To Apply or to Declare, or Both? Links between the Two Types of Intervention under the ICJ Statute

Hyun Seok Park*

It is conceivable that the construction of a convention is in question in a case brought before ICJ and a State that is a party to the convention but not to the case has legal interests which may be affected by the construction given by the judgment in the case. As hinted at in the Whaling in the Antarctic case and the Sovereignty over Pulau Ligitan and Pulau Sipadan case, such a third State might intervene in the proceedings under Article 62 as well as Article 63 of the Statute unless it should be interpreted otherwise. In light of relevant provisions of the Statute and jurisprudence of the Court, this paper explores the question whether such a State has the choice, to submit an application to intervene under Article 62 or to make a declaration of intervention under Article 63.

Keywords
Intervention as of Right, Discretionary Intervention, Non-Party Intervener, Intervener as a Party, ICJ Statute, Article 62, Article 63

* Professor of International Law at Hongik University, Seoul, Korea. LL.B./LL.M./Ph.D.(SNU). The author may be contacted at: ctrl_83@hanmail.net / Address: 94 Wausan-ro, Mapo-gu, Seoul 121-791 Korea.
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I. Introduction

The Statute of the International Court of Justice (hereinafter ICJ Statute) provides two different forms of intervention for a third State who is willing to protect its own interest in a case already brought before the Court. If a third State considers that it has a legal interest which may be affected by the decision of the Court in the case, the State is allowed to submit a request to the Court for permission to intervene in accordance with Article 62 of the ICJ Statute. If a multilateral treaty is in question regarding its interpretation before the Court, Article 63 grants a third State who is a party to the treaty the right to intervene in the proceedings.

In the *Whaling in the Antarctic* case, Japan has argued that New Zealand's declaration of intervention under Article 63 of the ICJ Statute can be interpreted as a strategy to avoid the burden of proving an "interest of a legal nature which may be affected by the decision in the case," as required under Article 62.[1] By contrast, the Philippines has invoked Article 62 instead of Article 63 to intervene in the *Sovereignty over Pulau Ligitan and Pulau Sipadan* case. It considered having an interest of a legal nature which might be affected by the Court's interpretation of certain treaties to which it is the successor-in-interest of one party.[2]

In the S. S. *Wimbledon* case, Poland also filed an application for permission to intervene into the interpretation of the Treaty of Peace of Versailles, to which Poland was then also a party, under Article 62 of the Statute of the Permanent Court of International Justice (hereinafter PCIJ Statute).[3] From a further communications with PCIJ, it appears to the Court that: "The Polish Government, abandoning the exclusive course which it seemed in the first instance to have adopted, now intends to avail itself of the right conferred upon it, as a party to the Treaty of Versailles, by Article 63 of the Statute."[4] Poland did not insist that the grounds for justifying the intervention under Article 62 should be taken into consideration.[5] PCIJ determined

1 ICJ, Written Observations of Japan on New Zealand's Written Observations (hereinafter Written Observations of Japan), ¶¶ 1-4, *re-cited from* Whaling in the Antarctic (Austl. v. Japan), Order, 2013 I.C.J. (Feb. 6) (Separate Opinion of Judge Cançado Trindade), *available at* http://www.icj-cij.org/docket/files/148/17272.pdf (last visited on Oct. 18, 2013). For an account of this dispute, *see* R. Davis, *The Whaling Dispute in the South Pacific: an Australian Perspective*, 4 J. East Asia & Int'l L. 419 (2012).

2 *See* Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. *v.* Malay.), Judgment, 2001 I.C.J. 580 (Oct. 23). The Application was rejected.

3 *See* Application by Polish Government to Intervene of May 22, 1923, S.S. Wimbledon (U.K., France, Italy, Japan *v.* Germ.), 1923 P.C.I.J. (ser. A) No.1, at 9-10.

4 *See* S.S. Wimbledon (U.K., France, Italy, Japan *v.* Germ.), 1923 P.C.I.J. (ser. A) No.1, at 13 (Jun. 28).

5 *Id.*