The efficacy of the procedure under Article 63 rests upon third States knowing at a sufficiently early stage in the proceedings that a case appears to involve the interpretation of a multilateral convention to which they are parties. Therefore, notification to such third States appeared as crucial to the drafters of the Statute.⁶² Accordingly, even before stating the right to intervene of the third States, Article 63 establishes in its first paragraph an obligation for the Registrar to make a special notification:

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.

This obligation of notification incumbent upon the Registrar coexists with the one established under Article 42 of the Statute to transmit all applications or special agreements instituting proceedings to the Member States of the UN and to any other States entitled to appear before the Court.⁶³ This obligation requires nonetheless from the Registrar to

⁵⁶ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 133, para 96. Cf. also Miron/Chinkin, on Art. 62 MN 29.

⁵⁷ Convention fixing the Rules to be observed for the Granting of Asylum, 20 February 1928, 132 LNTS 323.

⁵⁸ *Asylum*, Judgment, ICJ Reports (1950), pp. 266 *et seq.*

⁵⁹ Nicaragua's letter of 10 September 1984 cited in *Nicaragua*, Declaration of Intervention by the Republic of El Salvador, Diss. Op. Schwebel, ICJ Reports (1984), pp. 223, 228.

⁶⁰ Cf. *infra*, MN 56–60.

⁶¹ *Whaling in the Antarctic*, Declaration of Intervention by New Zealand, ICJ Reports (2013), pp. 3, 8, paras. 16–7.

⁶² The question is obviously less dramatic nowadays, since the application instituting proceedings or the special agreement are notified *urbi et orbi* via electronic means, and made available on the Court's website shortly after they have been filed.

⁶³ As aptly explained by the current Registrar, '[t]his "information" is traditionally provided by the transmission of the printed bilingual version, produced by the Registry, of the application instituting proceedings

make appreciations of fact and law—which are the parties to a convention? When is the convention in question in the proceedings?—which appear to surpass his/her competence as an auxiliary of justice.

Different Registrars of both the PCIJ and ICJ have adopted different administrative practice in this regard, and there have been adaptations in the various Rules of Court.⁶⁴ Article 60 of the 1922 Rules of Court did not make any provision for such notification. This provision was to some extent clarified in the first amendments to the Rules of Court in 1926 Article 60 of the Rules as amended in 1926 stated that:

The notification provided for in Article 63 of the Statute shall be sent to every State or Member of the League of Nations which is a party to the convention relied upon in the special agreement or in the application as governing the case submitted to the Court...⁶⁵

In order to determine which States were parties to the convention, the PCIJ Registrar consulted in practice with the President or the full Court.⁶⁶ The practice was early established for the Court to obtain details of parties from the depositary,⁶⁷ or from other sources.⁶⁸ For example, in the *Lockerbie* cases, the Registrar notified those States 'which on the basis of information supplied by the depositary Governments appeared to be parties to the Montreal Convention of 23 September 1971'.⁶⁹ Similarly, in the *Breard* case, the Registrar acted on the information received from the Secretary-General of the United Nations as depositary of the 1963 Vienna Convention on Consular Relations.⁷⁰ However, in the *Armed Activities* case (DRC v. Uganda) parties to a range of relevant treaties were notified without reference to the basis for this determination⁷¹ and similarly in *Georgia v. Russia* the Court merely remarked that it had notified all parties to CERD.⁷² The Registrar does not send a special notification to parties to the UN Charter, even when interpretation of its provisions is core to the decision.⁷³ Under an administrative

As this process can take some time, the Registrar may consider it necessary, in addition, to send an immediate communication by facsimile to all such States summarizing the terms of the application (or, *casu quo*, special agreement) and briefly describing the initial stages of the procedure. This is the case *inter alia* when a request for the indication of provisional measures is simultaneously filed and when, given the nature of the case, third States may be likely to apply for intervention in the proceedings (in particular on the basis of Art. 63 of the Statute); the date of the opening of hearings on the request for the indication of provisional measures is then usually announced in that communication. The Registry is currently considering the implementation of a generalized system of immediate electronic notification, not to replace the traditional notification but to precede it.' (Couvreur, in Piernas (2007), p. 9, fn. 6).

⁶⁴ Shaw, *Rosenne's Law and Practice*, vol. III, pp. 1500–1.

⁶⁵ Revised Rules of Court, PCIJ, Series D, No. 1, 1st edn., pp. 33, 58. There was no amendment to the provision in 1931.

⁶⁶ Elaboration of the Rules of Court of March 11th, 1936, PCIJ, Series D, fourth addendum to No. 2, p. 309.

⁶⁷ Elaboration of the Rules of Court of March 11th, 1936, PCIJ, Series D, third addendum to No. 2, pp. 309–10.

⁶⁸ In *Phosphates in Morocco*, PCIJ, Series A/B, No. 74, pp. 9 *et seq.*, the Registrar compiled a list of States parties to the Act of Algeciras, 7 April 1906, from the British and Foreign State Papers, PCIJ, Series C, No. 85, p. 1350, cited in Hudson, *PCIJ*, p. 421.

⁶⁹ *Lockerbie* (Libya v. UK; Libya v. USA), Provisional Measures, ICJ Reports (1992), pp. 3, 8, para. 14 and pp. 114, 119, para. 15, respectively.

⁷⁰ *Breard*, Provisional Measures, ICJ Reports (1998), pp. 248, 253, para. 15; see also *Bosnian Genocide*, Judgment, ICJ Reports (2007) pp. 43, 49, para. 2.

⁷¹ *Armed Activities* (DRC v. Uganda), Judgment, ICJ Reports (2005), pp. 168, 177, para. 12.

⁷² *Georgia v. Russia*, Preliminary Objections, ICJ Reports (2011), pp. 70, 76, para. 10.

⁷³ E.g., *Armed Activities* (DRC v. Uganda), Judgment, ICJ Reports (2005), pp. 168, 177, para. 12. Notifications were sent to States parties to the Chicago Convention on International Civil Aviation of 7 December 1944, the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War

decision taken early in the history of the ICJ under the presidency of Judge Basdevant, the Registrar does not notify the members of the United Nations when the Charter is cited before the Court because Article 40, para. 3 provides for the communication to all members of the United Nations and States entitled to appear before the Court of all applications to it.⁷⁴

- 26 In the 1978 Rules, notification is no longer dealt with in the articles relating to intervention (Rules 82–86) but in a new Article 43, which imposes the duty of notification on the Registrar of the Court as an administrative matter.⁷⁵ Article 43 of the Rules states: Whenever the construction of a convention to which States other than those concerned in the case are parties may be in question within the meaning of Article 63, paragraph 1, of the Statute, the Court shall consider what directions shall be given to the Registrar in the matter.

According to Lachs' authoritative statement on this new rule:

[S]eeking fully to protect the rights of such States [as are mentioned in Article 63], the Court has felt that in view of the further consequences of such a notification the Registrar should not act on his own, but should receive adequate instructions.⁷⁶

The introduction of this provision, which corresponds to a long-standing practice, shows that the notification under Article 63 goes beyond a simply administrative matter. As explained by Couvreur:

The decision as to whether [Article 63] should really be applied—that is to say, in cases where a convention is concerned, whether its construction is actually 'in question'—must, however, be taken by the Court, because any such decision is of a judicial nature, since it implies a preliminary analysis of the case on the merits.⁷⁷

- 27 Through oversight or lack of clarity as to whether a State is in fact a party to the convention in question, a State party might not receive the requisite notification under Article 63. In the *Free Zones* case, 'parties to the Treaty of Versailles were not specially notified under Article 63 of the Statute, which was considered as inapplicable in this case'.⁷⁸ However, the States' attention was drawn to the fact that they had the right 'to inform the Court should they wish to intervene in accordance with the said Article [63], in which case it would rest with the Court to decide'.⁷⁹
- 28 The order of priority in Article 63 of the Statute—the notification first, the right to intervene after—raised concern as to the consequences arising from a lack of notification.

of 12 August 1949, the Additional Protocol I of 8 June 1977 to the Geneva Conventions of 12 August 1949, the Vienna Convention on Diplomatic Relations of 18 April 1961, the International Covenant on Civil and Political Rights of 19 December 1966, the African Charter on Human and Peoples' Rights of 27 June 1981 and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.

⁷⁴ Cited in *Nicaragua*, Declaration of Intervention of the Republic of El Salvador, Diss. Op. Schwebel, ICJ Reports (1984), pp. 223, 233. As to Art. 40, para. 3, cf. Yee on Art. 40 MN 90–94.

⁷⁵ Rosenne (1993), p. 37.

⁷⁶ Lachs, 'The Revised Procedures of the International Court of Justice', in *Essays on the Development of the International Legal Order in Memory of Haro F. van Panhuys*, (Kalshoven *et al.*, eds., 1980), pp. 21, 33.

⁷⁷ Couvreur, in Piernas (2007), p. 10, fn. 8.

⁷⁸ *Free Zones*, Judgment, PCIJ, Series A/B, No. 46, pp. 95, 100. Hudson states that the reason for as-
serting Art. 63 to be inapplicable was not clear; Hudson (1934), pp. 370–1, fn. 65. Cf. also von Stauffenberg
pp. 446–7.

⁷⁹ *Ibid.*, citing PCIJ, Series C, No. 17-1, p. 2400. The Registrar's action was contested by Poland, p. 2423,
reply of Registrar, p. 2429.

The concern was increased by the fact that, according to the English version of para. 2 of the same provision, '[e]very State *so notified* has the right to intervene'.⁸⁰ However, as stated by Couvreur, '[t]he purpose of this notification is to facilitate the exercise of the right of intervention in the situation envisaged. It cannot in itself affect the very *existence* of such a right.'⁸¹ Article 66, para. 2 of the 1936 Rules of Court (corresponding to Article 60 in the 1926 version) clarified nonetheless these aspects and codified the protection for States that had not been notified which had been assumed in the *Free Zones* case:

Any State Member of the League of Nations or State, which is a party to the convention in question and to which the notification referred to has not been sent, may in the same way file with the Registry a declaration of intention to intervene under Article 63 of the Statute.⁸²

In the same vein, Article 82, para. 3 of the 1978 Rules of Court confirms that a State which has not received such notification can file a declaration of intervention nonetheless:

Such a declaration may be filed by a State that considers itself a party to the convention the construction of which is in question but has not received the notification referred to in Article 63 of the Statute.

Concerning the timing of the notification, Article 63 provides that it must be addressed 'forthwith' (*sans délai*). The issue was raised by Judge Petrán in the *Pakistani POW* case. He considered that the case concerned the construction of the Genocide Convention, in particular Article IX on jurisdiction, and the General Act of 1928. Accordingly, he was of the opinion that all parties to these conventions should be notified 'without delay'.⁸³ This was not done and the majority of the Court 'even opposed considering the question of notification' of the Genocide Convention before the pronouncement on Pakistan's request for interim measures. In the *Lockerbie* cases, the Registrar notified other States parties to the Montreal Convention on 25 March 1992 when the oral hearing to consider provisional measures commenced on 26 March 1992.⁸⁴ Similarly, in the *Breard* case, notifications to other States parties to the Vienna Convention on Consular Relations were made on 6 April 1998 and public hearings were held on 7 April.⁸⁵ In the *LaGrand* case, the Registrar sent notifications on an unspecified date after the order on provisional measures had been made.⁸⁶ These short periods demonstrate a dilemma presented by intervention where interim measures are requested: the time required for notification to other States parties to the relevant convention could prevent the request being heard sufficiently fast to prevent irreversible harm to the rights of the applicant State, but the short period between notification and oral hearings in these cases ruled out the possibility of any declaration of intervention. In other cases, notifications have apparently not been

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⁸⁰ On the difference with the French version, *cf. supra*, MN 6.

⁸¹ Couvreur, in Piernas (2007), p. 10, fn. 10.

⁸² Rules of Court, PCIJ, Series D, third addendum to No. 2, pp. 994 *et seq.* This protection is in analogy with Art. 66, para. 2 of the PCIJ Statute. Art. 66, para. 1 of the 1946 Rules (renumbered as Art. 71, para. 1 of the Rules in 1972) read: 'This declaration [under Art. 63] may be filed by a State even though it has not received the notification referred to in that Article'.

⁸³ *Pakistani POW*, Provisional Measures, Diss. Op. Petrán, ICJ Reports (1973), pp. 334–5.

⁸⁴ *Lockerbie* (Libya v. UK; Libya v. USA), Provisional Measures, ICJ Reports (1992), pp. 3, 8, para. 14 and pp. 114, 119, para. 15.

⁸⁵ *Breard*, Provisional Measures, ICJ Reports (1998), pp. 248, 253, para. 15.

⁸⁶ *LaGrand*, Judgment, ICJ Reports (2001), pp. 466, 470, para. 4.

made before the hearing on provisional measures.⁸⁷ At the same time, third States entitled to appear before the Court are informed of the Court's schedule, including the one on provisional measures, by the general notification under Article 42 of the Statute.⁸⁸

II. States Parties to the Convention

30 Article 82 of the 1978 Rules of the Court provides that:

- (2) The declaration shall state the name of an agent.^[89] It shall specify the case and the convention to which it relates and shall contain:
- (a) particulars of the basis on which the declarant State considers itself a party to the convention.

The scope *ratione personae* of Article 63 is limited to third States parties (or *participants* according to the French version)⁹⁰ to the convention in question.⁹¹ As usual, the Court resolved the inconsistency in the two languages of the Statute, by presuming that they had the same meaning. And, unless the judgments quote the Statute, the French version is aligned on the English and uses the term '*parties*'. In *Haya de la Torre*, the Court mentioned the '*droit conféré par l'article 63 du Statut de la Cour aux États parties à une convention*'.⁹² Similarly, in the *Whaling in the Antarctic* case, the term '*party*' was substituted to '*participant*', the Court stating that Article 63 is applicable à un Etat tiers au procès, mais partie à une convention dont l'interprétation est en cause dans celui-ci'.⁹³

31 But the status of a State to a particular treaty may be in doubt as a matter of fact.⁹⁴ Article 63 does not define '*party*'. Hudson considered that it required that a State must have ordinarily ratified and not denounced the treaty.⁹⁵ During the discussions on the revision of the PCIJ Rules, some judges expressed discomfort with the Court appreciating this status,⁹⁶ a position in line with the minimalist conception of the role of the Court in

⁸⁷ E.g., *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Provisional Measures, ICJ Reports (1999), pp. 124 *et seq.*; *Armed Activities* (DRC v. Uganda), Provisional Measures, ICJ Reports (2000), pp. 111 *et seq.*

⁸⁸ Cf. *supra*, fn. 63.

⁸⁹ Agents were not referred to in the articles on intervention in earlier Rules of Court as all provisions on agents were grouped together (Rosenne (1993), pp. 67–8).

⁹⁰ Cf. *supra*, MN 6.

⁹¹ The question whether intervention is open to States not parties to the Statute of the ICJ is identical under Arts. 62 and 63 (cf. Miron/Chinkin on Art. 62 MN 26). The Court's practice on this point is inconsistent. Rosenne notes that notifications under Art. 63 have been sent by the Registrar to States that were not parties to the Statute (Rosenne, *The Law and Practice of the International Court* (2nd edn., 1985), p. 433, fn. 1, citing *Protection of French Nationals and Protected Persons in Egypt*, Order 29 March 1950, ICJ Reports (1950), pp. 59 *et seq.*) But he also notes that the Registrar has limited notification to States parties to the Statute (Shaw, *Rosenne's Law and Practice*, vol. III, p. 1504, fn. 43 citing *U.S. Nationals in Morocco*, Judgment, ICJ Reports (1952), pp. 176, 178, where Spain as depositary listed as parties to the Treaty of Algeciras of 1906 States that were not parties to the Statute of the Court: Morocco, Germany, Italy, Austro-Hungary, Spain, and Portugal. Notifications were sent only to Spain, Italy, and Portugal from this list).

⁹² *Haya de la Torre*, Judgment, ICJ Reports (1951), pp. 71, 76.

⁹³ *Whaling in the Antarctic*, Declaration of Intervention by New Zealand, ICJ Reports (2013), pp. 3, 5, para. 7.

⁹⁴ E.g., the status of Pakistan with respect to the General Act for the Pacific Settlement of International Disputes, 26 September 1928, was disputed in *Pakistani POW*, Provisional Measures, Diss. Op. Petré, ICJ Reports (1973), pp. 334–5.

⁹⁵ Hudson (1934), p. 371.

⁹⁶ Elaboration of the Rules of Court of March 11th, 1936, PCIJ, Series D, fourth addendum to No. 2, pp. 272–3.

intervention.⁹⁷ The codification of the law of treaties by the 1969 VCLT clarified these aspects. There is no reason to consider that the term 'party' in Article 63 of the Statute is different from general international law.⁹⁸ Article 2, para. 1 (g) of the VCLT defines a party as 'a State which has consented to be bound by the treaty and for which the treaty is in force'.

Naturally, as all questions of jurisdiction and admissibility,⁹⁹ the quality of a party to a convention is to be appreciated at the date on which the request to intervene is filed. New Zealand had initially ratified the International Convention for the Regulation of Whaling (ICRW) in 1949, it denounced in 1969 and re-adhered to it in 1976,¹⁰⁰ but this succession of facts was wholly unproblematic. When it filed its declaration in 2012, New Zealand was a party to the ICRW, and that was all that mattered.

Several ambiguous situations persist for which the existing case law is of no help. For instance, there might be under consideration before the Court a convention to which a State has consented to be bound, but which is not yet in force, e.g., because it has not received the requisite number of ratifications or accessions. In the *Continental Shelf* case between Libya and Malta, the Court noted that the parties did not regard the 1982 UNCLOS as irrelevant to the proceedings although it was not in force.¹⁰¹ Under Article 2, para. 1 (f) VCLT, such a State is not a 'party' but a 'contracting State'. However, contracting States have obligations with respect to the treaty under Article 18 VCLT. An indication by the Court of the construction of a convention before it has entered into force could be influential in determining its future impact. Similarly, the question may arise as to whether Article 63 is applicable to conventions which are not in force, but under provisional application. Another problematic scenario concerns the ratification of multilateral conventions by entities whose statehood is not generally accepted (e.g.: Palestine ratified the Statute of the ICC. Bearing in mind that its Article 119 is a compromissory clause giving competence to the ICJ, the question may arise as to whether Palestine would have standing under Article 63 of the ICJ Statute to intervene if the ICC Statute were in question). Another uncertainty arises if the States parties to the case or the would-be intervener formulated reservations to the convention, which raised objections with maximum effect.¹⁰² These are but a few examples of complex appreciations which could arise under an apparently clear provision. For the moment, the scarce use of Article 63 has not given to the Court the occasion to engage into these challenging debates.

⁹⁷ Cf. *supra*, MN 17.

⁹⁸ The Court had already the occasion to apply the principles codified by the 1969 VCLT (23 May 1969, 1155 UNTS 331) in order to interpret its own Statute (e.g., *LaGrand*, Judgment, ICJ Reports (2001), pp. 446, 501, para. 99).

⁹⁹ See, for instance, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast*, Preliminary Objections, ICJ Reports (2016), pp. 100, 115, para. 31.

¹⁰⁰ *Whaling in the Antarctic*, Declaration of Intervention by New Zealand, ICJ Reports (2013), pp. 3, 6, para. 12.

¹⁰¹ *Continental Shelf (Libya/Malta)*, Merits, ICJ Reports (1985), pp. 13, 29, paras. 26–7.

¹⁰² In its Guide to Practice on Reservations to Treaties, the ILC defined these objections as following: 'An objection by a contracting State or a contracting organization to a valid reservation precludes the entry into force of the treaty as between the objecting State or organization and the reserving State or organization, if the objecting State or organization has definitely expressed an intention to that effect in accordance with guideline 2.6.7.' (ILC Yearbook (2011-II), Part 2, pp. 26 *et seq.*, Guideline 4.3.5).

III. Construction of a Convention which is in Question

1. A Convention

- 34 Article 63 applies only to conventions, not to other sources of international law such as customary international law or to instruments that are not conventions, such as resolutions of international institutions. The word 'convention' under Article 63 is not defined. Hudson's view was that the instrument must have at least two parties, which is necessary for Article 63 to apply.¹⁰³ It would appear more logical for the convention in question to have at least three parties (the two parties to the proceedings and the would-be intervenor). Hambro asserted that 'convention' must be given the same meaning as in Article 38 of the Statute of the Court.¹⁰⁴ In any case, the Court established that 'convention' should today be understood in accordance with the definition of the term 'treaty' in Article 2, para. 1 (a) VCLT.¹⁰⁵ Declarations under Article 63 were made both with respect to plurilateral conventions (the 1928 Havana Convention on Asylum in *Haya de la Torre* case) and multilateral conventions (the ICRW in the *Whaling in the Antarctic* case). The only major issue concerning this requirement concerned the possibility to intervene on the construction of declarations under the optional clause system of Article 36 of the Statute. The question was addressed to a certain extent in the *Nicaragua* case, by Judge Schwebel.¹⁰⁶ Though it is generally conflated with the question of whether a declaration of intervention can be made at the preliminary objections stage,¹⁰⁷ the two should nonetheless be distinguished. The impossibility to play the Article 63 card in relation to optional clause declarations is justified by their unilateral nature,¹⁰⁸ not by the phase of proceedings when the declaration is made. This does not exclude that third States seek to intervene at the preliminary objections stage when is in question the interpretation of a compromissory clause of a treaty.¹⁰⁹

2. A Convention in Question in the Main Proceedings

- 35 It is not sufficient that the convention is merely referred to in the case. The construction of the convention must in some direct way be determinative of the outcome of the case. This requirement is a logical consequence of the incidental character of intervention, which must remain within the bounds of the principal case submitted to the Court.¹¹⁰ When the PCIJ Rules were amended in 1926, the President of the PCIJ, Judge Huber, expressed concern that Article 63 should only be applicable to States parties to a convention on which the parties' proceedings were actually based (and not other conventions that might only incidentally come into the proceedings).¹¹¹ Hence, Article 60 of the Rules as amended in 1926 stated that intervention could only relate to a convention 'relied upon

¹⁰³ Hudson (1934), p. 371.

¹⁰⁴ Hambro (1975), pp. 388–9.

¹⁰⁵ Cf. Pellet/Müller on Art. 38 MN 181.

¹⁰⁶ *Nicaragua*, Declaration of Intervention of the Republic of El Salvador, Diss. Op. Schwebel, ICJ Reports (1984), pp. 223, 241–2.

¹⁰⁷ Cf. *infra*, MN 43–50.

¹⁰⁸ The unilateral nature of optional clause declarations was confirmed for instance in *Maritime Delimitation in the Indian Ocean*, Preliminary Objections, Judgment of 2 February 2017, para. 115. Cf. also Tomuschat on Art. 36 MN 75.

¹⁰⁹ Cf. *infra*, MN 43–50.

¹¹⁰ Cf. also Miron/Chinkin on Art. 62 MN 18, 77–83.

¹¹¹ Cf. Acts and Documents concerning the Organization of the Court, PCIJ, Series D, addendum to No. 2, p. 161.

in the special agreement or in the application as governing the case submitted to the Court'.¹¹² The formula (slightly reworded to 'a convention invoked in the special agreement or in the application as governing the case'),¹¹³ was taken up in the Rules amended in 1936. It disappeared however from the Rules adopted by the ICJ in 1946.

The requirement that intervention should relate to a convention 'in question' was scarcely discussed in the case law. In *Appeals from the Czechoslovak-Hungarian Mixed Arbitral Tribunal*, the PCIJ considered Article 63 to be applicable where a convention 'the construction of which is, *prima facie*, decisive for the settlement of the case' was before the Court.¹¹⁴ In the *ICAO Council* case it was the respondent State, Pakistan, that 'advanced the contention that questions concerning the construction of the Convention on International Civil Aviation and the International Air Services Transit Agreement were in issue'.¹¹⁵ The Registrar then notified other States parties to the convention.

In 1978, the rules relevant for intervention underwent substantial modifications on this point too. Article 82, para. 2 (b) of the 1978 Rules provides that:

The declaration ... shall specify the case and the convention to which it relates and shall contain:

- ...
(b) identification of the particular provisions of the convention the construction of which it considers to be in question.

The formula has not undergone any change since then.

It appears that the drafters of the Rules chose not to take a formalistic approach and restrict *ad ante* the admissibility of intervention to conventions referred to in the application or special agreement instituting proceedings. The approach seems sensible. According to 'Article 38, paragraph 2, of the Rules of Court, the Application specifies the facts and grounds on which the claim is based',¹¹⁶ the grounds referring here to the legal bases on which the claim is founded.¹¹⁷ However, it may happen that certain legal grounds are not specifically referred to in the instrument instituting proceedings,¹¹⁸ or, conversely, they are referred to, but are subsequently abandoned.¹¹⁹ The Court keeps the

¹¹² Revised Rules of Court, 1926, PCIJ, Series D, No. 1, 1st edn., pp. 33, 58. There was no amendment to the Article in 1931.

¹¹³ Statute and Rules of Court, PCIJ, Series D, No. 1, 4th edn., p. 55.

¹¹⁴ *Appeals from Certain Judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal*, cf. the Ninth Annual Report, PCIJ, Series E, No. 9, p. 176; cf. Hambro, 'The Interpretation of Multilateral Treaties by the International Court of Justice', *Transactions of the Grotius Society* 39 (1954), pp. 235-55.

¹¹⁵ *ICAO Council*, Judgment, ICJ Reports (1972), pp. 46, 48, para. 5.

¹¹⁶ *Obligation to Negotiate Access to the Pacific Ocean*, Preliminary Objection, ICJ Reports (2015), pp. 592, 604, para. 301.

¹¹⁷ Interestingly, as explained by Judge Tomka, '[t]he requirement to indicate the "grounds on which the claim is based" was first introduced in the 1936 Rules of Court, which thus implemented Article 63 of the Court's Statute. The preparatory documents reveal that "grounds" meant "the indication of the stipulations of the interpretation on which the solution of the case depends" and that "practice has shown the usefulness . . . of these indications with regard to the provisions of Article 63 of the Statute". The legal grounds are merely the legal arguments which, according to the Applicant, support its claims.' (*Certain Questions of Mutual Assistance in Criminal Matters*, Judgment, Sep. Op. Tomka, ICJ Reports (2008), pp. 269, 273, para. 15).

¹¹⁸ According to the Court's case law, 'additional claims formulated in the course of proceedings are inadmissible [only] if they would result, were they to be entertained, in transforming "the subject of the dispute originally brought before [the Court] under the terms of the Application"' (*Diallo*, Merits, ICJ Reports (2010), pp. 639, 656, para. 39).

¹¹⁹ In its Application instituting proceedings in the *Whaling in the Antarctic* case, Australia invoked mainly the ICRW. It added, as bases of its claims, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Convention on Biological Diversity, but it did not dwell upon their

power to appreciate which conventions are 'in question' for the purposes of Article 63 and does not solely rely on the statement of claims in the instrument instituting proceedings.

39 The 1978 Rules impose on the would-be intervener the obligation to include in its declaration of intervention substantial information concerning the provisions of the convention in question, as well as its preferred construction of those provisions. As with Article 62,¹²⁰ the connection between the main and incidental proceedings is also a requirement under Article 63. On this basis, the Court exercises control over the object of intervention, to ensure that it stays within the bounds of the dispute submitted to it by the Parties. Under Article 63, it is also the requirement which gives to the Court a certain margin of appreciation. In *Haya de la Torre*, the Government of Peru argued that the declaration was inadmissible in that it amounted to an attempt by Cuba to appeal against the earlier judgment given by the Court in the *Asylum* case.¹²¹ The Court observed that every intervention is incidental to the proceedings in a case and that accordingly a declaration filed as an intervention only acquires that character if it actually relates to the subject-matter of the pending proceedings.¹²² The Court considered that the subject-matter of the case in which the intervention was made related to a new question—the surrender of Haya de la Torre to the Peruvian authorities—that was outside the submissions of the parties and had not therefore been determined by that earlier judgment. The Court therefore accepted the Cuban position that the intervention was based on the necessary interpretation of an aspect of the Havana Convention that had not been argued in the earlier case. The Court allowed the declaration, but couched its acceptance in careful language by finding that '[r]educed in this way, [to the new issue of interpretation of the Havana Convention] and operating within these limits, the intervention of the Government of Cuba conforms to the conditions of Article 63'.¹²³

40 Compliance with the requirement of connection was also at issue in the *Nicaragua* case. Nicaragua commenced proceedings against the United States alleging that the latter had committed actions constituting violations of the prohibition of the use of force and wrongful intervention in and against Nicaragua. The allegations arose out of the broader conflict within Central America and in particular the support given by the United States to the *Contras* in Nicaragua. The United States contested the Court's jurisdiction. El Salvador filed a declaration of intervention:

for the sole and limited purpose of arguing that this Court does not have jurisdiction over Nicaragua's application or the claims set forth therein, that for multiple reasons the Court should declare itself unable to proceed concerning such application and claims, and that such application and claims are inadmissible.¹²⁴

The declaration of intervention by El Salvador stated that Nicaragua based its claim on the UN Charter, the Charter of the Organization of American States, the Convention on Rights and Duties of States of 1933, and the Convention relative to the Duties and Rights

interpretation (Application Instituting Proceedings, p. 18, para. 39). The Registrar addressed the notifications provided for in Art. 63 only to States parties to ICRW (Judgment, ICJ Reports (2014), pp. 226, 234, para. 3).

¹²⁰ Cf. also Miron/Chinkin on Art. 62 MN 77–83.

¹²¹ *Asylum*, Judgment, ICJ Reports (1950), pp. 266 *et seq.*

¹²² *Haya de la Torre*, Judgment, ICJ Reports (1951), pp. 71, 76.

¹²³ *Ibid.*

¹²⁴ Declaration of Intervention of El Salvador, 15 August 1984, pp. 1–2; cited in *Nicaragua, Declaration of Intervention of the Republic of El Salvador*, Diss. Op. Schwebel, ICJ Reports (1984), pp. 223, 229.

of States in the Event of Civil Strife of 1928. The conventions were listed without reference to specific provisions, nor were any preferred interpretations offered. The declaration also referred to the alleged basis of jurisdiction between Nicaragua and the United States, namely Article 36 of the Court's Statute. El Salvador recited that it, too, was a party to all these conventions 'on which Nicaragua alleges the jurisdictional basis of its substantive claims'.¹²⁵ El Salvador subsequently clarified its declaration by spelling out certain provisions of these conventions.¹²⁶ In its clarification, El Salvador referred to Article 36 of the Statute and to Articles 39, 51, and 52 UN Charter. El Salvador's offered construction of these articles was that, *inter alia*, they denoted the dispute between Nicaragua and the United States as political and not legal, that they denied the Court's jurisdiction and that they made other Central American States indispensable third parties. In its consideration of the declaration of intervention, the Court determined that the conventions referred to by El Salvador presupposed that it would have jurisdiction over the dispute and that El Salvador had not shown the intervention to relate to the subject-matter of the pending proceedings.¹²⁷ El Salvador had also reserved the right to refer to the interpretation and application of conventions at the substantive phase of the proceedings. The Court decided not to admit the declaration 'inasmuch as it relates to the current phase of the proceedings between Nicaragua and the United States'.¹²⁸ The Court reiterated this determination, with specific reference to the 'current phase of the proceedings' in its judgments on jurisdiction and admissibility¹²⁹ and on the merits.¹³⁰

While the majority of the court made no reference to the adequacy of the declaration of intervention, Judges Ruda, Mosler, Ago, Jennings, and Lacharrière agreed with the majority in dismissing the declaration because they had not been able to find in El Salvador's declaration either the necessary identification of convention provisions, nor the construction of those provisions for which it contended.¹³¹ Judge Schwebel, dissenting, considered that the original declaration did not comply with the requirements of Article 82 of the Rules but that the subsequent letter did.¹³² 41

The Court's margin of appreciation under Article 63 consists of ensuring, at the admissibility stage already, that the declaration of intervention remains within the bounds of the main case. The proceedings on admissibility may thus be the occasion to make the necessary adjustments. Cuba's intervention in *Haya de la Torre* was declared admissible only insofar as it stayed within the subject-matter in the main case, as defined by the Court.¹³³ In *Nicaragua*, such correction was impossible, especially without a hearing and within the short time schedule established by the Court.¹³⁴ In the *Whaling in the Antarctic* case, the 42

¹²⁵ Declaration of Intervention of El Salvador, 15 August 1984, para. XIV, cited in *Nicaragua*, Declaration of Intervention of the Republic of El Salvador, Diss. Op. Schwebel, ICJ Reports (1984), p. 223.

¹²⁶ Letter to the Registrar from Ivo P. Alvarenga, Ambassador, Agent of El Salvador to the International Court of Justice, 10 September 1984. The letter requested its circulation to all Members of the Court and to be considered as part of the declaration of intervention; cited in *Nicaragua*, Declaration of Intervention of the Republic of El Salvador, Diss. Op. Schwebel, ICJ Reports (1984), pp. 223, 225.

¹²⁷ *Ibid.*, Declaration of Intervention of the Republic of El Salvador, ICJ Reports (1984), pp. 215, 216, para. 2. The requirement was as stipulated in *Haya de la Torre*, Judgment, ICJ Reports (1951), pp. 71, 76.

¹²⁸ *Nicaragua*, Declaration of Intervention of the Republic of El Salvador, ICJ Reports (1984), pp. 215, 216, para. 2.

¹²⁹ *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 396, para. 6.

¹³⁰ *Ibid.*, Merits, ICJ Reports (1986), pp. 14, 17, para. 7.

¹³¹ *Ibid.*, Declaration of Intervention of the Republic of El Salvador, Sep. Op. Ruda, Mosler, Ago, Jennings, and Lacharrière, ICJ Reports (1984), p. 219 and *ibid.*, Sep. Op. Oda, p. 220, para. 2.

¹³² *Ibid.*, Diss. Op. Schwebel, ICJ Reports (1984), pp. 223, 225.

¹³³ *Haya de la Torre*, Judgment, ICJ Reports (1951), pp. 71, 77. Cf. *supra*, MN 39.

¹³⁴ Cf. *infra*, MN 57.

Court insisted that the 'limited object of the intervention is to allow a third State ... to present to the Court its observations on the construction of that convention'.¹³⁵ In this case, New Zealand scrupulously complied with the requirements set out in the Rules, at the admissibility as well as at the merits stage, and there are no further clarifications in this respect.

3. Intervention in Relation to Jurisdictional Aspects

- 43 El Salvador's attempt to intervene in the *Nicaragua* case at the jurisdictional phase rose up the more general question as to whether intervention is possible in relation to incidental proceedings. As already stressed out in the commentary under Article 62, the Court's case law does not provide definitive indications, one way or the other.¹³⁶
- 44 In order to understand the *Nicaragua* precedent, it is necessary to recall the context of El Salvador's declaration. El Salvador apparently wished to deny that the Court had jurisdiction in a contentious case where other involved States were not represented. El Salvador presumably wished to support the United States in its jurisdictional arguments and to challenge the admissibility of Nicaragua's application. It explained that it would not be possible for the Court to rule on Nicaragua's application without considering the legality of any armed actions in which the United States had engaged and accordingly the rights of the United States and El Salvador to engage in legitimate collective self-defence.¹³⁷ This declaration of intervention appeared implicitly to engage the indispensable third party principle as formulated in the *Monetary Gold* case,¹³⁸ and possibly an interest of a legal nature under Article 62. The Court did not address these possibilities. Its decision that the application was premature in that it related more accurately to the merits phase, and presupposed jurisdiction in the main proceedings, precluded it from having to decide whether El Salvador's application constituted a genuine intervention. This decision kept open the possibility of a further declaration of intervention at the merits phase of the case. According to the special study by the Registry on the form of the incidental decisions, the Court's order dismissing El Salvador's declaration 'may be likened to a measure simply aimed at pursuing the conduct of the case, in so far as it found in particular that the matters raised by El Salvador had been introduced at a premature stage in the proceedings'.¹³⁹ The United States did not appear in the merits phase of the case (at least in part because of the summary dismissal of El Salvador's claim)¹⁴⁰ and El Salvador did not make such a subsequent declaration.
- 45 In the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, a number of Pacific Island States made declarations of intervention under Article 63, as well as requesting to intervene under Article 62. The basis of the declaration under Article

¹³⁵ *Whaling in the Antarctic*, Declaration of Intervention by New Zealand, ICJ Reports (2013), pp. 3, 5, para. 7.

¹³⁶ Cf. Miron/Chinkin on Art. 62 MN 20–24.

¹³⁷ Declaration of Intervention of El Salvador, 15 August 1984, para. XIV, cited in *Nicaragua*, Declaration of Intervention of the Republic of El Salvador, Diss. Op. Schwebel, ICJ Reports (1984), p. 223.

¹³⁸ *Monetary Gold*, Judgment, ICJ Reports (1954), pp. 19, 32. Cf. as to this case and its progeny Tomuschat on Art. 36 MN 21–25; Brown on Art. 59 MN 18, 24, 64–67; Miron/Chinkin on Art. 62 MN 30–33. Costa Rica, another State embroiled in the broader regional conflict made it 'abundantly clear' that it did not intend to intervene; *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 431, para. 87.

¹³⁹ ICJ Yearbook (2014–2015), p. 99.

¹⁴⁰ United States, Statement of 18 January 1985, *ILM* 24 (1985), pp. 246 *et seq.*

63 was the 1986 Noumea Convention, a convention to which the Island States were all parties, as were France and New Zealand.¹⁴¹ The Noumea Convention was described in the declarations of intervention as the 'most important legal instrument governing the protection of the environment of the South Pacific region'.¹⁴² The construction of several of its articles was considered by the Island States to be the basis of New Zealand's claim with respect to both the provisional measures and the merits. Contrary to El Salvador's declaration, which lacked the required degree of specificity,¹⁴³ the declaration of each Island State set out in detail the construction of each provision they sought, although they stated that this was not exhaustive. The Court determined that New Zealand's request did not fall within para. 63 of the judgment in the *Nuclear Tests* cases¹⁴⁴ and was accordingly dismissed. The Court took no action on the declarations of intervention, which were dismissed along with New Zealand's request. This case is also inconclusive for assessing the admissibility of interventions during other incidental proceedings.

There appears to be no reason within the Statute, or its *travaux préparatoires*¹⁴⁵ why intervention should not be allowed for the purpose of challenging the Court's jurisdiction or the admissibility of the case. In fact, several arguments plead in favour of the possibility for a third State to make a request to intervene at the phase of jurisdiction and admissibility, at least under Article 63.¹⁴⁶ The wording of Article 63 is unqualified in asserting '[w]henever the construction of a convention ... is in question' which implies that it is applicable in all phases of the case.¹⁴⁷ Article 63 does not differentiate between types of treaty provisions, or types of treaty.¹⁴⁸ The purpose of Article 63 is to allow parties to a multilateral convention to put their construction of the convention to the Court in proceedings to which they are not parties. As Judge Schwebel emphasized,

There are multilateral conventions that, in whole or in part, relate to jurisdictional questions. Their construction by the Court in a case between two States can affect the legal position of a third State under such conventions no less than it can affect their position under other conventions, or parts of other conventions, whose clauses are substantive rather than jurisdictional. Take, for example, the controversies that have come before the Court more than once over the force and effect of the General Act of 26 September 1928 for the Pacific Settlement of International Disputes. If one State maintains that that Act remains in force and is a basis of the Court's jurisdiction, and another contests those contentions, why should not a third State party to the Act be able to intervene under

¹⁴¹ Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (Noumea Convention), 24 November 1986, *ILM* 26 (1987), pp. 38 *et seq.*

¹⁴² E.g., *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, Application for Permission to Intervene under Article 62, Declaration of Intervention under Article 63, submitted by the Government of the Marshall Islands, 24 August 1995, p. 8, para. 27.

¹⁴³ Cf. *supra*, MN 40.

¹⁴⁴ *Nuclear Tests (Australia v. France; New Zealand v. France)*, Judgments, ICJ Reports (1974), pp. 253 *et seq.* and pp. 457 *et seq.*

¹⁴⁵ *Nicaragua*, Declaration of Intervention of the Republic of El Salvador, Diss. Op. Schwebel, ICJ Reports (1984), pp. 223, 234.

¹⁴⁶ To the exception when jurisdiction is founded on optional clause declarations (cf. *supra*, MN 34). It must be noted, however, that Judge Hersch Lauterpacht considered that intervention was permissible at the jurisdictional phase of proceedings, with respect to the construction of the Statute and of declarations made under the optional clause (*Norwegian Loans*, Judgment, Sep. Op. Lauterpacht, ICJ Reports (1957), pp. 34, 63-4; *Interhandel*, Provisional Measures, Sep. Op. Lauterpacht, ICJ Reports (1957), pp. 117, 120).

¹⁴⁷ *Ibid.*, p. 234.

¹⁴⁸ Judge Schwebel discussed whether intervention under Art. 63 was available with respect to the interpretation of a provision of the UN Charter. He concluded that it is (*ibid.*, pp. 236-9).

Article 63 at the jurisdictional stage of the proceedings to submit a statement of the construction of the relevant provisions of that Act for which it contends.¹⁴⁹

In the same vein, in the *Maritime Delimitation in the Indian Ocean* case, the Court settled important jurisdictional questions relating to the combination between the optional clause declarations and the mechanisms for dispute settlement set out in Part XV of UNCLOS.¹⁵⁰ In order to do so, the Court dwelt, at length, upon the interpretation of Part XV, which is of obvious interest to all the parties to UNCLOS. In these instances, when the Court is called to decide on jurisdictional issues that go beyond the case itself, it is desirable for third States to be able to participate in the proceedings.

- 47 A further indication in favour of the admissibility of declarations under Article 63 at the jurisdictional stage comes from the fact that the Registrar sends, as per the Court's instructions, the notification provided in Article 63, para. 1 of the Statute and Article 43 of the Rules even at the preliminary objections stage. In the *Border and Transborder Armed Actions* case between Nicaragua and Honduras, the Registrar made the somewhat cryptic statement to the Parties to the Pact of Bogotá that he had been directed:

to draw to their notice the fact that in the Application the Republic of Nicaragua had invoked, *inter alia*, the Pact of Bogotá, adding however that the notification did not prejudice any decision which the Court might be called upon to take pursuant to Article 63 of the Statute of the Court.¹⁵¹

- 48 More recently, in the *Maritime Delimitation in the Indian Ocean* case, the notification was addressed to the parties to UNCLOS, after Kenya raised preliminary objections.¹⁵² There is no consistent pattern as to the timing when the notifications are sent,¹⁵³ therefore this administrative practice is no more than an indication that interventions under Article 63 may be admissible at the jurisdictional stage of proceedings. In *Obligation to Negotiate Access to the Pacific Ocean*, the communication addressed to the OAS contained this interesting clarification:

in view of the fact that the current phase of the proceedings related to the question of jurisdiction, any written observations should be limited to the construction of the provisions of the Pact of Bogotá concerning that question.¹⁵⁴

¹⁴⁹ *Ibid.*, p. 235.

¹⁵⁰ *Maritime Delimitation in the Indian Ocean*, Preliminary Objections, ICJ Reports (2017), pp. 3, 46-7, paras. 121-33.

¹⁵¹ *Border and Transborder Armed Actions* (Nicaragua v. Honduras), Judgment, ICJ Reports (1988), pp. 69, 71, para. 5. The case was withdrawn by Nicaragua before consideration of the merits.

¹⁵² *Maritime Delimitation in the Indian Ocean*, Preliminary Objections, ICJ Reports (2017), pp. 3, 9, paras. 5-6. See also the notifications addressed to States parties to the Pact of Bogotá and to the OAS in *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast*, Preliminary Objections, ICJ Reports (2016), pp. 100, 107, paras. 5-6 and in *Caribbean Sea*, Judgment, ICJ Reports (2016), pp. 3, 9, paras. 5-6.

¹⁵³ In *Georgia v. Russia*, the Registrar sent the required notifications nearly a year after the application was filed, but before Russia raised its preliminary objections (Preliminary Objections, ICJ Reports (2011), pp. 70, 76, para. 10). In light of Russia's pleadings during the provisional measures stage, it was most plausible that the Defendant would challenge the Court's jurisdiction. In the *Marshall Islands* cases, where the Marshall Islands sought to establish jurisdiction under the optional clause mechanism, notifications were addressed not to all States parties to the Statute, but to parties to the 1968 Treaty on the Non-Proliferation of Nuclear Weapons. (*Marshall Islands v. UK*, Preliminary Objections, ICJ Reports (2016), pp. 833, 838, paras. 3-6).

¹⁵⁴ *Obligation to Negotiate Access to the Pacific Ocean*, Preliminary Objection, ICJ Reports (2015), pp. 592, 597, para. 7.

If, under Article 43 of the Rules, an international organization is authorized to file written observations on jurisdictional issues, there is little reason not to allow the States parties to the convention in question to do the same.

III. Timing of a Declaration of Intervention

Although intervention under Article 63 is limited to the construction of a convention in question in the proceedings, allowing a third State to offer its preferred construction to the Court has the potential to delay those proceedings to the parties' detriment. The 'orderly and expeditious' progress of proceedings necessary to the sound administration of justice would be disrupted if third States could request intervention at any time.¹⁵⁵ The timing of an application to intervene and the subsequent time limits for procedural steps are therefore important procedural issues. Article 62 of the 1922 Rules of Court stated that:

Any State desiring to intervene, under the terms of Article 63 of the Statute, shall inform the Registrar in writing at latest before the commencement of the oral proceedings.

The Court, or the President, if the Court is not sitting, shall take the necessary steps to enable the intervening Party to inspect the documents in the case, in so far as they relate to the interpretation of the convention in question, and to submit the observations thereon to the Court.¹⁵⁶

Curiously, Article 60 of the 1926 Rules of Court omitted a fixed time limit (unlike Article 58 applying to intervention under Article 62 of the Statute) and instead allowed the Court, or the President if the Court is not sitting, to 'fix the times within which States desiring to intervene are to file any cases'.¹⁵⁷

Article 66 of the 1936 Rules of Court also made no provision for the timing of filing a declaration of intervention and it was not until the 1978 Rules of Court that a time limit was reintroduced, in Article 82, para. 1:

Such a declaration shall be filed as soon as possible, and not later than the date fixed for the opening of the oral proceedings. In exceptional circumstances a declaration submitted at a later stage may however be admitted.

This time limit is the same as that stipulated in 1922. It differs from that under Article 62 where the application must be made before the end of the written proceedings. The reasons for the later opportunity to intervene under Article 63 are not clear. The date for the commencement of oral proceedings in any particular case also remains unclear until it is fixed by the Court. The Court has not indicated what constitutes exceptional circumstances justifying a later filing of a declaration.

¹⁵⁵ *Pulau Ligitan*, Application by the Philippines for Permission to Intervene, ICJ Reports (2001), pp. 575, 585, para. 21. This case was in the context of a request for intervention under Art. 62 but the principle is the same with respect to Art. 63.

¹⁵⁶ *Supra*, fn. 36.

¹⁵⁷ *Supra*, fn. 65.

E. Procedural Issues of Article 63

I. Inspection of Documents and Written Submissions

- 51 Article 60 of the 1922 Rules of Court spelled out the procedures a State filing a declaration of intervention under Article 63 should follow and the assistance it could expect from the Registrar of the Court:

The Court, or the President if the Court is not sitting, shall take the necessary steps to enable the intervening State to inspect the documents in the case, in so far as they relate to the interpretation of the convention in question, and to submit its observations thereon to the Court.¹⁵⁸

- 52 These Rules did not specify whether such inspection of the documents should take place before or after the acceptance of the declaration of intervention. Article 60 of the 1926 Rules of Court provided greater detail on the further steps to be taken by the Registrar in transmitting the observations of the intervening State to the Court and the parties.

The Registrar shall take the necessary steps to enable the intervening State to inspect the documents in the case, in so far as they relate to the interpretation of the convention in question, and to submit its observations thereon to the Court. Such observations shall be communicated to the parties, who may comment thereon in Court. The Court may authorise the intervening State to reply.¹⁵⁹

- 53 Article 66, para. 3 of the 1936 Rules required the declaration to be communicated to the parties and specified that any doubt as to its admissibility should be resolved by the Court.¹⁶⁰ Article 66, para. 4 required the Registrar:

to take the necessary steps to enable the intervening State to inspect the documents in the case, in so far as they relate to the interpretation of the convention in question and to submit its written observations thereon to the Court within a time-limit to be fixed by the Court or by the President if the Court is not sitting.

Article 66, para. 5 of the Rules required the intervener's observations to be communicated to the other parties and provided that they 'may be discussed by them in the course of the oral proceedings'. It also specified that 'in these proceedings the intervening party shall take part'.

These articles use the expression 'intervening State' without specifying whether this is before, or only after, the Court has accepted the intervention, or indeed even envisaging the possibility of the declaration not being admitted. This is consistent with the view predominant at that time according to which the Court had the administrative duty to record the declaration of intervention.¹⁶¹

- 54 Article 66 of the 1946 Rules of Court largely followed Article 66 of the 1936 Rules of Court. In the 1978 Rules of Court, the procedures following the filing of a declaration of intervention are the same as for an application to intervene under Article 62. Article 83 of the 1978 Rules of Court requires that:

1. Certified copies of ... the declaration of intervention under Article 63 of the Statute, shall be communicated forthwith to the parties to the case, which shall be invited to furnish their written

¹⁵⁸ *Supra*, fn. 36.

¹⁵⁹ *Supra*, fn. 65.

¹⁶⁰ *Cf. supra*, MN 16.

¹⁶¹ *Cf. supra*, MN 14-17.

observations within a time-limit to be fixed by the Court or by the President if the Court is not sitting.

The third State's access to the written pleadings prior to the admission of intervention raises the same opposing tensions between the principle of confidentiality and the efficiency of intervention as for Article 62.¹⁶² Access to pleadings under Article 53 of the Rules is normally granted by the Court when there is no objection from the parties, and it is immaterial whether the third State expressed an intention to intervene or not.¹⁶³ Under Article 63, access to the written pleadings is not indispensable to the admissibility of the declaration. The third State is informed about the conventions in question from the instrument instituting proceedings. Moreover, intervention under Article 63 is or should be less conditioned by the claims of the parties. 55

II. Oral Submissions

Although Article 66, para. 5 of the 1936 Rules of Court envisaged the possibility of an oral hearing on the admissibility of a declaration of intervention, the requirement for such a hearing, if an objection to the declaration of intervention is filed by a party to the original proceedings, was not introduced until the 1978 Rules of Court. Article 84, para. 2 states: 56

If, within the time-limit fixed under Article 83 of these Rules, an objection is filed ... to the admissibility of a declaration of intervention, the Court shall hear the State seeking to intervene and the parties before deciding.

It is not always easy to ascertain whether there is objection or not. Parties, without absolutely disputing the right to intervene, may raise concerns about certain aspects related to the declaration. But Article 84, para. 2 of the Rules means that the parties can object only to the admissibility of the declaration of intervention but cannot object on other grounds to its being granted. If there is such an objection to admissibility, the article mandates a hearing, involving the parties and the intervening State. Otherwise, the Court decides in the best interest of the good administration of justice.

Prior to the introduction of this requirement, Poland was granted a hearing in the *Wimbledon* case and Cuba was granted a hearing after Peru objected to the declaration of intervention in the *Haya de la Torre* case. In its declaration of intervention in the *Nicaragua* case, El Salvador sought a hearing if either party objected. The United States did not object to the declaration. Nicaragua's strategy was to assert it did not object 'in principle' to El Salvador's declaration of intervention and to reassert the right of intervention under Article 63. At the same time it 'felt bound' to draw the Court's attention to certain deficiencies within it.¹⁶⁴ If Nicaragua's comments did not amount to an objection to the admissibility of El Salvador's declaration of intervention, El Salvador had no right to a hearing under Article 84, para. 2 of the Rules where it could respond to the adverse comments. However, on this view, El Salvador would have the right of intervention under Article 63. El Salvador accordingly responded to Nicaragua's observations by 57

¹⁶² Cf. Miron/Chinkin on Art. 62 MN 107.

¹⁶³ In the *Whaling in the Antarctic* case, the parties did not object to New Zealand being granted access even before it filed its declaration of intervention (Judgment, ICJ Reports (2014), pp. 226, 235, para. 7).

¹⁶⁴ Letter from Nicaragua, 10 September 1984, cited in *Nicaragua, Declaration of Intervention of the Republic of El Salvador*, Diss. Op. Schwebel, ICJ Reports (1984), pp. 223, 228-9.

asserting that since Nicaragua had not objected the Court should automatically record the declaration.¹⁶⁵

The Court accepted Nicaragua's strategy at 'full and face value',¹⁶⁶ disregarded El Salvador's response to Nicaragua's comments made in the letter of 17 September, and refused the declaration without according El Salvador a hearing.¹⁶⁷ This failure concerned a number of members of the Court. Judges Ruda, Ago, Mosler, Jennings, and Lacharrière considered that it would have been 'more in accordance with judicial propriety' for an oral hearing to have been granted.¹⁶⁸ Judge Nagendra Singh considered that there is a general principle that an applicant requesting it should be heard unless the request is *prima facie* absurd or totally inadmissible'. However, he, too, thought that any hearing at the jurisdictional phase would necessarily have impacted upon the merits of the case. He concurred with the majority opinion because he thought it helpful to place things 'in the order and sequence in which they rightly belong'.¹⁶⁹ Judge Oda was concerned that Nicaragua's opinion had not been sought on the additions El Salvador had made to its declaration of intervention by letters dated 10 September and 17 September (the declaration had been made on 15 August) as 'El Salvador's requests should have been considered as a whole'.¹⁷⁰ Judge Schwebel was of the opinion that either Nicaragua had not objected to the declaration of intervention, in which case Article 63 applied to accord intervention as of right, or Nicaragua had objected, in which case Article 84, para. 2 of the Rules provided for an oral hearing where El Salvador could clarify its position. It was also noted that the date for the oral hearings between Nicaragua and the United States had been set as 8 October 1984 and had been announced as such in a press communiqué of 27 September before the Court met to consider El Salvador's application on 4 October. This tight schedule appeared to foreclose in advance any possibility of an oral hearing on the declaration of intervention.¹⁷¹

58 In the merits phase of the case, some judges revisited the refusal to accept El Salvador's declaration of intervention. Judge Sette-Camara reiterated that El Salvador's application was untimely in that it was made at the jurisdictional phase of the proceedings, and that 'the court did preserve the rights of El Salvador to intervene on the merits'.¹⁷² Judge Lachs noted that courts 'being composed of fallible men ... may err'. He illustrated this 'unfortunate fact' by reference to the refusal to accord El Salvador a hearing. He considered that 'it would probably have been in the interest of the proper administration of justice for the Court to have granted "a hearing" and thus to have become more enlightened on the issues El Salvador had in mind'.¹⁷³ Judge Oda, too, expressed regret that he had taken the position of opposing according El Salvador a hearing.¹⁷⁴

¹⁶⁵ Letter to the Registrar from Ivo P. Alvarenga, Ambassador, Agent of El Salvador to the International Court of Justice, 17 September 1984, cited in the *Nicaragua* case, Declaration of Intervention by El Salvador, Diss. Op. Schwebel, ICJ Reports (1984), pp. 223, 230.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*, Declaration of Intervention of the Republic of El Salvador, ICJ Reports (1984), pp. 215, 216.

¹⁶⁸ *Ibid.*, Sep. Op. Ruda, Mosler, Ago, Jennings, and Lacharrière, ICJ Reports (1984), p. 219.

¹⁶⁹ *Ibid.*, Sep. Op. Nagendra Singh, ICJ Reports (1984), p. 218.

¹⁷⁰ *Ibid.*, Sep. Op. Oda, ICJ Reports (1984), pp. 220 *et seq.*

¹⁷¹ *Ibid.*, p. 221; *ibid.*, Diss. Op. Schwebel, ICJ Reports (1984), pp. 223, 232.

¹⁷² *Nicaragua*, Merits, Sep. Op. Sette-Camara, ICJ Reports (1986), pp. 192, 195.

¹⁷³ *Ibid.*, Sep. Op. Lachs, ICJ Reports (1986), pp. 158, 170-1.

¹⁷⁴ *Ibid.*, Diss. Op. Oda, ICJ Reports (1986), pp. 212, 244, para. 66.

In the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, the dismissal of New Zealand's request before the Court had taken any action with respect to the declarations of intervention meant that the intervening States did not receive a hearing. Judge *ad hoc* Palmer regretted this step.¹⁷⁵ He considered that filing the declarations and applications to intervene was a big step for these States to take and the failure to allow them to appear in oral argument may well have deprived the Court of some valuable assistance. 59

In the *Whaling in the Antarctic* case, Japan did 'not raise a formal objection to the intervention, [but it was] 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'.¹⁷⁶ In its order on the declaration of intervention, the Court noted that: 60

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.¹⁷⁷

This statement confirms the view that hearings will be organized only when one of the parties objects to the admissibility of the declaration. But the Court has not so far clarified whether hearings will be held if the Court itself has doubts as to the admissibility of the declaration.

G. Status of the Intervener under Article 63

As in case of Article 62,¹⁷⁸ the status of an intervener under Article 63 has also been the subject of confusion, with the difference that the binding effect of the interpretation given in the judgment is clearly stipulated in the Statute. However, this consequence is not enough for transforming the intervener into a party. 61

I. The Binding Effect of the Construction

Article 63 of the Statute clearly stipulates that 'the construction given by the judgment will be equally binding' upon the intervener ('l'interprétation contenue dans la sentence est également obligatoire à son égard'). The Court recalled this binding effect in the *Whaling in the Antarctic* case: 62

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.¹⁷⁹

¹⁷⁵ *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, Order of 22 September 1995, Diss. Op. Palmer, ICJ Reports (1995), pp. 381, 388–9, para. 24.

¹⁷⁶ *Whaling in the Antarctic*, Declaration of Intervention by New Zealand, Sep. Op. Owada, ICJ Reports (2013), pp. 11, 12, para. 4.

¹⁷⁷ *Ibid.*, ICJ Reports (2013), pp. 3, 9, para. 18.

¹⁷⁸ Cf. Miron/Chinkin on Art. 62 MN 120–127.

¹⁷⁹ *Whaling in the Antarctic*, Declaration of Intervention by New Zealand, ICJ Reports (2013), pp. 3, 9, para. 20.

- 63 In the forerunner to Article 63, *i.e.*, Article 56 of the 1899 Hague Convention for the Pacific Settlement of Disputes, the fact that a decision is binding only on the parties to the case, and a State's right of intervention with respect to the construction of a convention to which it is party, were linked.¹⁸⁰ The connection between the two principles was not made explicit in the Statute of the PCIJ and remains uncertain in the ICJ Statute. The binding effect under Article 63 is different from *res judicata* on multiple grounds. In *Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles*, the Court defined *res judicata* in the following terms:

the principle of *res judicata*, as reflected in Articles 59 and 60 of its Statute, is a general principle of law which protects, at the same time, the judicial function of a court or tribunal and the parties to a case which has led to a judgment that is final and without appeal It is not sufficient, for the application of *res judicata*, to identify the case at issue, characterized by the same parties, object and legal grounds; it is also necessary to ascertain the content of the decision, the finality of which is to be guaranteed. The Court cannot be satisfied merely by an identity between requests successively submitted to it by the same Parties; it must determine whether and to what extent the first claim has already been definitively settled.¹⁸¹

The *res judicata* principle operates only in relation to the parties. The intervener is a participant to the proceedings, but is not a party to the case.¹⁸² The *res judicata* is to be determined with respect to the claims of the parties. The intervener does not submit claims (*petita*), it only submits to the court its preferred construction. Finally, *res judicata* 'is contained in the operative clause of the judgment'.¹⁸³ And even if, 'in order to ascertain what is covered by *res judicata*, it may be necessary to determine the meaning of the operative clause by reference to the reasoning set out in the judgment',¹⁸⁴ the reasoning does not have an autonomous *res judicata* effect. By contrast, the construction of a convention appears generally in the reasoning part of a judgment. Therefore, the binding force of Article 63 operates mainly in relation to the reasoning.

- 64 One may wonder how the position of an intervener is different from that of the other parties to the convention in question. Article 63 predicates that the Court will interpret treaties consistently and it is thus reluctant to ignore its own prior decisions that will engender expectations in non-parties.¹⁸⁵ The essential difference seems to be that, being bound by the particular construction given by the Court, the intervener could not put forward a different one, at least not in subsequent proceedings before the Court.

- 65 But this raises concerns as to the relative effect of the judgments. Under Article 59 parties are bound by the judgment only 'in respect of that particular case'. Theoretically they are subsequently free to disregard the interpretation given by the Court to a treaty provision.¹⁸⁶ An intervening State is bound by the judgment 'equally' with the parties. This must also be limited to the judgment in the case, for it would be illogical for a third State

¹⁸⁰ Cf. *supra*, MN 5; also Brown on Art. 59 MN 60–63.

¹⁸¹ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast*, Preliminary Objections, ICJ Reports (2016), pp. 100, 125–6, paras. 58–9.

¹⁸² Cf. *infra*, MN 65.

¹⁸³ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast*, Preliminary Objections, ICJ Reports (2016), pp. 100, 126, para. 61.

¹⁸⁴ *Ibid.*

¹⁸⁵ Cf. *supra*, MN 4 and also Brown on Art. 59 MN 81–87.

¹⁸⁶ But cf. Brown on Art. 59 MN 45–46, 68–71 for the argument that the parties may also be bound to observe the Court's interpretation of the law in future cases.

to have a greater commitment under a judgment than the parties.¹⁸⁷ The point was made by Judge Gaja in his Declaration in the *Whaling in the Antarctic* case that the binding effect on the intervener is equally relative:

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.¹⁸⁸

Thus, if the *res interpretata* is an authoritative, but non-binding effect, operating *erga omnes partes*,¹⁸⁹ intervention under Article 63 results in a binding effect, but operating only among the participants to proceedings.

II. Relationship between the Intervener and the Parties

An intervener under Article 63 does not become a party to the case, even if it is partially bound by the judgment, in respect to the conclusions related to the object of its intervention. In the *Whaling in the Antarctic* case, the Court made clear that the intervener under Article 63 is not a party: 66

intervention under Article 63 of the Statute ... 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 [than the construction of the convention in question].¹⁹⁰

This clarification has important consequences: the third State does not enjoy any of the rights conferred upon the parties by the Statute. This applies to procedural rights,¹⁹¹ but also for instance to the right of applying for revision or interpretation of the judgment.

This being said, the presence of a third State in a bilateral dispute is perceived as disruptive of the balance between the parties. In the *Wimbledon* case, Poland's intervention was to support the interests of the applicant States. In the *Nicaragua* case, El Salvador's interests were entwined with those of the United States. In the *Whaling in the Antarctic* case, Japan claimed that New Zealand intervened to support Australia's position, which raised 'serious doubts concerning the equality of the parties in these proceedings before the Court'.¹⁹² The Court rejected this argumentation, basing itself on the purely formal, though correct argument, that the intervention, being limited to the construction of the conventions, 'cannot affect the equality of the Parties to the dispute'.¹⁹³ 67

¹⁸⁷ Verzijl, *Jurisprudence of the World Court* (1965), vol. 1, p. 21.

¹⁸⁸ *Whaling in the Antarctic*, Declaration of Intervention by New Zealand, Decl. Gaja, ICJ Reports (2013), p. 41-2.

¹⁸⁹ Cf. *supra*, MN 2.

¹⁹⁰ *Whaling in the Antarctic*, Declaration of Intervention by New Zealand, ICJ Reports (2013), pp. 3, 9, para. 18.

¹⁹¹ Cf. *infra*, MN 68-70.

¹⁹² *Whaling in the Antarctic*, Declaration of Intervention by New Zealand, ICJ Reports (2013), Sep. Op. Gwada, ICJ Reports (2013), pp. 11, 12, para. 4.

¹⁹³ *Ibid.*, Declaration of Intervention by New Zealand, ICJ Reports (2013), pp. 3, 9, para. 18.

III. Procedural Rights of the Intervenor

- 68 Since it has no vocation of becoming a party, the intervenor has no right to a judge *ad hoc*. This position is in conformity with the status of the intervening State as a third party to the litigation.¹⁹⁴ In *Whaling in the Antarctic*, Japan's concern was not with the intervenor appointing a judge *ad hoc*, but with the applicant preserving its right to appoint one. Japan referred to Article 31, para. 5 of the Statute and Article 36, para. 1 of the Rules 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. The Court pointed out that since the intervention of New Zealand did not confer upon it the status of party to the proceedings, Australia and New Zealand could not be regarded as parties in the same interest and that consequently the presence of a judge of the nationality of the intervening State had no effect on the right of the judge *ad hoc* chosen by the applicant to sit in the case under Article 31, para. 2.¹⁹⁵
- 69 The other procedural rights of the intervenor concern its participation at the merits stage.¹⁹⁶ Article 86 of the 1978 Rules is explicit about the right of the intervening State to have access to the parties' pleadings after acceptance of the declaration of intervention.
1. If an intervention under Article 63 of the Statute is admitted, the intervening State shall be furnished with copies of the pleadings and documents annexed, and shall be entitled, within a time-limit to be fixed by the Court, or by the President if the Court is not sitting, to submit its written observations on the subject-matter of the intervention.
These observations shall be communicated to the parties and to any other State admitted to intervene. The intervening State shall be entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention.
- 70 In the *Whaling in the Antarctic* case, New Zealand intervened after the closure of the written phase of the proceedings and submitted its written observations on the interpretation of the ICRW. The parties could also exchange a further set of written observations on the same subject-matter.¹⁹⁷ At the hearings on the merits, New Zealand was heard after the parties had made their presentations, and the time allotted to it was significantly shorter than the one of the parties.¹⁹⁸

H. Intervention in Other Fora

- 71 Provisions similar to Article 63 are found in other conventions providing for international arbitration or adjudication. Article 37 of the 1928 General Act of Arbitration (Pacific Settlement of International Disputes) provides as follows:
1. Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar of the Permanent Court of International Justice or the arbitral tribunal shall notify all such States forthwith.

¹⁹⁴ Cf. also Kooyjans/Bordin on Art. 31 MN 37–41 and Miron/Chinkin on Art. 62 MN 133.

¹⁹⁵ *Whaling in the Antarctic*, Declaration of Intervention by New Zealand, Reports (2013), pp. 3, 9, para. 21.

¹⁹⁶ Cf. also Miron/Chinkin on Art. 62 MN 128–134.

¹⁹⁷ *Whaling in the Antarctic*, Declaration of Intervention by New Zealand, Reports (2013), pp. 3, 9, para. 22.

¹⁹⁸ ICJ Press Release No. 2013/7 of 11 April 2013.

Every State so notified has the right to intervene in the proceedings; but, if it uses this right, the construction given by the decision will be binding upon it.

Article 32 of the ITLOS Statute¹⁹⁹ provides for intervention as of right, as in Article 72 of the ICJ Statute.

Article 32
Right to intervene in cases of interpretation or application

Whenever the interpretation or application of this Convention is in question, the Registrar shall notify all States Parties forthwith.

Whenever pursuant to Article 21 or 22 of this Annex the interpretation or application of an international agreement is in question, the Registrar shall notify all the parties to the agreement.

Every party referred to in paragraphs 1 and 2 has the right to intervene in the proceedings; if it uses this right, the interpretation given by the judgement will be equally binding upon it.

I. Evaluation

The reasons of policy behind Article 63 are readily apparent. All parties to a treaty have an interest in its construction. The very nature of a multilateral treaty allows a multiplicity of interests to emerge during litigation; the negotiation inherent in the conclusion of international agreements means that compromises may have been made over the final wording of the provisions, leading to uncertainty and disagreement as to the exact nature of the obligation accepted. The parties to a convention the construction of which is in issue should be given an opportunity to express their preferred interpretation to the Court, before that body gives and applies its interpretation. Like intervention under Article 62, intervention under Article 63 is a right to be heard.

The clarity of these objectives is not reflected in the language of Article 63. Even more than in the case of Article 62, there has been very infrequent recourse to Article 63, which contrasts with the enormous increase in multilateral treaty-making since 1920 and the frequency with which the Court addresses their interpretation. For lack of occasions, important issues remain obscure. The Court's unmotivated refusal to admit El Salvador's declaration of intervention and its failure to accord El Salvador a hearing appear now as a wasted opportunity. In *Whaling in the Antarctic*, 'the Court facing for the first time in several decades a declaration of intervention under Article 63 of the Statute',²⁰⁰ made an effort to dispel some of the obscurities and controversies, but it did not go beyond. The effects of intervention in particular remain unclear, but since they have not been cause for concern in practice, it may be that the question is not yet ripe for judicial decision. If the Court lacks occasions to clarify the case law, it is mainly because third States (and also international organizations under Article 43 of the Rules) have rarely seized the

¹⁹⁹ UNCLOS, Annex VI. For a brief comment, see Lekkas/Staker, 'Annex VI. Article 32: Right to Intervene in Cases of Interpretation or Application', in *United Nations Convention on the Law of the Sea: A Commentary* (Proelss, ed., 2017), pp. 2435-9.

²⁰⁰ *Whaling in the Antarctic*, Declaration of Intervention by New Zealand, Decl. Gaja, ICJ Reports (2013), pp. 41-2.

opportunity to 'be heard' as interveners. It remains to be seen if Judge Cançado Trindade's optimistic assessment, according to which Greece's intervention under Article 62 and New Zealand's under Article 63 mark indeed 'the *resurrectio* of intervention in contemporary judicial proceedings before the ICJ'.²⁰¹

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²⁰¹ *Ibid.*, Sep. Op. Cançado Trindade, ICJ Reports (2013), pp. 14, 36, para. 64.