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Commentary of Article 62 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 62

1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.
2. It shall be for the Court to decide upon this request.

1. Lorsqu'un État estime que, dans un différend, un intérêt d'ordre juridique est pour lui en cause, il peut adresser à la Cour une requête, à fin d'intervention.
2. La Cour décide.

	MN
A. Introduction	1-3
B. Historical Development	4-10
I. Antecedents	4-5
II. The <i>Travaux Préparatoires</i> of the Statute of the Court	6-8
III. Persistent Difference of Wording between the French and English Versions of the Statute	9-10
C. Practice of Intervention under Article 62	11-15
D. Characteristics of Intervention under Article 62	16-33
I. Intervention as Incidental Proceedings	16-24
II. Intervention as Statutory Jurisdiction	25-27
III. The Margin of Appreciation of the Court	28-29
IV. Intervention and the Indispensable Third Party	30-33
E. Requirements for Intervention under Article 62	34-114
I. Evolution of the Rules of the Court	35-37
II. Procedural Conditions	38-43
III. Substantive Conditions	44-102
1. Interest of a Legal Nature Which May Be Affected	45-74
a) The Interest of a Legal Nature	46-57
aa) The Legal Nature	47
bb) The Distinction between the Legal Interest and the Legal Right	48-51
cc) A Concrete and Individualized Interest	52-57
b) The Risk for the Interest to be Affected by the Decision	58-71
aa) Interpretation of the Term 'decision'	58-59
bb) A Circumstantial Assessment	60-71
c) Relationship between Articles 62 and 59 of the Statute	72-74
IV. The Object of Intervention	75-90
1. The Improper Object: Intervention Must Not Introduce a New Dispute	77-83
2. The Proper Object: Protection of Legal Interests and Information of the Court	84-85
3. Degree of Specificity of the Application	87-90
4. The Jurisdictional Link	91-102
V. Evidentiary Requirements	103-114
1. Evidence and Standard of Proof	103-106
2. Access to Written Pleadings	107-114
F. Procedures for Consideration of a Request to Intervene	115-120

G. The Status of the Intervener	121-135
I. The Distinction between Intervention as a Party and Intervention as a Non-Party	121-128
II. The Procedural Rights of the Intervener	129-135
H. Intervention in other Fora	136-142
I. Evaluation	143-147

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A. Introduction

- 1 Article 62 provides the major procedural device by which the interests of States not party to proceedings before the ICJ are protected by the Court. The procedure is termed intervention. Its '*raison d'être* ... is to enable a third State, whose legal interest might be affected by a possible decision of the Court, to participate in the main case in order to protect that interest'.¹ Intervention under Article 62 stems from the conviction that inter-State proceedings, focused upon the settlement of bilateral disputes,² may not afford sufficient protection to third States' interests, despite the well-established principle of the relative effect of *res judicata*. Moreover, Article 62 could ensure and thus enhance confidence in judicial settlement.
- 2 Requests for permission to intervene under Article 62 have so far been scarce—only fourteen States seised the Court in eleven cases—and the number of interventions granted by the Court, four so far,³ is so low that these promises of intervention remain unfulfilled. On the overall, the Court's limited case law contains but a few elements of clarification of the conditions set out for intervention under Article 62 or of the effects of the judgment on the intervening State.
- 3 The task of clarification is all the more difficult that Article 62 contains an 'imposing array of obscurities, ambiguities and lack of concordance between the two language versions',⁴ deliberately entertained by the drafters of the Statute. In fact, the conditions for intervention were left 'to be decided as and when they occurred in practice and in the light of the circumstances of each particular case'.⁵ This deliberate choice of the drafters leaves to the Court the cumbersome responsibility of filling in *lacunae* in the Statute.

B. Historical Development

I. Antecedents

- 4 Intervention is a regular procedural device in domestic legal systems,⁶ but not in inter-State proceedings. Unlike the related, but distinct procedure of intervention under

¹ *Territorial and Maritime Dispute*, Application by Honduras for Permission to Intervene, Judgment, ICJ Reports (2011), pp. 420 *et seq.*

² Wolfrum, 'Interventions in Proceedings before International Courts and Tribunals: to what Extent May Interventions Serve the Pursuance of Community Interests?', in *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (Boschiero *et al.*, eds., 2013), pp. 219–20; *Whaling in the Antarctic*, Declaration of Intervention by New Zealand, Sep. Op. Cançado Trindade, ICJ Reports (2013), pp. 14, 37–8, paras. 69–71.

³ See the table published in the *ICJ Yearbook* (2014–2015), pp. 142–3.

⁴ Shaw, *Rosenne's Law and Practice*, vol. III, p. 1497.

⁵ *Continental Shelf* (Tunisia/Libya), Application by Malta for Permission to Intervene, ICJ Reports (1981), pp. 3, 14–6, paras. 23–7; see also *Continental Shelf* (Libya/Malta), Application by Italy for Permission to Intervene, ICJ Reports (1984), pp. 3, 27–8, para. 45.

⁶ For a comprehensive comparative analysis, see *Pulau Ligitan*, Application by Philippines for Permission to Intervene, Sep. Op. Weeramantry, ICJ Reports (2001), pp. 630, 637–43, paras. 20–3. *Judge ad hoc*

Article 63, there was no forerunner provision in the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907⁷ and no existing basis within international arbitral procedure. The new concept of intervention was not mentioned in the 1907 project of the Court of Arbitral Justice.⁸ Rather it was evolved through various draft plans for the proposed new international court, alongside that of the more familiar idea of intervention in proceedings concerning the interpretation of a convention.

There were various proposals for what subsequently became intervention. Among these, Article 48 of the Plan of the Five Neutral Powers (Norway, Denmark, Sweden, Holland, and Switzerland) read simply: 5

Lorsqu'un différend soumis à la Cour touche les intérêts d'un Etat tiers, celui-ci a le droit d'intervenir au procès.⁹

Article 21 of a Swedish governmental Commission's draft convention read:

Lorsqu'un différend soumis à la Cour est relatif à une convention internationale générale ou concerne à d'autres égards les intérêts d'un Etat tiers, qui n'est pas Partie dans le litige, ce dernier aura le droit d'intervenir dans l'affaire.

La Partie qui a saisi la Cour d'un litige est tenue d'en donner avis à l'Etat qui, aux termes du premier alinéa du présent article a le droit d'intervenir dans l'affaire.¹⁰

Article 31 of another draft convention on an international judicial organization, prepared by three committees nominated by Denmark, Norway, and Sweden read:

Lorsqu'une affaire soumise à la Cour porte sur l'interprétation d'une convention internationale générale ou universelle, ou si elle concerne d'une autre manière les intérêts d'un Etat tiers, ce dernier aura le droit d'intervenir dans l'affaire.

Les Etats tiers doivent être avertis par la Partie qui a intenté l'affaire.¹¹

II. The *Travaux Préparatoires* of the Statute of the Court

The procedural device of intervention under what became Article 62 was introduced into the draft Statute of the PCIJ by the Advisory Committee of Jurists during their discussions of what is now Article 63.¹² Intervention was one of the particular procedural achievements mentioned by Baron Descamps in his summary of the work of the 6

Weeramantry refers to a comprehensive compilation on the use of intervention in domestic jurisdictions by Habscheid, 'Les conditions de l'intervention volontaire dans un procès civil', submitted to the ICJ in the *Continental Shelf* (Tunisia/Libya) case, Application by Malta for Permission to Intervene, ICJ Reports (1981), Pleadings, vol. III, pp. 459-84.

⁷ Cf. Miron/Chinkin on Art. 63 MN 3-7.

⁸ Report of Mr de Lapradelle, Chairman of the Drafting Committee, Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), pp. 693-749. Cf. also *Whaling in the Antarctic*, Declaration of Intervention by New Zealand, Sep. Op. Cançado Trindade, ICJ Reports (2013), pp. 14, 27-8, paras. 35-7.

⁹ Draft for the establishment of a Permanent Court of International Justice provided for in Covenant of the League of Nations (1920), Article 14, Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice, pp. 300-23.

¹⁰ *Ibid.*, pp. 236-51, Draft of a Convention drawn up by a Swedish Governmental Commission in 1919.

¹¹ *Ibid.*

¹² For a summary of the drafting process cf. *Continental Shelf* (Tunisia/Libya), Application by Malta for Permission to Intervene, ICJ Reports (1981), pp. 3, 13-4, paras. 22-3.

third State to show that '*un intérêt d'ordre juridique est pour lui en cause*', the English version refers to 'an interest of a legal nature which may be affected by the Court's decision in the case'. The French version is broader than the English one, on more than one account, since it neither qualifies the ways in which the interest of the third State may be affected ('*est en cause*'), nor does it mention the 'decision of the Court' as the source of impact.

The difference is so striking that in the *Land, Island and Maritime Frontier Dispute* case, the Chamber took the unusual approach of placing wording from the two texts side by side in the following passage:

In order to obtain permission to intervene under Article 62 of the Statute, a State has to show an interest of a legal nature which may be affected by the Court's decision in the case, or that *un intérêt d'ordre juridique est pour lui en cause*—the criterion stated in Article 62.¹⁹

The Chamber did not comment on the difficulties of translation, it simply postulated that the two versions referred to an equivalent concept. These differences may nonetheless trigger important consequences on the appreciation of the risk for the interest to be affected.²⁰

C. Practice of Intervention under Article 62 of the Statute

Very few applications to intervene under Article 62 have been made before either the ICJ or the ICJ. The only case where an application to intervene was made before the ICJ was:

Wimbledon (United Kingdom, France, Italy, and Japan v. Germany), by Poland.²¹

There have been applications to intervene before the ICJ in the following cases:

Nuclear Tests (Australia and New Zealand v. France), by Fiji;²²

Continental Shelf (Tunisia/Libya), by Malta;²³

Continental Shelf (Libya/Malta), by Italy;²⁴

Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), by Nicaragua;²⁵

Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), by Equatorial Guinea;²⁶

¹⁹ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 114, para. 52. See also *Continental Shelf* (Libya/Malta), Application by Malta for Permission to Intervene, ICJ Reports (1984), pp. 3, 25, para. 40.

²⁰ Cf. *infra*, MN 58–59.

²¹ *Wimbledon*, Question of Intervention by Poland, PCIJ, Series A, No. 1, pp. 11 *et seq.* Intervention was denied, but under Art. 63 of the Statute.

²² *Nuclear Tests* (Australia v. France; New Zealand v. France), Application by Fiji for Permission to Intervene, ICJ Reports (1973), pp. 320 *et seq.*, and pp. 324 *et seq.*, respectively; *ibid.*, Application by Fiji for Permission to Intervene, ICJ Reports (1974), pp. 530 *et seq.*, and pp. 535 *et seq.*, respectively.

²³ *Continental Shelf* (Tunisia/Libya), Application by Malta for Permission to Intervene, ICJ Reports (1981), pp. 3 *et seq.*

²⁴ *Continental Shelf* (Libya/Malta), Application by Italy for Permission to Intervene, ICJ Reports (1984), pp. 3 *et seq.*

²⁵ *Land, Island and Maritime Frontier Dispute*, Application for Permission to Intervene, Order of 28 February 1990, ICJ Reports (1990), pp. 3 *et seq.*; Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92 *et seq.*

²⁶ *Land and Maritime Boundary*, Order of 21 October 1999, ICJ Reports (1999), pp. 1029 *et seq.*

- *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 (New Zealand v. France), by Australia, the Solomon Islands, the Federated States of Micronesia, the Marshall Islands, and the Samoa Islands.²⁷ The last four States also made declarations of intervention under Article 63;
- *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia), by the Philippines;²⁸
- *Territorial and Maritime Dispute* (Nicaragua v. Colombia), by both Costa Rica²⁹ and Honduras;³⁰
- *Jurisdictional Immunities of the State* (Germany v. Italy), by Greece.³¹

12 In some other cases there have been indications that a State has been considering intervention, or has decided against doing so. For example, in the *Eastern Greenland* case, Iceland withdrew a request to intervene.³² In the Pakistani *POW* case,³³ Afghanistan indicated that it had an interest in Pakistan's claims relating to State succession,³⁴ but made no formal request to intervene before the case was removed from the General List. Rosenne recounts that the agents in the *Aerial Incident of 27 July 1955* cases examined the possibility of each applicant State (Israel, United Kingdom, and the United States) seeking to intervene under Article 62 in each other case.³⁵ Finally, Colombia appears to have envisaged to intervene in the *Caribbean Sea Delimitation* case,³⁶ but the Honduras precedent left it with little prospects for success and finally decided not to.

13 The brief list of cases in which an application to intervene has been made or considered shows that the procedure has been little used. States have not come to 'regard intervention as a predictable contingency of international life'³⁷ and:

What might well have been expected, at the time the Court's Statute was adopted, to grow into a substantial branch of international jurisprudence, has thus turned out to be extremely limited in its growth.³⁸

14 The cases where a request to intervene has been granted are even more limited. There was no successful request to intervene under Article 62 before the PCIJ. Poland's request,

²⁷ *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, para. 67. The Court decided, by the same Order, on the main case, on the request for provisional measures and on the applications to intervene.

²⁸ *Pulau Ligitan*, Application by the Philippines for Permission to Intervene, ICJ Reports (2001), pp. 575 *et seq.*

²⁹ *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, ICJ Reports (2011), pp. 348 *et seq.*

³⁰ *Ibid.*, Application by Honduras for Permission to Intervene, ICJ Reports (2011), pp. 420 *et seq.*

³¹ *Jurisdictional Immunities of the State*, Application by the Hellenic Republic for Permission to Intervene, ICJ Reports (2011), pp. 494 *et seq.*

³² Even in the absence of a request to intervene, the PCIJ indicated in its judgment that the extent of a claim of sovereignty by another power was a factor to be taken into account; *Eastern Greenland*, Judgment, PCIJ, Series A/B, No. 53, pp. 21, 46; *cf.* the letters from the Prime Minister of Iceland to the Registrar of 19 August and 25 October 1932, PCIJ, Series C, No. 67, pp. 4081–2.

³³ *Pakistani POW*, Provisional Measures, ICJ Reports (1973), pp. 328 *et seq.*

³⁴ The Minister for Foreign Affairs of Afghanistan stated in a letter to the President of the Court (12 August 1973) that if the decision of the Court 'would involve unequal treaties imposed by Britain on Afghanistan, and be in variance with our national interests, then Afghanistan, in accordance with the Statute . . . will resort to peaceful actions in order to defend its legitimate interests' (*Pakistani POW*, Pleadings, p. 168).

³⁵ Rosenne (1993), pp. 7–8.

³⁶ *Caribbean Sea Delimitation and Islas Portillos*, CR 2017/10, 6 July 2017, pp. 45–6, para. 38 (Brotons).

³⁷ Elias (1983), p. 91.

³⁸ *Cf. Pulau Ligitan*, Application by the Philippines for Permission to Intervene, Sep. Op. Weeramantry, ICJ Reports (2001), pp. 630, 631, para. 4.

in the *Wimbledon* case, was made on the basis that the cargo of the vessel was consigned to the Polish Naval Base at Danzig and thus it had a legal interest in the decision in the case.³⁹ However, Poland also referred to Article 380 of the Treaty of Versailles, concerning the Kiel Canal, which led the British agent to suggest that the intervention would more properly come under Article 63, a suggestion that was accepted by Poland and approved by the Court.⁴⁰

Before the ICJ, there have been three successful requests to intervene under Article 62, all others being dismissed. Fiji's request in the *Nuclear Tests* cases⁴¹ and those of Australia, the Solomon Islands, the Federated States of Micronesia, the Marshall Islands, and the Samoa Islands in the 1995 *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 were all dismissed when the main case was found to be inadmissible. The requests of Malta in the *Continental Shelf* (Tunisia/Libya) case, of Italy in the *Continental Shelf* (Libya/Malta) case, of the Philippines in the *Pulau Ligitan* case and of both Costa Rica and Honduras in the *Territorial and Maritime Dispute* were all rejected. Nicaragua's request to intervene in the *Land, Island and Maritime Frontier Dispute* case was accepted by a Chamber of the Court and Equatorial Guinea's request in the *Land and Maritime Boundary* case was accepted by the full Court, as was that of Greece in the *Jurisdictional Immunities of the State* case.

D. Characteristics of Intervention under Article 62

I. Intervention as Incidental Proceedings

Intervention, either under Article 62 or Article 63 of the Statute, applies only to contentious proceedings.⁴² It is available only to States. A provision allowing the International Labour Office, or other international institutions to request intervention was rejected by the sub-committee of the Third Committee of the First Assembly of the League of Nations.⁴³ This differentiates intervention from *amicus curiae* briefs, under the forms allowed by Article 34, para. 2 of the Statute for contentious proceedings and by Article 66, para. 2 for advisory opinions.⁴⁴

Intervention has consistently been characterized as 'incidental to the proceedings'⁴⁵ which are already before the Court.⁴⁶ Logically, the provisions of the 1978 Rules of Court concerning intervention (Articles 81, 83–85) appear in Part III, headed 'Proceedings in

³⁹ *Wimbledon*, Application by the Polish Government to Intervene, PCIJ, Series A, No. 1, pp. 9–10.

⁴⁰ *Ibid.*, Observations on the Part of the Government of His Britannic Majesty in pursuance of Rule 59 of the Rules of the Court on the Subject of the Polish Application to be allowed to intervene in the *Wimbledon* case, Series C, No. 3, vol. I, pp. 106–8.

⁴¹ *Nuclear Tests* (Australia v. France; New Zealand v. France), Application by Fiji for Permission to Intervene, ICJ Reports (1974), pp. 530 *et seq.*, and pp. 535 *et seq.*

⁴² In *Acquisition of Polish Nationality*, Advisory Opinion, PCIJ, Series B, No. 7, pp. 5 *et seq.*, Romania was advised that Art. 62 and 63 were inapplicable to the advisory jurisdiction of the PCIJ.

⁴³ Records of First Assembly, Committee I, pp. 400, 499–500, 537.

⁴⁴ Cf. Dupuy/Hoss on Art. 34 MN 1–5, 39–41 and Paulus on Art. 66 MN 12–18; Sands/Mackenzie, 'International Courts and Tribunals, Amicus Curiae', *Max Planck EPIL*.

⁴⁵ *Haya de la Torre*, Judgment, ICJ Reports (1951), pp. 71, 76; *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 425, para. 74; *Land, Island and Maritime Frontier Dispute*, Application for Permission to Intervene, Order of 28 February 1990, ICJ Reports (1990), pp. 3, 4; *ibid.*, Application by

⁴⁶ *Nicaragua* for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 127–8, para. 84.

⁴⁷ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 134, para. 98.

Contentious Cases, Section D, Incidental Proceedings'.⁴⁷ Consequently, Article 84 of the Rules affords 'litigants an important protection against protracted uncertainty'⁴⁸ by requiring that an application to intervene be dealt with 'as a matter of priority', although the Court has a discretion to act otherwise.

18 Several important consequences arise from the incidental nature of intervention. First, it ensures that the case is not transformed into a new dispute, a 'different case with different parties'.⁴⁹ This aspect would be discussed in greater detail in relation to the object of intervention.⁵⁰

19 The second consequence of the incidental nature of intervention relates to the court competent to examine the admissibility of the applications made under Article 62 and 63 of the Statute. It is a general principle of adjudication that the court competent for the main proceedings is also competent for deciding on incidental matters.⁵¹ *Accessorium sequitur principale*. In *Land, Island and Maritime Frontier Dispute*, the ICJ clarified that the principle applied also when the dispute was submitted to a chamber. In that case, Nicaragua's claim to have its application considered by the full Court, and not by the chamber dealing with the merits of the case, was rejected by the plenary:

[I]t is for the tribunal seised of a principal issue to deal also with any issue subsidiary thereto; ... a chamber formed to deal with a particular case therefore deals not only with the merits of the case, but also with incidental proceedings arising in that case.⁵²

19 Finally, the question arises as to whether an incidental proceeding can be introduced in relation to other incidental proceedings like the preliminary objections or the provisional measures. The Court case law tends to provide a negative answer to that. On three occasions, the Court rejected interventions at an incidental phase (submitted either under Article 63 or under Article 62). But each of these cases must be resituated in their own context.

20 In the *Nuclear Tests* cases, Fiji's application to intervene was made on the basis of Article 62 of the Statute and related to the merits of the case. It was deposited on 18 May 1973, nine days after the applications instituting proceedings, and two days after France had contested the Court's jurisdiction.⁵³ By a first order, the ICJ deferred consideration of Fiji's request to intervene until it had pronounced on France's objections

⁴⁷ Insisting upon the incidental character of intervention, Torres Bernárdez, *Rec. des Cours* (1995-VI), pp. 270-1.

⁴⁸ Lachs, 'The Revised Procedure 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. 21-52, 40.

⁴⁹ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 134, para. 98.

⁵⁰ Cf. *infra*, MN 77-83.

⁵¹ Obviously, this general principle applies in the absence of contrary provisions in the instruments which govern jurisdiction. For instance, Art. 290, para. 5 UNCLOS (10 December 1982, 1833 UNTS 3) provides that ITLOS has jurisdiction to decide on provisional measures pending the constitution of an Annex VII arbitral tribunal.

⁵² *Land, Island and Maritime Frontier Dispute*, Application for Permission to Intervene, Order of 28 February 1990, ICJ Reports (1990), pp. 3, 4.

⁵³ *Nuclear Tests* (Australia v. France; New Zealand v. France), Application by Fiji for Permission to Intervene, ICJ Reports (1973), pp. 320 *et seq.* and pp. 324 *et seq.* The application was rapidly filed in the hope that the Court would allow Fiji to participate at the hearings on provisional measures (*ibid.*, Application for Permission to Intervene by Fiji, pp. 149, 151).

jurisdiction and admissibility,⁵⁴ and by a second order, it held that the application was 'no longer [had] any object'.⁵⁶ The two orders contain two singularly Delphic statements on the link between the main and incidental proceedings. In the first, the Court considered that 'the application of the Court by its very nature presupposes that the Court has jurisdiction to entertain the dispute between New Zealand [Australia] and France and that New Zealand's [Australia's] application against France in respect of that dispute is admissible'.⁵⁷ The use of the term 'by nature' would seem to refer to the proceedings of intervention, not to the content or object of Fiji's application. Thus, a request to intervene at the jurisdictional stage would be premature, because intervention presupposes that the Court has jurisdiction. However, beyond this textual argument, there is nothing in the order or in the judges' opinions to sustain this view.⁵⁸ When it found that 'the claim of New Zealand no longer [had] any object',⁵⁹ the Court logically concluded in its second order that 'in consequence there [would] no longer be any proceedings before the Court to which the application for permission to intervene could relate'.⁶⁰ The treatment of Fiji's request to intervene means two things: first, that an intervention based on a legal interest relating to the merits shall be considered as premature at the jurisdictional stage; second, a request to intervene cannot withstand dismissal of the main case. But this precedent should not be interpreted as rejecting at large the possibility of intervention on jurisdictional issues at the jurisdictional stage.

The Court's order in the *Nicaragua* case confirms that the applications dealing with the merits are premature at the jurisdictional stage.⁶¹ 21

The Declaration of Intervention of the Republic of El Salvador, which relates to the present phase of the proceedings [the preliminary objections], addresses itself also in effect to matters, including the construction of conventions, which presuppose that the Court has jurisdiction to entertain the dispute.⁶²

Consequently, the Court concluded that 'the declaration ... is inadmissible inasmuch as it relate[d] to the current phase of the proceedings between Nicaragua and the United States'.⁶³ The Court did not opt for deferring consideration, as it did in Fiji's case, because El Salvador made clear that its intention was to intervene at the jurisdictional stage, though it left open the possibility to intervene on the merits too. This conclusion on admissibility being provisional, the Court reiterated it, with specific reference to the

⁵⁴ *Ibid.*, Application by Fiji for Permission to Intervene, ICJ Reports (1973), pp. 320 *et seq.*, and pp. 324

⁵⁵ *Ibid.*, Application by Fiji for Permission to Intervene, ICJ Reports (1973), pp. 320 *et seq.*, and pp. 324 *et seq.*

⁵⁶ *Nuclear Tests (New Zealand v. France)*, Application by Fiji for Permission to Intervene, ICJ Reports (1973), pp. 320 *et seq.*, and pp. 324 *et seq.*

⁵⁷ *Ibid.*, p. 535.

⁵⁸ *Nuclear Tests (Australia v. France; New Zealand v. France)*, Application by Fiji for Permission to Intervene, ICJ Reports (1973), pp. 320 *et seq.*, and pp. 324 *et seq.*

⁵⁹ The judges having appended statements insisted upon the lack of jurisdictional link (*cf. infra*, MN 95).

⁶⁰ *Nuclear Tests (New Zealand v. France)*, Application by Fiji for Permission to Intervene, ICJ Reports (1973), pp. 320 *et seq.*, and pp. 324 *et seq.*

⁶¹ *Ibid.*

⁶² Since El Salvador attempted to intervene under Art. 63 of the Statute, the case is analysed in more detail in Miron/Chinkin on Art. 63 MN 43-50.

⁶³ *Nicaragua*, Declaration of Intervention of the Republic of El Salvador, ICJ Reports (1984), pp. 215, 216.

⁶⁴ *Ibid.*

'current phase of the proceedings' in its judgments on jurisdiction and admissibility⁶⁴ and on the merits.⁶⁵

- 22 Finally, 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*, Australia, the Federated States of Micronesia, the Marshall Islands, the Samoa Islands, and the Solomon Islands, applied to intervene in New Zealand's request for provisional measures. The intervening States argued that Article 62 does not limit the phase of proceedings when such an application may be made and that, in the particular circumstances of the case, the provisional measures phase might be the only time a request to intervene could have any practical effect.⁶⁶ Like for the 1974 case,⁶⁷ the Court's dismissal of New Zealand's request precluded any decision on intervention.
- 24 Rosenne and Shaw also consider that there is not in the Statute an absolute bar from introducing an application to intervene on jurisdictional issues,⁶⁸ provided the admissibility requirements are respected. Fiji's and El Salvador's application related not to the subject-matter of the proceedings on jurisdiction, but to the merits. As such, the object of their intervention⁶⁹ was not aligned with the subject-matter of the proceedings to which they purported to relate. It may be that the conditions for admissibility applied to the interlocutory stage are easier to satisfy under Article 63 than under Article 62.⁷⁰ There is however one textual argument to support the inadmissibility of application for interventions at the preliminary or provisional measures stage and it may be drawn from the requirement that the interest of the third State must be at risk of being affected by 'the decision in that case'. In the context of intervention, the Court tends to interpret these terms as referring to the judgment on the merits, as will further be seen.⁷¹ If this restriction is confirmed, in that case, it may indeed be difficult to make applications under Article 62 at an interlocutory stage.

II. Intervention as Statutory Jurisdiction

- 25 The question whether jurisdiction over intervention is based on States' consent has been a most controversial issue.⁷² When a Chamber of the Court finally resolved it in 1990, in the *Land, Island and Maritime Frontier Dispute* case, it also made the important clarification that intervention was founded on the Statute:

The competence of the Court in this matter of intervention is not, like its competence to hear and determine the dispute referred to it, derived from the consent of the parties to the case, but from

⁶⁴ *Ibid.*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 396, para. 6.

⁶⁵ *Ibid.*, Merits, ICJ Reports (1986), pp. 14, 17, para. 7.

⁶⁶ *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, 301, paras. 24-5, 41, and pp. 306-7, para. 67. The Applications of the Marshall Islands, Micronesia, Samoa, and the Solomon Islands were all made both under Arts. 62 and 63 of the Statute and in similar terms (*ibid.*, p. 292, para. 11).

⁶⁷ *Cf. supra*, MN 20.

⁶⁸ For a contrary view, see Shaw, *Rosenne's Law and Practice*, vol. III, pp. 1529-35.

⁶⁹ On the requirements relating to the object of the intervention, *cf. infra*, MN 75-90.

⁷⁰ *Nicaragua*, Declaration of Intervention of the Republic of El Salvador, Diss. Op. Schwebel, ICJ Reports (1984), pp. 223, 234.

⁷¹ *Cf. infra*, MN 58-59.

⁷² *Cf. infra*, MN 91-102.

the consent given by them, in becoming parties to the Court's Statute, to the Court's exercise of its powers conferred by the Statute.⁷³

The Chamber added: It is 'acceptance of the Statute [which] entails acceptance of the competence conferred on the Court by Article 62'.⁷⁴ Therefore, intervention can be considered as an example of statutory jurisdiction, alongside interpretation and revision, with the difference however that these two forms lead to the introduction of new cases, identified as such on the General List, whereas intervention is an incidental proceeding.

Some authors raise the question whether intervention is, *ratione personae*, open only to parties to the Statute. They consider that since Articles 62 and 63 mention 'a State/ every State' in general, there is no such particular restriction.⁷⁵ But, as a form of statutory jurisdiction, intervention rests upon the acceptance of the Statute. It is then logical that both forms of intervention (under Articles 62 and 63) should be open only to parties to the Statute or to States having otherwise accepted the Statute according to its Article 35, para. 2.⁷⁶ 26

Since the ratification of the Statute gives to the Court jurisdiction over intervention, the conditions set out by the relevant provisions of the Statute and of the Rules constitute conditions for the admissibility of the request, and not conditions for jurisdiction.⁷⁷ The Court pays more and more attention to the distinction between the two. An objection to admissibility 'consists in the contention that there exists a legal reason, even when there is jurisdiction, why the Court should decline to hear the case, or more usually, a specific claim therein'.⁷⁸ In *Certain Questions of Mutual Assistance in Criminal Matters*, the Court added that 'in determining the scope of the consent expressed by one of the parties, the Court pronounces on its jurisdiction and not on the admissibility of the application'.⁷⁹ In intervention proceedings, this insistence upon admissibility as opposed to jurisdiction highlights the will to disconnect intervention from States' consent. 27

III. The Margin of Appreciation of the Court

Even if jurisdiction over intervention is established by the Statute, the Rules of the Court systematically organize a separate, preliminary proceeding, dedicated to the appreciation of the admissibility of the applications made under Article 62 and 63. This means that neither form of intervention is as of right. The Court's margin of appreciation is however different under the two provisions. Even if intervention under Article 62 has been termed 'discretionary/discretionary intervention', the Court has asserted that it has no discretion 28

⁷³ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 133, para. 96.

⁷⁴ *Ibid.*

⁷⁵ Quintana, *ICJ Litigation*, pp. 852–3; Shaw, *Rosenne's Law and Practice*, vol. III, pp. 1527–8; Chinkin in the second edition of this Commentary (Art. 62 MN 7).

⁷⁶ Cf. also Zimmermann on Art. 35 MN 38.

⁷⁷ As the Court put it, 'the task entrusted to it by that paragraph is to determine the admissibility or otherwise of the request by reference to the relevant provisions of the Statute' (*Continental Shelf (Tunisia/Libya)*, Application by Malta for Permission to Intervene, ICJ Reports (1981), pp. 3, 12, para. 17).

⁷⁸ *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, 123, para. 48, quoting *Cratichian Genocide*, Preliminary Objections, ICJ Reports (2008), pp. 412, 456–7, para. 120; in the same sense, *Oil Platforms*, Merits, ICJ Reports (2003), pp. 161, 177, para. 29.

⁷⁹ *Certain Questions of Mutual Assistance in Criminal Matters*, Judgment, ICJ Reports (2008), pp. 177, 200, para. 48.

to reject a request solely on policy grounds. When the article was drafted, Lord Phillimore proposed the inclusion of an explicit discretion that the Court could grant the request 'if it sees fit'.⁸⁰ This was rejected. Thus, the Court does not have the faculty to reject intervention if the statutory conditions are met.⁸¹ Its margin of discretion rests within the appreciation of the conditions stipulated in Article 62,⁸² but it remains important due to the vagueness of the relevant provisions. This being said, the Court considers that admission or rejection of intervention is guided not only by compliance with the statutory conditions, but also by the principle of the sound administration of justice:

It is for the Court, responsible for safeguarding the proper administration of justice, to decide whether the condition laid down by Article 62, para. 1, has been fulfilled.⁸³

The reference to the principle of the sound administration of justice echoes the functions of intervention, which aim at informing the Court on the factual and legal context of the dispute submitted to it, thus providing it with all the necessary elements for deciding it.⁸⁴ It is also reminiscent of the fact that, as all incidental powers, the admission of intervention is deemed necessary or appropriate for the Court to discharge its principal mission (that of deciding the dispute submitted to it). However, the reference to the sound administration of justice also supports the vision according to which the Court decides to grant or not an intervention under Article 62 not only on legal grounds, but also according to considerations of opportunity.⁸⁵ This being said, the conditions for the admissibility of an application under Article 62 are sufficiently vague to leave to the Court a large margin of appreciation.⁸⁶ In particular, since the interest of a legal nature of the third State must be at risk of being affected by the decision on the merits, the Court can—and does—rely on its own engagement to protect the third State's interests at the merits stage in order to reject the application.⁸⁷

- 29 The degree of discretion enjoyed by the Court under Article 62 may also be appreciated in light of the attitude of the parties. Since intervention does not rest on parties' consent, their objection is not enough to dismiss the application: 'opposition of the parties

⁸⁰ Lord Phillimore proposed that if 'a State considers that a dispute submitted to the Court affects its interests, it may request to be allowed to intervene; the Court shall grant permission if it thinks fit'. *Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists* (1920), p. 593.

⁸¹ It has been argued that the concept of a 'request' suggests potential refusal, despite compliance with the stipulated criteria (Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-1954: Questions of Jurisdiction, Competence and Procedure', *BYIL* 34 (1958), pp. 1-161, 127).

⁸² *Continental Shelf (Tunisia/Libya)*, Application by Malta for Permission to Intervene, ICJ Reports (1981), pp. 3, 12, para. 17; *Continental Shelf (Libya/Malta)*, Application by Italy for Permission to Intervene, ICJ Reports (1984), pp. 3, 8-9, para. 12; *Territorial and Maritime Dispute*, Application by Honduras for Permission to Intervene, ICJ Reports (2011), pp. 420, 434, para. 36.

⁸³ *Territorial and Maritime Dispute*, Application by Honduras for Permission to Intervene, ICJ Reports (2011), pp. 420, 434, para. 36, quoting *Continental Shelf (Tunisia/Libya)*, Application by Malta for Permission to Intervene, ICJ Reports (1981), pp. 3, 12, para. 17. See also *Continental Shelf (Libya/Malta)*, Application by Italy for Permission to Intervene, ICJ Reports (1984), pp. 3, 12, paras. 17-8; *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, ICJ Reports (2011), pp. 348, 358, para. 25.

⁸⁴ Cf. Kolb, 'Le principe de la "bonne administration de la justice" dans la jurisprudence internationale', *L'Observateur des Nations Unies* 27 (2009), pp. 5-21, 12. Cf. also *infra*, MN 84-85.

⁸⁵ *Territorial and Maritime Dispute*, Application by Honduras for Permission to Intervene, Diss. Op. Abraham, ICJ Reports (2011), pp. 447, 450, para. 12; *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, ICJ Reports (2011), Diss. Op. Cançado Trindade and Yusuf, pp. 402, 409, paras. 1, 15.

⁸⁶ Cf. *infra*, MN 44-102.

⁸⁷ Cf. *infra*, MN 72-74.

to a case is, though very important, no more than one element to be taken into account by the Court'.⁸⁸ It remains unclear however on what bases and to what extent the parties' attitude should influence the Court's assessment of the admissibility of intervention. Apart from the fact that the Rules of the Court reserve a different procedural treatment to unopposed applications,⁸⁹ it remains that, with the exception of Nicaragua's application in the *Land, Island and Maritime Frontier Dispute*, in the other two cases when the Court declared admissible the applications for permission to intervene, there was no objection from the parties to the dispute.⁹⁰ The least one could say is that, though not decisive, the absence of an objection from the parties certainly facilitates the acceptance of intervention.⁹¹

IV. Intervention and the Indispensable Third Party

The absence of a third party may prevent the Court from adjudicating the case where that party has rights in the very subject-matter of the case, indicating the close connection between intervention under Article 62 and the principle of the so-called indispensable third party. However, several elements help distinguishing the two hypotheses: the indispensable party is the one whose rights constitute the very-subject matter of the case submitted to the Court, while for intervention, only the legal interests need to be presumably affected. Unlike intervention, the indispensable third party rule is not provided for within the Statute of the Court, but rests upon the principle of consent.⁹² Accordingly, the absence of the indispensable third party prevents the Court from exercising jurisdiction.

In *Monetary Gold*, it was contended that Albania might have intervened, and that there was nothing in the Statute to prevent proceedings from continuing when a third State which would be entitled to intervene refrained from doing so.⁹³ The Court concluded that a third State has a choice whether or not to intervene and that if it chooses not to it is protected by Article 59 of the Statute.⁹⁴ Since Albania's rights were the subject-matter of the dispute, the proceedings could not be continued in its absence.⁹⁵

In the *Land, Island and Maritime Frontier Dispute* case, Nicaragua explicitly linked the indispensable third party principle with intervention. Nicaragua argued that *Monetary Gold* meant that the case could not be heard without its participation, *i.e.*, that its failure to intervene could deprive the Court of its jurisdiction bestowed by special agreement between the parties. The Chamber agreed that if Nicaragua's interests did indeed constitute

⁸⁸ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 133, para. 96, quoting *Continental Shelf (Libya/Malta)*, Application by Libya for Permission to Intervene, ICJ Reports (1984), pp. 3, 28, para. 46.

⁸⁹ See Art. 84, para. 2 of the Rules; *cf. infra* MN 118–119.

⁹⁰ See *Land and Maritime Boundary*, Order of 21 October 1999, ICJ Reports (1999), pp. 1029, 1033–4, paras. 9–10; *Jurisdictional Immunities of the State*, Application by the Hellenic Republic for Permission to Intervene, ICJ Reports (2011), pp. 494, 496, para. 6.

⁹¹ Criticizing the influence upon the Court of the attitude of the parties, see *Territorial and Maritime Dispute*, Application by Honduras for Permission to Intervene, Diss. Op. Donoghue, ICJ Reports (2011), pp. 71, 490–1, para. 56.

⁹² *Land and Maritime Boundary*, Judgment, ICJ Reports (2002), pp. 303, 421, para. 238. *Cf. also* Tomuschat Art. 36 MN 21–25 and Brown on Art. 59 MN 60–67.

⁹³ *Monetary Gold*, Judgment, ICJ Reports (1954), pp. 19, 32.

⁹⁴ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 114–5, para. 54.

⁹⁵ The *Monetary Gold* principle was applied in *East Timor*, Judgment, ICJ Reports (1995), pp. 90 *et seq.* to prevent the Court from deciding the case in the absence of Indonesia.

part of the 'very subject matter of the decision' it would doubtless justify intervention under Article 62 'which lays down a less stringent criterion'.⁹⁶ However, it found that while Nicaragua had a legal interest in the case, this did not form the very subject-matter of the case. The Chamber therefore did not have to determine whether it would have been able to continue the case without Nicaragua's participation.⁹⁷

- 33 The absence of the indispensable third party is all the more an obstacle to the Court's exercise of jurisdiction that, to the difference of '[n]ational courts, [which] have more often than not the necessary power to order *proprio motu* the joinder of third parties who may be affected by the decision to be rendered ... on the international plane the Court has no such power'.⁹⁸ Intervention is a 'procedural *faculty*',⁹⁹ not an obligation of the would-be intervener. This being said, the Court, or some of its members, can of course 'draw the attention of third States to the possible impact that its future judgment on the merits may have on their interests', leaving it to such third States to decide whether or not to request intervention.¹⁰⁰ In the *Barcelona Traction* case, Judge Fitzmaurice suggested that Canada could have been asked to intervene to cast further light on the status of the corporation.¹⁰¹ In *Land and Maritime Boundary*, the Court stated in its judgment on the preliminary objections that Equatorial Guinea's and to São Tomé and Príncipe's interests may be affected by the decision on the merits. It added that '[w]hether such third States would choose to exercise their rights to intervene in these proceedings pursuant to the Statute remained to be seen'.¹⁰² Following this virtual invitation to intervene, Equatorial Guinea chose to do so, the parties did not object, and the full Court unanimously accepted Equatorial Guinea's request. São Tomé and Príncipe did not request intervention.

E. Requirements for Intervention under Article 62

- 34 The Rules of the Court provide for more detailed substantive and formal conditions for the admissibility of an application for permission to intervene and thus clarify the vagueness of Article 62. 'Since the Rules cannot add to or modify the effect of the Statute, it has to be assumed that [the] additional items of information are required only to enable the Court more effectively to appreciate whether the statutory requirements of intervention are fulfilled.'¹⁰³

⁹⁶ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 116, para. 56.

⁹⁷ *Ibid.*, p. 122, para. 73.

⁹⁸ *Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 260, para. 53. See also *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 134-5, para. 99, citing *Continental Shelf (Libya/Malta)*, Application by Italy for Permission to Intervene, ICJ Reports (1984), pp. 3, 25, para. 40 and *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 431, para. 88; *East Timor*, Judgment, ICJ Reports (1995), pp. 90, 101, para. 26.

⁹⁹ *Continental Shelf (Libya/Malta)*, Application by Italy for Permission to Intervene, ICJ Reports (1984), pp. 3, 28, para. 46.

¹⁰⁰ *Territorial and Maritime Dispute*, Application by Honduras for Permission to Intervene, ICJ Reports (2011), pp. 420, 433, para. 34.

¹⁰¹ '[T]he intervention of the Canadian Government under Article 62 ... should have been sought, in order that its views might be made known'. *Barcelona Traction*, Merits, ICJ Reports (1970), Sep. Op. Fitzmaurice, ICJ Reports (1970), pp. 65, 80, para. 28.

¹⁰² *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 324, para. 116, emphasis added in *ibid.*, Order of 21 October 1999, ICJ Reports (1999), pp. 1029, 1030, para. 2.

¹⁰³ *Continental Shelf (Libya/Malta)*, Application by Italy for Permission to Intervene, Diss. Op. Jennings, ICJ Reports (1984), pp. 148, 152, para. 12.

I. Evolution of the Rules of Court

Unlike the text of Article 62, the relevant Rules of Court have been changed a number of times.¹⁰⁴ The changes have not resolved the ambiguities and uncertainties. One of the areas that successive Rules of Court have addressed is what the State party must include in a request to intervene. The initial draft of the 1922 Rules of Court stated in its Article 48:

A party intervening under Article 62 of the Court Statute shall take part in the proceedings as a joint party. A party wishing to intervene under the terms of this Article shall address a written application to the Registrar. The application shall contain:

- 1) the designation of the case;
- 2) a statement of the facts justifying intervention;
- 3) a list of annexes.¹⁰⁵

This draft also made provision for the President to decide upon the request, 'if the Court is not in session'. Whether the State requesting intervention should have to provide more details to show that it had complied with Article 62 was controversial. A number of questions concerned the Advisory Committee of Jurists. They were identified in a questionnaire that accompanied the proposed draft. Part III, para. 7 concerned intervention. The questions raised were:

1. Have third States interested in a case the right of intervention only when the original parties have accepted the compulsory jurisdiction of the Court?
2. Is there any difference in this regard between Article 62 and Article 63 of the Statute?
3. What principle should the Court adopt, when several parties are taking joint action in a case before the Court, in deciding which party should have the right to appoint a judge of its own nationality, in conformity with Article 31 of the Statute?¹⁰⁶

In the extensive discussions on these questions in the drafting committee it became apparent that there was no agreement on these and other such central issues. In light of the lack of consensus a 'meagre'¹⁰⁷ Rule was adopted in 1922 that avoided these controversial issues, leaving them to be decided by the Court as they arose.¹⁰⁸

Article 59 of the 1922 Rules of Court, as finally adopted, read:

The application referred to in the previous Article (An application for permission to intervene under the terms of Article 62) shall contain:

- 1) a specification of the case in which the applicant desires to intervene;
- 2) a statement of law and of fact justifying the intervention;
- 3) a list of the documents, in support of the application; these documents shall be attached.¹⁰⁹

The Article was not amended in 1926 or 1931. In 1936, it was renumbered as Article 64 and slightly reworded but the requirements for an application to intervene remained

¹⁰⁴ Cf. Rosenne (1993), pp. 39–78; Shaw, *Rosenne's Law and Practice*, vol. III, pp. 1511–20.

¹⁰⁵ Rules of Court, Draft prepared by the Secretariat, PCIJ, Series D, No. 2, pp. 253, 266.

¹⁰⁶ Questions to be submitted for discussion at a full meeting of the Court on 7 February 1922, *ibid.*, pp. 289–91.

¹⁰⁷ Lachs, *supra*, fn. 48, p. 39.

¹⁰⁸ *Continental Shelf (Tunisia/Libya)*, Application by Malta for Permission to Intervene, ICJ Reports (1981), pp. 3, 14, para. 23.

¹⁰⁹ Preparation of the Rules of Court of January 30th, 1922, PCIJ, Series D, No. 2, p. 573.

the same. Article 64, para. 2 (a) of the 1945 Rules of Court required the State requesting intervention to provide a 'description of the case' but otherwise repeated the earlier Rules.

37 It was not until the 1978 Rules of Court that requirements were introduced for much greater specificity in the form and contents of a request to intervene. Article 81 of the 1978 Rules of Court reads as follows:

1. An application for permission to intervene under the terms of Article 62 of the Statute, signed in the manner provided for in Article 38, para. 3, of these Rules, shall be filed as soon as possible, and not later than the closure of the written proceedings. In exceptional circumstances, an application submitted at a later stage may however be admitted.
2. The application shall state the name of an agent. It shall specify the case to which it relates and shall set out:
 - (a) the interest of a legal nature which the state applying to intervene considers may be affected by the decision in that case;
 - (b) the precise object of the intervention;
 - (c) any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case.
3. The application shall contain a list of the documents in support, which documents shall be attached.

Appointment and naming of an agent were not specified in the articles on intervention in the earlier Rules of Court, as all provisions on agents were grouped together.¹¹⁰ Even if some of its paragraphs may look outdated, Rule 81 has not been amended ever since.

II. Procedural Conditions

38 Article 81 establishes procedural conditions for the admissibility of intervention: the request to intervene must be made through an 'application'. The term used is different from a request under Article 63, which is made via a 'declaration', but this difference is merely terminological, the procedural requirements being very similar. As a matter of form, the application 'shall state the name of the agent' (Article 81, para. 2), and 'contain a list of documents in support, which documents shall be attached' (Article 81, para. 3).

39 The procedural requirement which led to some discussion concerns the timing within which an application can be made. The deadline for submitting an application under Article 62 varied throughout the different versions of the Rules of Court.

40 Article 58 of the 1922 Rules of Court stated:

An application for permission to intervene under the terms of Article 62 of the Statute, must be communicated to the Registrar *at latest before the commencement of the oral proceedings*. Nevertheless the Court may, in exceptional circumstances, consider an application submitted at a later stage.¹¹¹

This article was not changed in 1926 or 1931. In 1936 it was renumbered as Article 64, para. 1, but remained in essence the same.¹¹² The same time specification was maintained

¹¹⁰ Rosenne (1993), p. 67.

¹¹¹ Preparation of the Rules of Court of January 30th, 1922, PCIJ, Series D, No. 2, pp. 560, 572-3.

¹¹² Art. 64, para. 1 of the 1936 Rules of Court stated that the application 'shall be filed' in place of the 'must be communicated' of the earlier version (emphasis added).

with the adoption of the 1945 Rules of Court of the ICJ. Article 64 of the Rules required the application 'to be filed in the Registry' rather than just communicated to the Registrar. In 1972, Article 64 was again renumbered, to Article 69, but again without changing the time requirement.

By contrast, Article 81, para. 1 of the 1978 Rules of Court changed the relevant time limit, since:

An application for permission to intervene ... shall be filed *as soon as possible*, and *not later than the closure of the written proceedings*. In exceptional circumstances, an application submitted at a later stage may however be admitted. (emphasis added)

The Rules allow some discretion for an application after the closure of the written proceedings but the Court has not indicated what might constitute 'exceptional circumstances' for these purposes.

States submit applications very late, which is detrimental to the 'orderly and expeditious' progress of proceedings necessary to the sound administration of justice.¹¹³ The Court may at times point out to this disruptive effect, but no application has been dismissed due to this objection *ratione temporis*, which supports the idea that the 'as soon as possible' requirement is indicative. Providing the application was made before the deadline, the Court considers it admissible. 41

In the *Continental Shelf (Libya/Malta)* case, Italy's application was made only two days before the time limit for the filing of the counter-memorials, but the Court held that it was not out of time.¹¹⁴ In the *Pulau Ligitan* case, the Philippines submitted their application a few days after the closure of the written pleadings. The Court considered it inadmissible on substantive grounds, but it equally insisted that

[t]he time chosen for the filing of the Application ... can hardly be seen as meeting the requirement that it be filed "as soon as possible" as contemplated in Article 81, para. 1, of the Rules of Court. This requirement which, although when taken on its own might be regarded as not sufficiently specific, is nevertheless essential for an orderly and expeditious progress of the procedure before the Court. In view of the incidental character of intervention proceedings, it emphasizes the need to intervene before the principal proceedings have reached too advanced a stage. In one of the recent cases, dealing with another type of incidental proceedings the Court observed that: 'the sound administration of justice requires that a request for the indication of provisional measures ... be submitted in good time' The same applies to an application for permission to intervene, and indeed even more so, given that an express provision to that effect is included in Article 81, para. 1, of the Rules of Court.¹¹⁵

In the *Jurisdictional Immunities of the State* case, Greece filed its Application for permission to intervene one day before the date of the closure of the written pleadings,¹¹⁶ but the Court made no comment in its order admitting the application concerning the untimely filing.

This being said, it is not always easy to anticipate the date of the closure of the written pleadings, since it is not established from the outset of a case, and the number of written 42

¹¹³ *Pulau Ligitan*, Application by the Philippines for Permission to Intervene, ICJ Reports (2001), pp. 575, 585, para. 21.

¹¹⁴ *Continental Shelf (Libya/Malta)*, Application by Italy for Permission to Intervene, ICJ Reports (1984), pp. 3, 8, para. 10.

¹¹⁵ *Ibid.*

¹¹⁶ ICJ Press Release No. 2011/2 of 17 January 2011.

rounds is generally determined according to the parties' wishes.¹¹⁷ In the *Land, Island and Maritime Frontier Dispute* case, the special agreement between Honduras and El Salvador bestowing jurisdiction upon the Court allowed for a third round of pleadings, which meant that the date for the closure of written proceedings remained to be determined after the filing of the counter-memorial.¹¹⁸

- 43 Similarly, in the *Pulau Ligitan* case, the Special Agreement provided for the possibility of one or more round of written pleadings, 'if the Parties so agree or if the Court decides so'. The exchange of rejoinders was made on 2 March 2001, whereas the Philippines filed its application on 13 March 2001. However, it was not until 28 March that the parties notified the Court that they had agreed that no further rounds of pleadings were necessary. Thus, the Philippines' application was filed after the last round of pleadings had terminated, but on a date when neither the Court nor any third State could know whether the written proceedings had come to an end. The Court held that the application complied with the time limits of Article 81, para. 1 of the Rules.¹¹⁹

III. Substantive Conditions

- 44 The application to intervene must set out how it satisfies each of the substantive requirements of Article 81, para. 2 of the Rules, with separate paragraphs addressed to each. These requirements are:
- (a) the interest of a legal nature which the State applying to intervene considers may be affected by the decision in that case;
 - (b) the precise object of the intervention;
 - (c) any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case.

Only requirement (a) is specifically mentioned in Article 62 of the Statute. The Court clarified that requirement (c) is actually *not* a requirement for the admissibility of an application for permission to intervene, at least not if the third States wishes to intervene as a non-party, which is usually the case. Its maintenance in the Rules reflects the continuing dichotomy of status of the intervener, which the Court has not thus far resolved.

1. *Interest of a Legal Nature Which May be Affected by the Decision*

- 45 The first substantive requirement, the existence of an interest of a legal nature which may be affected by the decision, is also the most difficult to apprehend. The Court's case law reveals its marked reluctance to define the concept of 'interest a legal nature' and the threshold at which this interest appears at risk to be affected. It is equally difficult to assess whether these are two cumulative conditions or rather a single one. On the conceptual level, the first element is amenable to definition in general terms, according to objective parameters, while the second is purely circumstantial, a question of fact, depending on the particular circumstances of a case. The Court treats them, however, together, as if they were a single condition, combining arguments of fact and law in their analysis.

¹¹⁷ See Miron, 'Working Methods of the Court', *JIDS* 7 (2016), pp. 384-7.

¹¹⁸ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene. Judgment, ICJ Reports (1990), pp. 92, 98, para. 12.

¹¹⁹ *Pulau Ligitan*, Application by the Philippines for Permission to Intervene. ICJ Reports (2001), pp. 575, 586, paras. 24-6.

a) The Interest of a Legal Nature

Three characteristics of the interest-requirement emerge from the Court's case law: first, its legal nature; second, the difference with the legal right; third, its concrete and individualized character. 46

aa) The Legal Nature

It is for the Court to decide whether a State requesting intervention has demonstrated that it has a valid interest of a legal nature¹²⁰ and to determine the applicable standard of proof. Although the language of Article 62 is 'plainly liberal',¹²¹ the jurisprudence around these requirements shows the Court to have adopted a restrictive interpretation, at least in classic bilateral disputes such as those involving land or maritime boundaries.¹²² The adjective 'legal' suggests that this interest is protected under international law. The State seeking to intervene must thus define its interests by reference to rules of international law. But the Court only defined this aspect negatively: 47

Article 62 requires the interest relied upon by the State seeking to intervene to be of a legal nature, in the sense that this interest has to be the object of a real and concrete claim of that State, based on law, as opposed to a claim of a purely political, economic or strategic nature.¹²³

bb) The Distinction between the Legal Interest and the Legal Right

The second characteristics of the interest-requirement under Article 62 concerns its distinction from the close concepts of right and claim. During the drafting of the Statute by the Advisory Committee of Jurists in 1922, there was discussion as to whether the basis for requesting intervention should be an 'interest' or a 'right' that might be affected by the main dispute.¹²⁴ The adopted wording was a compromise between these two positions, which was soon denounced as a 'monster which defies expression'.¹²⁵ 48

After using the terms 'legal rights' and 'legal interests' interchangeably,¹²⁶ the Court stated the distinction between them in the intervention cases, at first without any further analysis:

¹²⁰ In *Judgement No. 273 (Review)*, Advisory Opinion, ICJ Reports (1982), pp. 325 *et seq.*, the ICJ considered that a State not a party to proceedings of the UNAT between the Organization and a staff member could nevertheless have a legal interest in the outcome. The example given was of an error of law as to the interpretation of a provision of the UN Charter to which the State is a party.

¹²¹ *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, Diss. Op. Al-Khasawneh, ICJ Reports (2011), pp. 374, 375, para. 5.

¹²² *Jurisdictional Immunities of the State*, Application by the Hellenic Republic for Permission to Intervene, Sep. Op. Cançado Trindade, ICJ Reports (2011), pp. 505, 530, para. 58.

¹²³ *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, ICJ Reports (2011), pp. 348, 358–9, para. 26; *ibid.*, Application by Honduras for Permission to Intervene, ICJ Reports (2011), pp. 420, 434, para. 37 (emphasis added).

¹²⁴ Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), pp. 593–4; see *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, Diss. Op. Al-Khasawneh, ICJ Reports (2011), pp. 374, 380, para. 21; *ibid.*, Diss. Op. Cançado Trindade and Yusuf, ICJ Reports (2011), pp. 402, 406, para. 10.

¹²⁵ Farag (1927), p. 59.

¹²⁶ Notably in *South West Africa* (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment, ICJ Reports (1966), pp. 6, 18–9, paras. 4–8, and 20–2, paras. 10–5.

In order to be permitted to intervene, a State does not have to show that it has rights which need to be protected, but merely an interest of a legal nature which may be affected by the decision in the case.¹²⁷

In its 2011 judgments in the *Territorial and Maritime Dispute* case, the Court draw a parallel between the legal interests for the purposes of Article 62 and the legal claims or entitlements of a State.¹²⁸ It stated that:

The State seeking to intervene as a non-party therefore does not have to establish that one of its rights may be affected; it is sufficient for that State to establish that its interest of a legal nature may be affected. Article 62 requires the *interest relied upon by the State seeking to intervene to be of a legal nature, in the sense that this interest has to be the object of a real and concrete claim of that State, based on law*...¹²⁹

- 49 The distinction between interests and rights is also discussed in individual opinions. Judge Abraham noted that an interest 'is always a notion that is both more flexible and broader [than that of a right]; ... one may have an interest to protect without its being linked, strictly speaking, to a corresponding right, or at least to an established right'.¹³⁰ Judge Keith asked in his Declaration '[i]f the claim is based on law and is real and concrete, is it not a claim of a right (or a liberty or a power) recognized by the law?'.¹³¹ Judge Keith analysed the earlier requests for intervention to demonstrate the close linkage between interests of a legal nature and entitlements under international law. The 2011 decisions establish clearly a parallel between the legal interest and the legal entitlement or the legal claim.¹³² The three notions do not necessarily coincide: the entitlement is founded on legal rules, but its precise scope remains to be determined. The legal claim is a subjective proposition of the State, made public. And the interest of a legal nature is possibly broader and certainly more flexible.¹³³

¹²⁷ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 129, para. 87. Previously, the ICJ had discussed the difference between interest and right in *Barcelona Traction*, Merits, ICJ Reports (1970), pp. 3, 36, para. 46.

¹²⁸ Charles de Visscher defined the legal interest as *entitlement*: 'Invoquer un intérêt juridique c'est se réclamer à des fins juridiques d'un titre susceptible d'atteindre de telles fins, sans que le bien-fondé en droit de ce titre s'en trouve pour autant préjugé.' (De Visscher, *Aspects récents du droit procédural de la Cour internationale de Justice* (1966), p. 63).

¹²⁹ *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, ICJ Reports (2011), pp. 348, 358–9, para. 26 (emphasis added). See also *ibid.*, Application by Costa Rica for Permission to Intervene, ICJ Reports (2011), pp. 420, 434, para. 37.

¹³⁰ *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, Diss. Op. Abraham, ICJ Reports (2011), pp. 384, 385, para. 6.

¹³¹ *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, Decl. Keith, ICJ Reports (2011), pp. 393 *et seq.*, para. 6.

¹³² Judge Donoghue did not entirely endorse this parallel: "The Court today appears to suggest that an "interest of a legal nature" must be framed as a "claim" of a legal right. The focus on claims may flow from a body of jurisprudence derived from maritime claims. Nonetheless, although a generalized interest in the content of international law has been found to be insufficient to comprise an "interest of a legal nature", I do not rule out the possibility of a third State demonstrating an "interest of a legal nature" without framing it as a "claim" of a legal right' (*ibid.*, Application by Honduras for Permission to Intervene, Diss. Op. Donoghue, ICJ Reports (2011), pp. 471, 476).

¹³³ The distinction may be important in cases where the third State attempts to intervene in a case and then seeks adjudication on the subject-matter of its application to intervention. This is precisely Costa Rica's position in the *Caribbean Sea Delimitation*. Costa Rica's claim in the merits of this case (an adjusted equidistance line: Memorial of Costa Rica, 3 February 2015, pp. 79–82) goes beyond the line which bordered its area of interest in its application to intervene (based on a simple equidistance line: *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, ICJ Reports (2011), pp. 348, 364, paras. 54–55). The Court's Judgment on the merits (*Caribbean Sea Delimitation*, 2 February 2018) does not even mention Costa

The difference between the legal interest, on the one hand, and the legal right, on the other, stands still as long as the parties or the Court do not seek to ascertain the validity or the soundness of the former.¹³⁴ This limitation is moreover consistent with the requirement that intervention must not seek to introduce a new dispute and that the Court must refrain from any pronouncement on the legal rights of third States.¹³⁵

Interestingly, Honduras' application illustrates the reverse situation when the Court had already determined the legal rights of the would-be intervener prior to its application for permission to intervene. The Court considered that Honduras could not bring the evidence of an interest of a legal nature, since the 2007 judgment setting out the boundary between Nicaragua and Honduras had already established the extent of their respective legal rights.¹³⁶ The judgment being dispositive of their legal rights, it was *a fortiori* dispositive of its legal interests in the same subject-matter.¹³⁷ In the absence of any right of Honduras in the area to be delimited, the would-be intervener could not attempt to bypass the 2007 *res judicata* by using Article 62 proceedings.¹³⁸

(c) A Concrete and Individualized Interest

If the *legal interest* is framed as a *claim*—a *concrete* proposition based on law—then the determination of *general* points of law is not enough for the purposes of Article 62. The interest under Article 62 cannot be a *general interest*.¹³⁹ In its order on intervention by Malta in *Continental Shelf (Libya/Malta)* excluded that the interest could rest on the argument that 'the resulting judgment might form an important precedent as a subsidiary means for the ascertainment of the law'.¹⁴⁰ And in the *Land, Island and Maritime Frontier Dispute* case, the Chamber also stated that it did not consider that 'an interest of a third State in the general rules and principles likely to be applied by the decision can justify an intervention'.¹⁴¹

This is a reasonable approach, for at least two reasons: (i) a contrary position would virtually open the gate of intervention to all States (since they all have an interest to the determination of the rule of law opposable to them); (ii) intervention under Article 63 of the Statute is the best vehicle for third states to develop points of law before the Court.

As Bonafé underlines, 'the protection of *general interests* of third states in the interpretation of multilateral treaties'¹⁴² is preserved by Article 63, whereas 'the protection afforded by Article 62 is limited to situations in which the *specific interests* of a third state may be affected'.¹⁴³ Considering however that Article 63 is restricted to the construction of

Rica's position during the intervention proceedings, which means that the area of interest and the claim do not necessarily correspond.

¹³⁴ In the same vein, Palchetti, *Max Planck UNYB* (2002), p. 144.

¹³⁵ Cf. *infra*, MN 77–83.

¹³⁶ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, Judgment, ICJ Reports (2007), pp. 659 *et seq.*

¹³⁷ *Territorial and Maritime Dispute*, Application by Honduras for Permission to Intervene, ICJ Reports (2011), pp. 420, 442, para. 64.

¹³⁸ *Ibid.*, p. 443, paras. 66–70.

¹³⁹ See also Queneudec (1995), pp. 419–20.

¹⁴⁰ *Continental Shelf (Tunisia/Libya)*, Application by Malta for Permission to Intervene, ICJ Reports (1981), pp. 3, 11, para. 16 and p. 17, para. 29.

¹⁴¹ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 124, para. 76.

¹⁴² Bonafé, 'Discretionary Intervention (Article 62, Statute of the Court)', in *Latin America and the International Court of Justice: Contributions to International Law* (Almeida/Sorel, eds., 2017), pp. 98–108, 99.

¹⁴³ *Ibid.*

multilateral conventions—a vestige of an epoch where international law was considered to be the exclusive product of the will of the States—it cannot be invoked in respect to the determination of rules of customary law. This limitation in Article 63 of the Statute makes necessary for States to mould their application to fit the requirements of Article 62. As Judge *ad hoc* Gaja noted:

[T]he only opportunity provided by the Statute and Rules for a State which is not a party to the proceedings to express its views on an issue of general international law is to intervene under Article 62 of the Statute and address the issue if it is relevant to the intervention.¹⁴⁴

54 This appeared to be Greece's dilemma in the *Jurisdictional Immunities of the State* case. Even if in its application Greece stated that it wished to inform the Court of its approach and practice in relation to the customary rules of immunities only as a matter of background information,¹⁴⁵ in reality most of Greece's written observations related to ascertaining the existence of some rules of customary law.¹⁴⁶ Greece changed tack during the oral hearings, in order to concentrate on how the application of the general rules might affect its legal obligations.

55 Moreover, the interest should be individualized: the would-be intervener must seek to protect its own interest, and not that of one of the parties. In the order on intervention by Malta in *Continental Shelf (Tunisia/Libya)*, the Court held that:

The interest of a legal nature invoked by Malta does not relate to any legal interest of its own directly in issue as between Tunisia and Libya in the present proceedings or as between itself and either one of those countries.¹⁴⁷

56 The requirement may be differently appreciated in case of *erga omnes* obligations. The concept of a 'public interest' intervention had been indirectly suggested in the *Landwarów-Kaisiadorys* case, where the PCIJ affirmed third State interests in freedom of transit and communications, noting that 'nevertheless no third State has considered it necessary or expedient to intervene'.¹⁴⁸ The possibility of intervention in order to protect a third State interest shared with other members of the international community has not been directly addressed by the ICJ itself. In the *Nicaragua* case, Judge Schwebel suggested that it might be a proper purpose of intervention to raise fundamental questions of international law on behalf of the international community; that is to assert that all States would benefit from the Court's pronouncement on such norms.¹⁴⁹

57 In its application to intervene in the *Nuclear Tests (Request for Examination)* case, the would-be interveners pointed out, in similar terms, that most requests for intervention are in the context of boundary disputes 'where the third party interest is to a greater or

¹⁴⁴ *Jurisdictional Immunities of the State*, Application by the Hellenic Republic for Permission to Intervene, Decl. Judge *ad hoc* Gaja, ICJ Reports (2011), pp. 531 *et seq.*, para. 1.

¹⁴⁵ *Ibid.*, Application by the Hellenic Republic for Permission to Intervene, ICJ Reports (2011), pp. 494, 499, para. 18. In the same vein, Kolb, *ICJ*, p. 228.

¹⁴⁶ Greece's pleadings dealt at length with the existence of a private right to compensation for human rights violations and the exception to State immunity in case of violations of norms of *jus cogens* (*ibid.*, Written Statement of the Hellenic Republic, 3 August 2011, *passim*).

¹⁴⁷ *Continental Shelf (Tunisia/Libya)*, Application by Malta for Permission to Intervene, ICJ Reports (1981), pp. 3, 12, para. 19 (emphasis added).

¹⁴⁸ *Landwarów-Kaisiadorys*, Advisory Opinion, PCIJ, Series A/B, No. 42, pp. 108, 118.

¹⁴⁹ *Nicaragua*, Provisional Measures, Diss. Op. Schwebel, ICJ Reports (1984), pp. 190 *et seq.*; *ibid.*, Declaration of Intervention of the Republic of El Salvador, Diss. Op. Schwebel, ICJ Reports (1984), pp. 215, 223.

lesser extent opposed to those of the parties to the proceedings'.¹⁵⁰ In contrast, there is a community of interest in disputes about obligations owed *erga omnes*, thereby implying that there should be a greater willingness on the part of the Court to recognize the appropriateness of the request. The requests to intervene were dismissed along with New Zealand's claim in the 1995 *Nuclear Tests (Request for Examination)* case and the purported purpose of intervention, *i.e.*, to uphold obligations owed *erga omnes*, was not considered by the Court. Judge Cançado Trindade also developed on the notion of collective interest and on intervention as a collective guarantee in his opinion on *Whaling in the Antarctic* case.¹⁵¹

b) The Risk for the Interest to be Affected

aa) Interpretation of the Term 'decision'

The Court has generally refrained from establishing general guidelines on how the interest of a legal nature may be affected, but its case law contains some indicia nonetheless. In *Pulau Ligitan*, the Court commented on the meaning of 'decision' in Article 62: 58

The word 'decision' in the English version of this provision could be read in a narrower or a broader sense. However, the French version [*est pour lui en cause*] clearly has a broader meaning. Given that a broader reading is the one which would be consistent with both language versions and bearing in mind that this Article of the Statute of the Court was originally drafted in French, the Court concludes that this is the interpretation to be given to this provision.¹⁵²

In accordance with the broader meaning that is compatible with both authentic texts, it determined that the interest of a legal nature could relate not only to the *dispositif* of a judgment but may extend to the 'reasons which constitute the necessary steps to the *dispositif*'.¹⁵³

On the other hand, in *Territorial and Maritime Dispute*, the Court commented that the English text is more explicit than the French: 59

The Court observes that, as provided for in the Statute and the Rules of Court, the State seeking to intervene shall set out its own interest of a legal nature in the main proceedings, and a link between that interest and the decision that might be taken by the Court at the end of those proceedings. In the words of the Statute, this is 'an interest of a legal nature which may be affected by the decision in the case' (expressed more explicitly in the English text than in the French 'un intérêt d'ordre juridique ... pour lui en cause'; see Article 62 of the Statute).¹⁵⁴

The Court also identified the decision as being the judgment on the merits, which would tend to suggest that intervention under Article 62 would only be possible in relation to the merits stage.¹⁵⁵

¹⁵⁰ *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, 294, para. 19.

¹⁵¹ *Whaling in the Antarctic*, Declaration of Intervention by New Zealand, Sep. Op. Cançado Trindade, ICJ Reports (2013), pp. 14, 33–5, paras. 53–60.

¹⁵² *Pulau Ligitan*, Application by the Philippines for Permission to Intervene, ICJ Reports (2001), pp. 575, 596, 597–8, paras. 47, 55.

¹⁵³ *Ibid.*, p. 596, para. 47; *Territorial and Maritime Dispute*, Application by Honduras for Permission to Intervene, ICJ Reports (2011), pp. 420, 434, para. 38. Cf. also Brown on Art. 59 MN 41 *et seq.* as well as Zimmermann/Thienel on Art. 60 MN 72 and also Damrosch on Art. 56 MN 12–14, 21.

¹⁵⁴ *Territorial and Maritime Dispute*, Application by Honduras for Permission to Intervene, ICJ Reports (2011), pp. 420, 433, para. 33 and *ibid.*, Application by Costa Rica for Permission to Intervene, ICJ Reports (2011), pp. 348, 358, para. 23.

¹⁵⁵ See the discussion *supra*, MN 21–25.

It is up to the State concerned to apply to intervene, even though the Court may, in the course of a particular case, draw the attention of third States to the possible impact that its future judgment on the merits may have on their interests.¹⁵⁶

The Court established that the would-be intervener must bring evidence of how the judgment on the merits may affect its legal interests, either in its dispositive part or in its reasoning. As a consequence, the interest of a legal nature must be linked to the subject-matter of the dispute between the parties or, at least, to the legal grounds on which their claims are based.¹⁵⁷ Beyond these minimal indicia, the Court has not interpreted the word 'affected' and the risk for the interest of a legal nature to be affected can thus only be appreciated on a case-by-case basis. A panorama of the relevant cases shows that any attempt to draw general guidelines is futile.

bb) A Circumstantial Assessment

60 In the *Continental Shelf* (Tunisia/Libya) case, Malta had to word its application in light of the parties' *compromis*, which limited the jurisdiction to indicating 'principles and rules of international law which may be applied'. The parties also asked the Court to 'clarify the practical method for the application of these principles and rules in this specific situation, so as to enable the experts of the two countries to delimit those areas without any difficulties'.¹⁵⁸ In common with claims in other maritime boundary disputes, Malta's claimed legal interest rested upon its location vis-à-vis the parties, in that at some point the boundaries of those States' continental shelves would come up against its own—the issue of 'overlapping third-State claims'.¹⁵⁹ Since the interest put forward must be concrete, the Court held that mere preoccupation with the relevant principles of international law that might be stated in the Court's judgment is insufficient to support a claim for intervention, for this is a shared interest with other States.¹⁶⁰ Further, since Malta had expressly stated that the purpose of its intervention was not to put its own claims with respect to Tunisia and Libya, it had in effect denied that it had a legal interest that could be affected by the decision in the case. This holding concerned a number of judges.¹⁶¹

61 In the follow-up *Continental Shelf* (Libya/Malta) case, Italy expressed its interest in the litigation between Libya and Malta as a desire to protect its own 'sovereign rights' over its continental shelf. The Court dismissed Italy's claim, because it considered that to have granted it would have involved the Court in pronouncing upon Italy's rights.¹⁶² This rejection presented third States with an apparently insoluble dilemma. If a third State thinks its sovereign rights may be affected by a decision in pending proceedings, it should request to intervene. However, if the request involves claiming those sovereign rights, it

¹⁵⁶ *Territorial and Maritime Dispute*, Application by Honduras for Permission to Intervene, ICJ Reports (2011), pp. 420, 433, para. 33 and *ibid.*, Application by Costa Rica for Permission to Intervene, ICJ Reports (2011), pp. 348, 358, para. 23.

¹⁵⁷ See also *Continental Shelf* (Tunisia/Libya), Application by Malta for Permission to Intervene, ICJ Reports (1981), pp. 3, 14, para. 23.

¹⁵⁸ Art. 1 of the agreement, cited in *Continental Shelf* (Tunisia/Libya), Application by Malta for Permission to Intervene, ICJ Reports (1981), pp. 3, 23, para. 4.

¹⁵⁹ *Territorial and Maritime Dispute*, Application by Honduras for Permission to Intervene, Judgment, Diss. Op. Donoghue, ICJ Reports (2011), pp. 471, 477, para. 19.

¹⁶⁰ *Continental Shelf* (Tunisia/Libya), Application by Malta to Intervene, ICJ Reports (1981), pp. 3, 8-9, para. 13.

¹⁶¹ *Continental Shelf* (Tunisia/Libya), Application by Malta for Permission to Intervene, Sep. Op. Oda, ICJ Reports (1981), pp. 23, 31, para. 19; *ibid.*, Sep. Op. Schwebel, ICJ Reports (1981), pp. 35 *et seq.*

¹⁶² *Cf. infra*, MN 77-83.

may be rejected as going beyond mere intervention and raising a new dispute, different from the one submitted to the Court by the special agreement. At the same time, if the third State presents its interests in general terms, its request may be refused as was the case with Malta. This position appeared insupportable and indeed Judge Ago considered that the rejection of Italy's request to intervene sounded the 'death knell' for Article 62.¹⁶³

The *Land, Island and Maritime Frontier Dispute* case, the first successful request to intervene under Article 62, suggested this gloomy prognosis to have been premature. Nicaragua accepted that it had no legal interest in the decision of the Court with respect to the land frontier between El Salvador and Honduras. It therefore limited its application to intervene to the 'legal situation of the islands and maritime spaces'.¹⁶⁴ Nicaragua stated its legal interest in those areas in general terms. However, in respect of the Gulf, it asserted:

that both parties, among other questions that affect our interests, are asking the Chamber to define or clarify the general or overall status of the whole Gulf of Fonseca in which Nicaragua plainly has rights.¹⁶⁵

Since the Central American Court of Justice had in 1917 recognized El Salvador, Honduras, and Nicaragua as 'co-owners' of the Gulf of Fonseca, Nicaragua's interest was evident.¹⁶⁶ El Salvador and Honduras had different claims with respect to the status of the waters in the Gulf of Fonseca. El Salvador claimed the waters to be subject to a condominium of the coastal States, while Honduras claimed a 'community of interest' between the riparian States. The Chamber held that it could not prejudge the issue on the merits, in considering a request to intervene.¹⁶⁷ The Chamber held that the claims of both El Salvador and Honduras affected the legal interests of Nicaragua. El Salvador's claim of a condominium was for an objective legal regime of the coastal States which might 'in any case ... be applicable to the Gulf as customary international law', while the 'community of interests' claimed by Honduras 'embraces Nicaragua as one of the three riparian States'.¹⁶⁸ Since the claims of both parties clearly involved Nicaragua, the Chamber upheld Nicaragua's request to intervene with respect to the status of the Gulf.

On the other hand, the Chamber found Nicaragua had no legal interest with respect to sovereignty over certain islands. As far as the maritime delimitation between El Salvador and Honduras was concerned, the Chamber considered that the legal interest of Nicaragua would not be 'affected' by such maritime delimitation. It observed that frequently in practice a delimitation between two States involves taking account of the coast of a third State; but the taking into account of all the coasts and coastal relationships within the Gulf as a geographical fact for the purpose of effecting an eventual delimitation as between two riparian States in no way signifies that by such an operation itself

¹⁶³ *Continental Shelf (Libya/Malta)*, Application by Italy for Permission to Intervene, Diss. Op. Ago, ICJ Reports (1984), pp. 115, 129, para. 22.

¹⁶⁴ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 116, para. 58.

¹⁶⁵ *Ibid.*, p. 117, para. 60. The specific aspects of Nicaragua's legal interest are set out *ibid.*, p. 108, para. 37.

¹⁶⁶ *El Salvador v. Nicaragua*, Central American Court of Justice, reprinted in *AJIL* 11 (1917), pp. 674-96.

¹⁶⁷ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 118, para. 62; repeated in *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, Judgment, ICJ Reports (2011), pp. 348, 371, para. 85.

¹⁶⁸ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 121, para. 72.

the legal interest of a third riparian State of the Gulf, Nicaragua, may be affected.¹⁶⁹ In its rejection of Nicaragua's request to intervene with respect to the islands and maritime delimitation the Chamber took the restrictive approach of the *Continental Shelf* cases between Tunisia and Libya, as well as Libya and Malta.

- 65 In the *Land and Maritime Boundary* case, Nigeria had argued in its preliminary objections, for the inadmissibility of the case on the basis of the indispensable third party principle. It considered that 'the question of maritime delimitation necessarily involves the rights and interests of third States',¹⁷⁰ in particular São Tomé and Príncipe and Equatorial Guinea. In response, the Court accepted that the geographical configuration of the Gulf of Guinea meant that:

it is evident that the prolongation of the maritime boundary between the Parties ... will eventually run into maritime zones where the rights and interests of Cameroon and Nigeria will overlap those of third States.

- 66 In its application for permission to intervene, Equatorial Guinea claimed that its legal interests which may be affected were its sovereign rights and jurisdiction 'up to the median line between Equatorial Guinea and Nigeria on the one hand, and between Equatorial Guinea and Cameroon on the other hand'.¹⁷¹ Without developing its reasoning, the Court accepted that this established that Equatorial Guinea had an interest of a legal nature that might be affected by the decision in the case between Cameroon and Nigeria.¹⁷²

- 67 In the *Pulau Ligitan* case, the Philippines claimed an interest of a legal nature in the Court's reasoning in the case before it, which could affect the outcome of the Philippines' claims with respect to North Borneo. The Philippines' interest was in the Court's findings and reasoning with respect to various specific treaties that it might rely on in another dispute between itself and one of the two parties before the Court. The case raised the interesting question as to whether an interest may be affected, even though it does not correspond to the subject-matter of the dispute submitted by the Parties.¹⁷³ Since the Court had held that an interest may be affected by the *dispositif*, as well as by the motives, it sought to determine whether the basis of title put forward by the Philippines would be essential to its reasoning. The Philippines was unable to show the Court how the reasoning or the interpretation of specific treaties in the case before it might affect a legal interest of the Philippines.¹⁷⁴

- 68 The case shows that, while not impossible as a matter of principle, it is in practice more difficult for the would-be intervener to prove that its interest may be affected by a case, when they are not related to the subject-matter submitted to the Court. More generally, the Court held that:

¹⁶⁹ *Ibid.*, p. 124, para. 77.

¹⁷⁰ *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 322, para. 112.

¹⁷¹ *Ibid.*, Order of 21 October 1999, ICJ Reports (1999), pp. 1029, 1031, para. 3.

¹⁷² *Ibid.*, p. 1034, para. 13.

¹⁷³ '[T]he Court will at the outset consider whether a third State may intervene under Article 62 of the Statute ... when the State seeking to intervene has no interest in the subject-matter of that dispute as such, but rather asserts an interest of a legal nature in such findings and reasonings that the Court might make on certain specific treaties that the State seeking to intervene claims to be in issue in a different dispute between itself and one of the two Parties to the pending case before the Court.' (*Pulau Ligitan*, Application by the Philippines for Permission to Intervene, ICJ Reports (2001), pp. 575, 595-6, para. 46).

¹⁷⁴ *Cf. supra*, MN 58-59.

The wish of a State to forestall interpretations by the Court that might be inconsistent with responses it might wish to make, in another claim, to instruments that are not themselves sources of the title it claims, is simply too remote for purposes of Article 62.¹⁷⁵

One may wonder if *a contrario* the legal right of a third State may be affected in case the Court is called to interpret and apply a legal instrument which is also the source of a title for a third State (with the exception of multilateral, general conventions, like UNCLOS).

In the *Territorial and Maritime Dispute* case, the Court reverted to its restrictive approach to intervention that had apparently been softened in the cases of Nicaragua and Equatorial Guinea. In language drawing upon that used in earlier requests for intervention Costa Rica stated its interest of a legal nature to be its 'interest in the exercise of its sovereign rights and jurisdiction in the maritime area in the Caribbean Sea to which it is entitled under international law by virtue of its coast facing on that sea'.¹⁷⁶ The Court accepted that Costa Rica had demonstrated an interest of a legal nature in specified maritime areas.¹⁷⁷ However, in order to comply with Article 62, the interest of a legal nature 'is not just any kind' but must be one that may be affected 'in its content and scope, by the Court's future decision in the main proceedings'.¹⁷⁸ It considered that in those proceedings it could protect third State interests by ending any delimitation line 'before it reaches an area in which the interests of a legal nature of third States may be involved'.¹⁷⁹ Accordingly Costa Rica had not satisfactorily demonstrated that its (recognized) legal interest would be affected by the Court's decision in the main case. As in the case of Equatorial Guinea, this protective stance by the Court would apply to any third State, whether seeking to intervene or not, thereby undermining the reason for seeking intervention in boundary cases.¹⁸⁰ The treatment by the Court of Costa Rica's request shows that the existence of an interest of a legal nature (acknowledged) does not necessarily mean it will also be affected (the application was rejected on this ground). Thus, para. 2 (a) of Article 81 of the Rules appears to refer to two distinct requirements, even though the Court has not always treated them as such.¹⁸¹

In the same case, Honduras, on the other hand, primarily requested intervention as a party and, in the alternative, as a non-party. It framed its object of intervention differently in each case. As a State requesting intervention as a party, Honduras sought determination of the maritime boundary between itself and Nicaragua and Colombia. If permission to intervene as a party was refused but permission to intervene as a non-party granted, Honduras wanted 'to protect its rights and legal interests and to inform the Court of the nature of these, so that they are not affected by the future maritime delimitation between Nicaragua and Colombia'.¹⁸² In its judgment, the Court rejected

¹⁷⁵ *Pulaw Ligitan*, Application by the Philippines for Permission to Intervene, ICJ Reports (2001), pp. 575, 603, para. 83.

¹⁷⁶ *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, ICJ Reports (2011), pp. 348, 364, para. 54.

¹⁷⁷ Nicaragua disputed the areas but the Court determined that it did not have to examine the geographical parameters of the areas in question; *ibid.*, p. 367, para. 65.

¹⁷⁸ *Ibid.*, p. 358, para. 26.

¹⁷⁹ *Ibid.*, p. 372, para. 89. The Court drew upon its earlier jurisprudence, notably *Maritime Delimitation in the Black Sea*, Judgment, ICJ Reports (2009), pp. 61, 100, para. 112.

¹⁸⁰ *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, ICJ Reports (2011), pp. 348, 372, para. 86.

¹⁸¹ Cf. *supra*, MN 45.

¹⁸² *Territorial and Maritime Dispute*, Application by Honduras for Permission to Intervene, ICJ Reports (2011), pp. 420, 429, para. 18.

both of Honduras' submissions. It emphasized that the elements stipulated by Article 62 and Rule 81 must be satisfied regardless of the requested capacity for intervention.¹⁸³ It considered that Honduras' request related to two issues: whether the Court's judgment in 2007 had settled the entire maritime boundary between Honduras (a party to the earlier case) and Nicaragua¹⁸⁴ and the effect the Court's decision in the current case might have on Honduras' rights under the 1986 Maritime Delimitation Treaty between Honduras and Colombia.¹⁸⁵ The Court found that Honduras could not have an interest of a legal nature in the area to be delimited, at least not vis-à-vis Nicaragua,¹⁸⁶ and its legal claims vis-à-vis Colombia, based on the 1986 Treaty, could not in any case be affected, since the Court 'would not place any reliance'¹⁸⁷ on that instrument in the main proceedings.

- 71 In the *Jurisdictional Immunities of the State* case, Greece initially referred to an interest of a general nature regarding State immunities in case of violations of *jus cogens*,¹⁸⁸ then narrowed its submission to the enforcement of judgments given by Greek courts in Italy,¹⁸⁹ which Germany claimed to be a breach of its jurisdictional immunities by the Respondent. Without much explanation, the Court determined that it was sufficient to establish that Greece had an interest of a legal nature in the main proceedings that it might have to consider the decisions of the Greek courts in making findings in those proceedings.¹⁹⁰

c) Relationship between Articles 62 and 59 of the Statute

- 72 Besides the absence of definition of the term 'affected', the most problematic aspects stem from the Court's changing position on the relationship between Articles 62 and 59 of the Statute. It results from a majority of the Court's relevant decisions that the interest of a legal nature of a third State cannot be affected as long as it is protected by the relative effect of the *res judicata*, a principle enshrined in Article 59 of the Statute. In its earlier decisions, the Court considered that the existence of overlapping claims in the area to be delimited was not enough to establish that the interest of a third State might be affected.¹⁹¹ But in the *Land and Maritime Boundary* case, the Court reversed this position, asserting that 'in the case of maritime delimitations where the maritime areas of several States are involved, the protection afforded by Article 59 of the Statute may not always be sufficient'.¹⁹² It then admitted Equatorial Guinea's intervention, even though, in its judgment on the merits, it nonetheless protected the interests of all third States

¹⁸³ *Ibid.*, p. 432, para. 30.

¹⁸⁴ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, Judgment, ICJ Reports (2007), pp. 659 *et seq.*

¹⁸⁵ *Territorial and Maritime Dispute*, Application by Honduras for Permission to Intervene, ICJ Reports (2011), pp. 420, 439, para. 59.

¹⁸⁶ *Cf. supra*, MN 51.

¹⁸⁷ *Territorial and Maritime Dispute*, Application by Honduras for Permission to Intervene, ICJ Reports (2011), pp. 420, 444, para. 73.

¹⁸⁸ *Cf. supra*, MN 54.

¹⁸⁹ *Jurisdictional Immunities of the State*, Application by the Hellenic Republic for Permission to Intervene, ICJ Reports (2011), pp. 494, 499, paras. 16–8.

¹⁹⁰ *Ibid.*, pp. 501–2, para. 25. For a different assessment, *ibid.*, Decl. Judge *ad hoc* Gaja, p. 531, para. 2.

¹⁹¹ *E.g.*, *Continental Shelf (Libya/Malta)*, Application by Italy for Permission to Intervene, ICJ Reports (1984), pp. 3, 26, para. 42 ('the rights claimed by Italy would be safeguarded by Art. 59 of the Statute'). *Land and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 124, para. 77 quoted in *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, ICJ Reports (2011), pp. 348, 371, para. 85. *Cf. supra*, MN 60–71.

¹⁹² *Land and Maritime Boundary*, Judgment, ICJ Reports (2002), pp. 303, 421, para. 238.

potentially affected by determining that 'the boundary line continues until the point at which it reaches the area in which the rights of a third State may be affected'.¹⁹³ A State that has unsuccessfully sought intervention may be in a better situation in that it has directly alerted the Court to its interests, but the Court's assertion in the *Land and Maritime Boundary* case that it could not rule on Cameroon's claims in a way that might affect Equatorial Guinea and São Tomé and Príncipe's rights¹⁹⁴ entailed the intervening State, Equatorial Guinea and the non-intervening State, São Tomé and Príncipe being accorded the same consideration.¹⁹⁵

By contrast, the 2011 judgments in *Territorial and Maritime Dispute* mark a return to the excessively formalistic approach according to which Article 59 provides sufficient protection of the interests of third States:

[T]o succeed with its request, Costa Rica must show that *its interest* of a legal nature in the maritime area bordering the area in dispute between Nicaragua and Colombia *needs a protection that is not provided by the relative effect of decisions of the Court under Article 59 of the Statute*.¹⁹⁶

A number of judges have expressed scepticism about the effectiveness of Article 59 to protect third States. They stressed the fact that, if Article 59 is seen as providing adequate protection for third States, Article 62 would be redundant. Judge Jennings, *e.g.*, described the purpose of Article 59 to be 'to prevent legal principles accepted by the Court in a particular case from being binding also upon other States or in other disputes'.¹⁹⁷ In a judgment allocating rights and duties, Article 59 provides a purely technical protection which is unlikely to be determinative.¹⁹⁸ Judge Jennings rejected what he considered to be 'enervating bilateralism' and did not accept that Article 59 could displace Article 62.¹⁹⁹ Judge Oda has emphasized that Article 59 may not be accepted as guaranteeing that a decision of the Court in a case regarding title would not affect a claim by a third State to the same title.²⁰⁰ Judge Sette-Camara suggested that Article 59 goes to the doctrine of *res judicata* and not that of precedent²⁰¹ in that it determines the rights and obligations of the parties *inter se* and is silent on the subsequent impact of the decision on third States. Judge Al-Khasawneh considered Article 59 and Article 62 to be entirely different in their scope. The former protects a non-intervening third State from the effects of *res judicata*,

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¹⁹³ *Ibid.*

¹⁹⁴ *Land and Maritime Boundary*, Judgment, ICJ Reports (2002), pp. 303, 421, para. 238.

¹⁹⁵ Cf. also *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, ICJ Reports (2011), pp. 348, 372, para. 86.

¹⁹⁶ *Ibid.*, p. 372, para. 87 (emphasis added).

¹⁹⁷ *Continental Shelf (Libya/Malta)*, Application by Italy for Permission to Intervene, Diss. Op. Jennings, ICJ Reports (1984), pp. 148, 157, para. 27. Judge Jennings was referring to the objective of Art. 59 as defined by the PCIJ in *Certain German Interests*, Merits, PCIJ, Series A, No. 7, pp. 3, 19.

¹⁹⁸ '[T]he slightest acquaintance with the jurisprudence of this Court shows that Article 59 does by no manner of means exclude the force of persuasive precedent. So, the idea that Article 59 is protective of third States' interests in this sense, at least is illusory'. (*Continental Shelf (Libya/Malta)*, Application by Italy for Permission to Intervene, Diss. Op. Jennings, ICJ Reports (1984), pp. 148, 157, para. 27). Cf. also Brown on Art. 59 MN 50 *et seq.*

¹⁹⁹ 'Quite apart from the dangers, inadequacies and infelicities which would result from using Art. 59 as a vehicle for importing an inappropriate bilateralism or relativism into the judgments of the Court concerning "sovereign rights", the complete answer to the argument that Italy is sufficiently protected by Art. 59 is simply that Art. 62 is just as much part of the Court's Statute as is Art. 59.' (*Continental Shelf (Libya/Malta)*, Application by Italy for Permission to Intervene, Diss. Op. Jennings, ICJ Reports (1984), pp. 148, 159, para. 34).

²⁰⁰ *Ibid.*, Diss. Op. Oda, ICJ Reports (1984), pp. 90, 102, para. 27.

²⁰¹ *Ibid.*, Diss. Op. Sette-Camara, ICJ Reports (1984), pp. 71 *et seq.*

while Article 62 gives 'a would-be intervener a chance to be heard in order to protect an interest before the merits'.²⁰² Similarly, Judges Cançado Trindade and Yusuf stated that reliance on Article 59 deprives States from informing the Court of its interests before the main decision, stressing that Article 62 explicitly involves third States in legal proceedings, a matter of increased importance in light of the 'ever-increasing complexity and multilateralization of international relations'.²⁰³

- 74 It remains to be seen whether this restrictive approach of the Court is adopted only for maritime delimitation cases. In the *Jurisdictional Immunities of the State* case, the Court did not even mention Article 59. Besides, one can imagine that Article 59 does not ensure sufficient protection in other law of the sea cases. This may, for instance, be the case with the application of Article 121 UNCLOS and the determination of the status of some maritime features, claimed by the Parties, but also by third States.²⁰⁴

IV. The Object of Intervention

- 75 Article 81, para. 2 (b) of the Rules of Court introduced another substantive requirement that a State must specify the precise object of its request to intervene. The Court must consider 'the object of the Application and the way in which that object corresponds to what is contemplated by the Statute'.²⁰⁵ Yet, Article 62 makes no reference to the proper object of intervention and nor did any of the earlier Rules of Court. This requirement is all the more difficult to apprehend that, in English, the term 'object' has a double meaning, either material, 'a thing that is not living',²⁰⁶ or subjective, 'a reason for doing something, or the result you wish to achieve by doing it'.²⁰⁷ In the context of intervention, these two understandings are used alternatively,²⁰⁸ even if the purpose-oriented meaning appears predominant.
- 76 The identification of a proper object for intervention has long been considered through the prism of the relationship between the intervening State and the parties. Consequently, the object of intervention has been mainly analysed through the lens of dispute-settlement, and became thus intrinsically conditioned by considerations of

²⁰² *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, Diss. Op. Al-Khasawneh, ICJ Reports (2011), pp. 374, 378, para. 14.

²⁰³ *Ibid.*, Diss. Op. Cançado Trindade and Yusuf, ICJ Reports (2011), pp. 402, 413, paras. 26-7.

²⁰⁴ The arbitral tribunal encountered this kind of difficulty in the *South China Sea Arbitration*, in relation to a number of features claimed not only by the Parties, but also by Vietnam or Taiwan (*South China Sea Arbitration* (Philippines v. China), PCA Case No. 2013-19, Award of 12 July 2016, paras. 43, 157, 89, 92, 401). See also Wolfrum, *supra*, fn. 2, p. 220.

²⁰⁵ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 128, para. 85.

²⁰⁶ Cambridge Dictionary Online, <<http://dictionary.cambridge.org>>.

²⁰⁷ *Ibid.*

²⁰⁸ Compare for instance the different formulations retained by the Court in the *Territorial and Maritime Dispute* judgments under the heading 'The Precise Object of the Intervention'. In relation to Costa Rica's application, the Court used the purpose-oriented understanding:

In the opinion of the Court, the precise object of the request to intervene certainly consists in informing the Court of the interest of a legal nature which may be affected by its decision in the dispute between Nicaragua and Colombia, but the request is also aimed at protecting that interest. (*Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, ICJ Reports (2011), pp. 348, 360, para. 33).

By contrast, the Court adopted the material approach in relation to Honduras' application, the object of the intervention becoming similar, if not identical, with the interest requirement: 'the State seeking to intervene is required by the Statute to demonstrate the existence of a legal interest which may be affected by the decision of the Court in the main proceedings.' (*Ibid.*, Application by Honduras for Permission to Intervene, ICJ Reports (2011), pp. 420, 435, para. 44).

consent, jurisdictional link and effect of the judgment on the intervener.²⁰⁹ However, intervention 'cannot have been intended to be employed as a substitute for contentious proceedings'.²¹⁰ Logically, the Court considers that requests from a third State to adjudge its own claims or the introduction of a new dispute are objects incompatible with the functions of intervention. This reflects the incidental nature of intervention, which must remain within the bounds of the dispute submitted by the Parties. On the other hand, even if Article 62 identifies its purpose as the protection of third States' legal interests, the information of the Court on relevant factual and legal aspects, as well as the protection of collective interests are also proper objects.

1. *The Improper Object: Intervention Must Not Introduce a New Dispute*

Intervention must not introduce a new dispute, for this would be at odds both with its incidental nature,²¹¹ with the functions of intervention and possibly with the principle of consent to jurisdiction. Since intervention must not introduce a new dispute, its 'precise object ... must be connected with the subject of the main dispute' between the parties to the main proceedings.²¹² 77

In the *Continental Shelf (Tunisia/Libya)* case, Malta's expressed purpose of intervention was to submit its views on 'particular geographical and geomorphological factors, special circumstances or the application of equitable principles'.²¹³ Malta stressed that its purpose was not to seek any ruling on matters concerning its own continental shelf, but that it was anxious lest the Court's decision affect its interests. The Court rejected the application nonetheless, on grounds that 'Malta ... assumes existing rights ... to areas of continental shelf opposable to the claims of the two States Parties to the dispute before the Court',²¹⁴ simply because its pleadings related to the area in dispute between Tunisia and Libya. By the same token, the Court risked prejudging the merits of Malta's disputes with the two parties.²¹⁵ 78

In the *Continental Shelf (Libya/Malta)* case, Italy insisted that there was no dispute between itself and the parties. It argued nonetheless that it sought 'to participate in the proceedings to the full extent necessary to enable it to defend the rights which it claims over some of the areas claimed by the Parties'.²¹⁶ Italy formulated the object of its application 79

²⁰⁹ Cf. notably *Continental Shelf (Tunisia/Libya)*, Application by Malta for Permission to Intervene, Sep. Op. Oda, ICJ Reports (1981), pp. 23 *et seq.*; *ibid.*, Sep. Op. Schwebel, ICJ Reports (1981), pp. 35 *et seq.*; *Continental Shelf (Libya/Malta)*, Application by Italy for Permission to Intervene, Sep. Op. Mbaye, ICJ Reports (1984), pp. 35 *et seq.*; *ibid.*, Diss. Op. Oda, ICJ Reports (1984), pp. 90 *et seq.*

²¹⁰ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 134, para. 99.

²¹¹ 'An incidental proceeding cannot be one which transforms that case into a different case with different parties.' (*Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 134, para. 98; *Territorial and Maritime Dispute*, Application by Honduras for Permission to Intervene, ICJ Reports (2011), pp. 420, 435, para. 44).

²¹² *Territorial and Maritime Dispute*, Application by Honduras for Permission to Intervene, ICJ Reports (2011), pp. 420, 435, para. 44.

²¹³ *Continental Shelf (Tunisia/Libya)*, Application by Malta for Permission to Intervene, ICJ Reports (1981), pp. 3, 17, para. 29. For a discussion on the purpose of Malta's request cf. Jessup, 'Intervention in the International Court', *AJIL* 75 (1981), pp. 903-9.

²¹⁴ *Continental Shelf (Tunisia/Libya)*, Application by Malta for Permission to Intervene, ICJ Reports (1981), pp. 3, 18, para. 31.

²¹⁵ *Ibid.*

²¹⁶ *Continental Shelf (Libya/Malta)*, Application by Italy for Permission to Intervene, ICJ Reports (1984), pp. 3, 21, para. 33 (emphasis put by the Court, when quoting Italy's Application).

by reference to its legal rights, not interests as required by Article 62.²¹⁷ Even if the Court insisted that it was for itself to determine whether the request raised a new dispute and to isolate the true object of the application,²¹⁸ this reference to 'legal rights' in the Application and throughout proceedings led it to consider that it would necessarily have 'to make a finding as to Italy's rights (to the extent they are opposed to Malta's and Libya's claims)'.²¹⁹ The Court concluded that it is not a valid purpose of intervention to allow a third State to introduce an extraneous dispute, since this would run contrary to the cardinal principle of consent to jurisdiction.²²⁰

80 In the *Land, Island and Maritime Frontier Dispute* case, Nicaragua had to avoid the pitfalls of the *Continental Shelf (Tunisia/Libya)* case and the *Continental Shelf (Libya/Malta)* case. It claimed that its purposes for intervention were to protect its legal interests in the Gulf of Fonseca 'by all legal means available'.²²¹ El Salvador argued that this object 'necessarily involves the inclusion in such means of "that of seeking a favourable judicial pronouncement" on its own claims'.²²² The Chamber held that '[t]he "legal means available" must be those afforded by the institution of intervention for the protection of a third State's legal interests. So understood, that object cannot be regarded as improper'.²²³

81 The case reinforces the dilemma of intervention noted earlier:²²⁴ '[o]nce a state identifies the existence of specific rights to which it is a claimant, it is faced with the problem of explaining how it is seeking to protect its interests without becoming a party to the litigation'.²²⁵ The Chamber sought to bypass this dilemma by holding that intervention must not seek to and cannot result in adjudging claims of the intervener:

the object stated first in Nicaragua's Application, namely 'generally to protect the legal rights of the Republic of Nicaragua in the Gulf of Fonseca and the adjacent maritime areas by all legal means available', is not to be interpreted as involving the seeking of a judicial pronouncement on Nicaragua's own claims.²²⁶

82 It appears that the Chamber was willing to allow some effectiveness to the procedure of intervention under Article 62. It managed to do so by clarifying that the purpose of intervention is to protect the entitlements of the third State and not to provide their definitive recognition nor to adjudge them.²²⁷

83 The condition for the application to remain within the bounds of the main case must not be taken for an occasion for a third State to seek to be identified with either of the parties to the proceedings. The would-be intervener is an independent participant raising its own concerns. During the PCIJ period, it was envisaged that '[a]n intervenor may

²¹⁷ Cf. *supra*, MN 48–51.

²¹⁸ *Continental Shelf (Libya/Malta)*, Application by Italy for Permission to Intervene, ICJ Reports (1984), pp. 3, 19, para. 29, citing *Nuclear Tests (Australia v. France; New Zealand v. France)*, Judgments, ICJ Reports (1974), pp. 253, 262, para. 29, and pp. 457, 466, para. 30.

²¹⁹ *Continental Shelf (Libya/Malta)*, Application by Italy for Permission to Intervene, ICJ Reports (1984), pp. 3, 21, para. 33.

²²⁰ *Ibid.*, pp. 22–4, paras. 34–7.

²²¹ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 108, para. 38.

²²² *Ibid.*, p. 131, para. 91.

²²³ *Ibid.*, p. 131, para. 92.

²²⁴ Cf. *supra*, MN 61.

²²⁵ Greig, *Va. JIL* (1992), p. 306.

²²⁶ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 131, paras. 91–2.

²²⁷ See Palchetti, *Max Planck UNYB* (2002), pp. 148–9.

make an independent claim, or it may side with one of the previous parties'.²²⁸ In the *Wimbledon* case, Poland wished to intervene on the side of the four applicant States against Germany. In the *Nuclear Tests* cases, Fiji's interests were aligned with those of Australia and New Zealand against France. But if a State wishes to present common arguments with one of the parties, without putting forward any specific interest,²²⁹ it should seek to join the proceedings, or commence its own action, if it can establish jurisdiction. Otherwise, the status of the intervener, beneficiary of rights and submitted to little obligations, would be too disruptive of the equality between the parties.

2. *The Proper Object: Protection of Legal Interests and Information of the Court*

On its face, Article 62 has two intertwined functions: protective of the interests of a third State possibly affected and informative of these interests. The would-be interveners seek to set out how their application tends to fulfil this double function, considering that the informative function alone is not sufficient. In the *Continental Shelf (Libya/Malta)* case, Italy argued that allowing it to intervene would assist the Court in establishing an overall picture of the situation that it would not receive from the parties' representations alone. The Court rejected this offer on the grounds that the test for intervention is not whether it would be useful, or even necessary, for the Court to receive further information, but whether the criteria of Article 62 are met.²³⁰ In the *Land, Island and Maritime Frontier Dispute* case, the Chamber found that:

[I]t is perfectly proper, and indeed the *purpose* of intervention, for an intervener to *inform* the Chamber of what it regards as its rights or interests, in order to ensure that no legal interest may be 'affected' without the intervener being heard.²³¹

In the *Land and Maritime Boundary* case, Equatorial Guinea relied again on the double functions of Article 62, its purpose being to 'inform the Court of the nature of the legal rights and interests of Equatorial Guinea that could be affected by the Court's decision',²³² and thus to 'protect the legal rights of the Republic of Equatorial Guinea ... by all legal means available'.²³³ The Court reiterated the language of the Chamber in the *Land, Island and Maritime Frontier Dispute* case in holding this to be a proper purpose of intervention,²³⁴ as well as in *Pulau Ligitan* case.²³⁵

Having in mind Nicaragua's and Equatorial Guinea's successful precedents, Costa Rica adopted similar language,²³⁶ insisting both on the preventive and informative functions

²²⁸ Hudson, *PCIJ*, p. 371, citing the Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), p. 745.

²²⁹ The question is however different in case of *erga omnes* obligations (cf. *supra*, MN 56–57).

²³⁰ *Continental Shelf (Libya/Malta)*, Application by Italy for Permission to Intervene, ICJ Reports (1984), pp. 3, 25, para. 40.

²³¹ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 130, para. 90 (emphasis added).

²³² *Land and Maritime Boundary*, Order of 21 October 1999, ICJ Reports (1999), pp. 1029, 1031, para. 3.

²³³ *Ibid.*, p. 1032, para. 4.

²³⁴ *Ibid.*, p. 1034, para. 14.

²³⁵ *Pulau Ligitan*, Application by the Philippines for Permission to Intervene, ICJ Reports (2001), pp. 575, 606, para. 88. The Court was referring to its judgment in *Land and Maritime Boundary*, Order of 21 October 1999, ICJ Reports (1999), pp. 1029 *et seq.*, and that of the Chamber in the *Land, Island and Maritime Frontier Dispute* case, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92 *et seq.*

²³⁶ *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to intervene, Judgment, ICJ Reports (2011), pp. 348, 354, para. 12.

of Article 62. The Court expressly endorsed the terminology and seemed to adhere to the underlying philosophy:

The decision of the Court granting permission to intervene can be understood as a *preventive* one, since it is aimed at allowing the intervening State to take part in the main proceedings in order to *protect* an interest of a legal nature which risks being affected in those proceedings.²³⁷

Greece too kept its objective straightforward: 'to inform the Court of the nature of the legal rights and interests of Greece that could be affected by the Court's decision in light of the claims advanced by Germany to the case before the Court'. Referring to its order with respect to Costa Rica, the Court approved this as a proper object of intervention.²³⁸

3. Degree of Specificity of the Application

87 It is not easy to assess the degree of specificity required for an application for permission to intervene to be admissible: too vague assertions are incompatible with Article 81 para. 2 (b) which refers to the '*precise* object' of intervention and would also be at odds with the requirement that its interest must be concrete and specific.²³⁹ Too much detail, on the other hand, may either bring the application close to the introduction of a new dispute or make intervention itself superfluous.

88 In *Land, Island and Maritime Frontier Dispute* case, El Salvador asserted that Nicaragua's application failed 'to indicate its position with respect to the fundamental issue in the case, which is to define the object of the litigation'.²⁴⁰ El Salvador argued that Nicaragua had not specified what rights it claimed, how they might be affected by the decision in the case, or the substantive objectives it hoped to achieve.²⁴¹ The Chamber held that Nicaragua's purpose in requesting intervention could have been expressed more precisely, but that the imprecision did not warrant rejection of the application *in limine*, as requested by El Salvador.²⁴²

At the same time, and quite contradictorily, El Salvador made the argument that the admissibility proceedings are enough for intervention to fulfil its protective purpose:

If the object of the intervention is to inform the Court of its rights or claims, Nicaragua will have a full opportunity to do so in the oral proceedings ... without any need to allow its intervention. If, on the other hand, the object of its application is to protect its claims by all legal means ... then such a purpose will signify the introduction by Nicaragua of additional disputes.²⁴³

The Chamber rightly recognized that the consequence of El Salvador's argument would be that a request to intervene would almost never succeed 'if not for one reason then for the other'.²⁴⁴

²³⁷ *Ibid.*, p. 359, para. 27 (emphasis added).

²³⁸ *Jurisdictional Immunities of the State*, Application by the Hellenic Republic for Permission to Intervene, ICJ Reports (2011), pp. 494, 502, paras. 28–9.

²³⁹ *Cf. supra*, MN 52–57.

²⁴⁰ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 111, para. 45.

²⁴¹ *Ibid.*, p. 129, para. 88.

²⁴² *Ibid.*, pp. 111–2, para. 45.

²⁴³ *Ibid.*, p. 129, para. 88. In a previous case, Judge Nagendra Singh concluded that all the goals of Italy's request could have been, and in fact were, achieved by the application to intervene (*Continental Shelf (Libya/Malta)*, Application by Italy for Permission to Intervene, Sep. Op. Nagendra Singh, ICJ Reports (1984), pp. 31 *et seq.*).

²⁴⁴ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 130, para. 89.

In the *Territorial and Maritime Dispute* case, Costa Rica strived to find the right balance of detail: 89

Costa Rica argues that it is not its purpose to inform the Court, at this stage, of the full extent of its interest, which will occur in the second stage of the intervention proceedings, when it will inform the Court on the subject in detail and in full. In any event, for Costa Rica, the initial stage cannot be a substitute for the second stage in providing the Court with information.²⁴⁵

At the admissibility stage, Costa Rica gave sufficient information of the extent of its interests, based on maritime entitlements, its own claims in the area to be delimited, even though the Court did not hold this to be a mandatory requirement,²⁴⁶ but refrain from submitting arguments on the merits of its claims or those of the parties. In rejecting Costa Rica's application, the Court seemed to consider it was sufficiently informed, and no longer required its assistance during the merits phase:

This does not prevent the Court, if it rejects the application for permission to intervene, from taking note of the information provided to it at this stage of the proceedings.²⁴⁷

In *Land, Island and Maritime Frontier Dispute*, the Chamber insisted that Nicaragua should be permitted to intervene but solely in respect of the Chamber's consideration of the legal regime of the maritime spaces within the Gulf of Fonseca.²⁴⁸ At the merits stage however, Nicaragua dwelt upon other aspects too. The Chamber noted Honduras' protests, but declined to trigger any consequences.²⁴⁹ In the *Jurisdictional Immunities of the State* case, Greece hesitated as to the proper object of its intervention,²⁵⁰ but the Court 'limited [it] to the decisions of Greek courts which were declared by Italian courts as enforceable in Italy',²⁵¹ and Greece followed these instructions during the merits stage.²⁵² 90

These two cases of successful interventions show that, beyond its role as a condition for the admissibility of the request, the 'precise object' requirement plays a role at the merits stage too. It tends to control upstream that intervention remains within the bounds of the main case. The scope of intervention is clearly canalized and bounded by the judgment on admissibility.

4. The Jurisdictional Link

Article 81, para. 2 (c) of the Rules provides that the application 'shall set out ... any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case'. The jurisdictional link²⁵³ is the reflection of the long-standing 91

²⁴⁵ *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, ICJ Reports (2011), pp. 348, 362, para. 46.

²⁴⁶ *Ibid.*, p. 367, para. 65 and p. 372, para. 86.

²⁴⁷ *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, ICJ Reports (2011), pp. 348, 363, paras. 49–51; see also *ibid.*, Decl. Gaja, p. 417, para. 4; *ibid.*, Application by Honduras for Permission to Intervene, Diss. Op. Donoghue, ICJ Reports (2011), pp. 471, 491, para. 57.

²⁴⁸ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 136, para. 103. See also *ibid.*, p. 125, para. 79.

²⁴⁹ *Ibid.*, Judgment, ICJ Reports (1992), pp. 351, 581, para. 371.

²⁵⁰ Cf. *supra*, MN 71.

²⁵¹ *Jurisdictional Immunities of the State*, Judgment, ICJ Reports (2012), pp. 99, 106, para. 10.

²⁵² *Ibid.*, p. 109, paras. 18–9.

²⁵³ The phrase 'jurisdictional link' is particular to intervention proceedings. The phrase as such was cornered in *Continental Shelf (Tunisia/Libya)*, Application by Malta for Permission to Intervene, ICJ Reports (1981), pp. 3, 20, para. 36 and was adopted by the Chamber in *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 133, para. 94.

hesitations as to how intervention would cope with the fundamental principle of consent. Even if the Court clarified that intervention is a case of statutory jurisdiction,²⁵⁴ the question is not entirely moot. Beyond its historic interest, consent remains a valid requirement, at least as long as the Court will maintain the possibility for a third State to intervene as a party.²⁵⁵

92 The issue of whether an intervening State requires a jurisdictional nexus has been highly controversial from the outset of the PCIJ. Article 62 is silent on whether a jurisdictional nexus is required between the would-be intervener and the parties to the litigation. Nor is there any cross-reference between Article 62 and Article 36 on the Court's jurisdiction (as there is, *e.g.*, in Article 53).²⁵⁶ In 1922, when Article 62 was drafted, there was still an assumption that the Court would have compulsory jurisdiction and that the question of establishing a jurisdictional nexus between an intervening State and the parties would not arise. An intervening State—like the parties—would automatically be subject to the Court's jurisdiction. When compulsory jurisdiction was rejected in favour of the jurisdictional provisions of Article 36 of the PCIJ Statute, the jurisdictional aspect of Article 62 became contentious. The 1922 Committee of Jurists was divided over whether intervention was only available to those States that had accepted the compulsory jurisdiction of the Court, or whether any State could claim it.²⁵⁷ Judge Anzilotti, for example, argued that if any State could request intervention: 'States would hesitate to have recourse to the Court if they had reason to fear third parties would intervene in their cases'.²⁵⁸ The President of the Court, Judge Loder, rejected restricting intervention to those States that had accepted the Court's jurisdiction as contrary to the Statute²⁵⁹ and would not take a vote on the proposal. The 1922 Rules of Court were silent on the need for any jurisdictional nexus, as were all the subsequent Rules until 1978.

93 The failure to clarify the question of a jurisdictional link in the Rules of Court allowed the continuation of two bodies of opinion. One was that Article 62 requires a jurisdictional link between the intervener and the parties, the other that this would be importing into Article 62 a condition that is not specified within the article.²⁶⁰ This view asserts that the only relevant conditions are those specified in Article 62 and acceptance of the Court's Statute incurs acceptance of the possibility of a State seeking to intervene. That Article 62 was not abandoned along with compulsory jurisdiction was not due to oversight or carelessness. It was a deliberate and calculated decision, as is made clear by its inclusion as one of the eight points raised for consideration in the Report of 27 October 1927 by Mr Leon Bourgeois to the Council of the League.²⁶¹ Indeed, John Bassett Moore hoped that in the absence of compulsory jurisdiction, intervention might 'prove to be a means of inducing governments, be they great or small, to come before the Court' and thus enhance confidence in the institution.²⁶²

²⁵⁴ *Cf. supra*, MN 25–27.

²⁵⁵ *Cf. infra*, MN 120–127.

²⁵⁶ *Cf. von Mangoldt/Zimmermann on Art. 53 MN 54–57.*

²⁵⁷ *Continental Shelf (Tunisia/Libya), Application by Malta for Permission to Intervene*, ICJ Reports (1981), pp. 3, 14, para. 23.

²⁵⁸ Preparation of the Rules of Court of January 30th, 1922, PCIJ, Series D, No. 2, p. 87.

²⁵⁹ *Ibid.*, p. 96.

²⁶⁰ *Pulau Ligitan*, Application by the Philippines for Permission to Intervene, Sep. Op. Weeramantry, ICJ Reports (2001), pp. 630, 633, para. 9.

²⁶¹ *Ibid.*, para. 10.

²⁶² Moore, 'The Organisation of the Permanent Court of International Justice', *Columb. L. Rev.* 22 (1922), pp. 497–511, 507.

The question of whether a jurisdictional link is required between the intervening State and the parties to the case before the Court is connected with that of the status of the intervener. This has also been controversial. Article 62 of the Statute makes no reference to intervention as a party or as a non-party, an apparently deliberate decision.²⁶³ Article 59 of the 1922 Rules of Court was silent on both issues, even if the drafters imagined at some point intervention as a joint party.²⁶⁴ The controversy continued through the Revision of the Rules of Court that commenced in 1933. The discussion was based on the Registrar's reports of 14 March 1934 and June 1934, that of the Third Committee, and the recommendations of the Coordination Commission. Intervention was discussed at the Court's 20th meeting on 21 February 1935 and at its 51st meeting on 8 April 1935. Most discussion centred around the related issues of jurisdictional link, the status of an intervening State as party or non-party to the proceedings, and that of whether an intervening State was entitled to appoint a judge *ad hoc*.²⁶⁵ Despite all the discussions, the Rules of Court of 1933, 1936, 1946, and 1972 cast no further light on these questions.

In Fiji's request to intervene in the *Nuclear Tests* cases, a number of judges had expressed differing views on these matters in separate and dissenting opinions.²⁶⁶ As summarized by Ambassador Quintana:

Fiji's attempted intervention in the *Nuclear Tests* cases ... had so wide a scope that it was considered by some as a veiled attempt to institute separate proceedings between the third State and France, rather than a genuine intervention under Article 62. ... The requests eventually lapsed, given that the Court found that the applications by Australia and New Zealand became moot, but as a consequence of Fiji's attitude the Court itself may have felt the need to adopt a stricter approach towards intervention.²⁶⁷

Consequently, Article 81, para. 2 (c) of the 1978 Rules of Court introduced the 'sweeping and surprising innovation'²⁶⁸ that a State requesting intervention must indicate any basis for jurisdiction that might exist between itself and the parties to the case. This provision did not clarify matters for '[i]t is couched in nebulous language and one does not know if it is simply a requirement for the information of the Court or a real prerequisite, indispensable for the admissibility of intervention in a given case'.²⁶⁹ Far from definitely establishing a jurisdictional requirement, the insertion of this paragraph in the Rules had a preventive scope:

This it did in order to ensure that, when the question did arise in a concrete case, it would be in possession of all the elements which might be necessary for its decision. At the same time the

²⁶³ *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, Diss. Op. Donoghue, ICJ Reports (2011), pp. 414, 416, para. 9.

²⁶⁴ Cf. *supra*, MN 35.

²⁶⁵ Elaboration of the Rules of Court of March 11th, 1936, PCIJ, Series D, third addendum to No. 2, pp. 304-7.

²⁶⁶ E.g., *Nuclear Tests* (Australia v. France; New Zealand v. France), Application by Fiji for Permission to Intervene, Decl. Onyeama, ICJ Reports (1974), pp. 531-2 and pp. 536-7; *ibid.*, Decl. Dillard and Waldock, ICJ Reports (1974), p. 532 and p. 537; *ibid.*, Decl. Jiménez de Aréchaga, ICJ Reports (1974), pp. 533-4 and pp. 537-8; *ibid.*, Decl. by Barwick, ICJ Reports (1974), pp. 533 and 538.

²⁶⁷ Quintana, *ICJ Litigation*, p. 850 (footnote omitted).

²⁶⁸ *Continental Shelf* (Libya/Malta), Application by Italy for Permission to Intervene, Diss. Op. Settecamara, ICJ Reports (1984), pp. 71, 76, para. 32.

²⁶⁹ *Ibid.*

- 18 Court left any question with which it might in future be confronted in regard to intervention to be decided on the basis of the Statute and in the light of the particular circumstances of each case.²⁷⁰
- 97 In the *Continental Shelf (Libya/Malta)* case, diverse views were again expressed.²⁷¹ Applying, as usual, the Ockham's razor's principle, the present Court and its predecessor deliberately avoided for nearly sixty-two years to pronounce upon the 'vexed question'²⁷² of a jurisdictional link requirement, considering it wiser to postpone the decision until it would have no other choice. That was the case in the *Land, Island and Maritime Frontier Dispute* case. Once the Chamber had determined that Nicaragua had a legal interest that might be affected by the decision, and a proper purpose for intervention, it had to determine whether Nicaragua needed to establish a basis of jurisdiction between itself and the parties. Nicaragua did not claim a jurisdictional link, another ground of objection by El Salvador. The Court had to weigh third State interests in intervention against those of the parties in their litigation. It was argued that if a jurisdictional nexus is not required for intervention, parties could find their proceedings intruded upon by a third State, which could not commence proceedings against either of them. This could undermine the requirement of party consent to the Court's jurisdiction, cause delay and deter States from using the Court. However, if the Court required a jurisdictional nexus between the intervening State and the parties, it would reduce still further the likelihood of successful third State claims.

- 98 The Chamber determined, for the first time, that a jurisdictional link between Nicaragua and the parties was not required for intervention as a non-party. Thus, the Chamber considered that Article 81, para. 2 (c) merely allowed States to indicate where there is such a link, and 'the use of the words "any basis" ... shows that a valid link of jurisdiction is not treated as a *sine qua non* for intervention'.²⁷³ In reaching this position, the Court based itself on the nature and purposes of intervention as incidental proceedings:

It thus follows also from the juridical nature and from the purposes of intervention that the existence of a valid link of jurisdiction between the would-be intervener and the parties is not a requirement for the success of the application. On the contrary, the procedure of intervention is to ensure that a State with possibly affected interests may be permitted to intervene even though there is no jurisdictional link and it therefore cannot become a party.²⁷⁴

- 99 A different conclusion applies in case the third States seeks to intervene as a party. Through this distinction, the Court sought to mitigate the audacity of its finding on the absence of a jurisdictional link requirement, which it counterbalanced by a finding that States may become parties to the proceedings, and are thus bound by the judgment, if consent to the jurisdiction is established:

²⁷⁰ *Continental Shelf (Tunisia/Libya)*, Application by Malta for Permission to Intervene, ICJ Reports (1981), pp. 3, 16, para. 27.

²⁷¹ *Continental Shelf (Libya/Malta)*, Application by Italy for Permission to Intervene, Sep. Op. Nagendra Singh, ICJ Reports (1984), pp. 31 *et seq.*; *ibid.*, Sep. Op. Mbaye, ICJ Reports (1984), pp. 35 *et seq.*; *ibid.*, Sep. Op. Jiménez de Aréchaga, ICJ Reports (1984), pp. 55 *et seq.*; *ibid.*, Diss. Op. Sette-Camara, ICJ Reports (1984), pp. 71 *et seq.*; *ibid.*, Diss. Op. Oda, ICJ Reports (1984), pp. 90 *et seq.*; *ibid.*, Diss. Op. Ago, ICJ Reports (1984), pp. 115 *et seq.*; *ibid.*, Diss. Op. Schwebel, ICJ Reports (1984), pp. 131 *et seq.*; and *ibid.*, Diss. Op. Jennings, ICJ Reports (1984), pp. 148 *et seq.*

²⁷² *Continental Shelf (Libya/Malta)*, Application by Italy for Permission to Intervene, ICJ Reports (1984), pp. 3, 27-8, para. 45.

²⁷³ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 135, para. 100.

²⁷⁴ *Ibid.*

Those States are the 'parties' to the proceedings, and are bound by the Court's eventual decision because they have agreed to confer jurisdiction on the Court to decide the case, the decision of the Court having binding force as provided for in Article 59 of the Statute. Normally, therefore, no other state may involve itself in the proceedings without the consent of the original Parties.²⁷⁵

This distinction between intervention as a party and as a non-party has been always restated, but never clarified. In the *Land and Maritime Boundary* case, the full Court confirmed the Chamber's approach and held that the juridical nature and the purpose of the procedure preclude the need for a jurisdictional link between the third State and the parties: 100

On the contrary, the procedure of intervention is to ensure that a State with possibly affected interests may be permitted to intervene even though there is no jurisdictional link and it therefore cannot become a party.²⁷⁶

In the *Jurisdictional Immunities of the State* case, the Court simply noted that 'since Greece has made clear that it seeks to intervene as a non-party' there was no need to establish any jurisdictional basis in the case.²⁷⁷

The duality of status has had little practical consequences, since there was only one request for intervention as a party. In the *Territorial and Maritime Dispute* case, Honduras primarily sought permission to intervene as a party and alternatively, if that request was not acceded to, as a non-party.²⁷⁸ In the former case it asserted jurisdiction on the basis of the American Treaty on Pacific Settlement, Article XXXI,²⁷⁹ to which it is a party as well as Nicaragua and Colombia. The Court confirmed that 'the status of intervener as a party requires ... the existence of a basis of jurisdiction as between the States concerned, the validity of which is established by the Court at the time when it permits intervention. However ... such a basis of jurisdiction is not a condition for intervention as a non-party.'²⁸⁰ 101

By not insisting on a jurisdictional link for intervention as a non-party, the Court has removed at least one hurdle for third States seeking intervention. This approach has clarified the protective and informative nature of the procedure and—at least theoretically—facilitated a request for intervention by a third State in the face of objections by the parties. On the other hand, the maintenance of the theoretical possibility for a State to intervene as a party creates confusion and appears to be the only logical reason why paragraph 2 (c) of Article 81, has not been amended since 1990. 102

²⁷⁵ *Ibid.*, p. 133, para. 95.

²⁷⁶ *Land and Maritime Boundary*, Order of 21 October 1999, ICJ Reports (1999), pp. 1029, 1034–5, para. 15; *Pulau Ligitan*, Application by the Philippines for Permission to Intervene, ICJ Reports (2001), pp. 575, 588–9, paras. 35–6.

²⁷⁷ *Jurisdictional Immunities of the State*, Application by the Hellenic Republic for Permission to Intervene, ICJ Reports (2011), pp. 494, 502–3, para. 31.

²⁷⁸ *Territorial and Maritime Dispute*, Application by Honduras for Permission to Intervene, ICJ Reports (2011), pp. 420, 431, para. 23.

²⁷⁹ 30 April 1948, 30 UNTS 55.

²⁸⁰ *Territorial and Maritime Dispute*, Application by Honduras for Permission to Intervene, ICJ Reports (2011), pp. 420, 432, para. 28.

V. Evidentiary Requirements

1. Evidence and Standard of Proof

- 103 All the versions of the Rules of Court since 1922 have required an intervener to list the documentary evidence attached to the application to intervene.²⁸¹ Article 81, para. 3 of the 1978 Rules of Court states: 'The application shall contain a list of the documents in support, which documents shall be attached.'
- 104 Some parties have argued that the application to intervene was not in conformity with the Rules of Court because of lack of documentary evidence in support of the assertion of a legal interest.²⁸² The Court has responded that since the State seeking to intervene bears the burden of proving the conditions required by Article 62 and Rule 81, it is for that State to decide which documents to submit.²⁸³
- 105 Paragraph 3 of Article 81 has an evidentiary scope, but its incidence upon the admissibility of the request is undeniable.²⁸⁴ Consequently, the Court held that:

The evidence required from the State seeking to intervene cannot be described as restricted or summary at [the admissibility] stage of the proceedings, because, essentially, the State must establish the existence of an interest of a legal nature which may be affected by the decision of the Court.²⁸⁵

- 106 The standard of proof may be difficult to meet because a request for intervention is necessarily speculative, for neither the third State nor the Court can know at this preliminary stage what the outcome of the main proceedings will be. The wording of Article 62 suggests that the third State should not be put to a high standard of proof. In the *Land, Island and Maritime Frontier Dispute* case, Nicaragua asserted that it need show only a 'provisional standard of proof', an assertion rejected by El Salvador and Honduras. The Chamber held that the State requesting intervention bears the burden of proof²⁸⁶ and that it must 'demonstrate convincingly what it asserts'.²⁸⁷ It simultaneously stressed the subjective wording of Article 62, and required the intervening State to demonstrate to its satisfaction an interest that according to the Statute it has only to consider "may" be affected, not that it will or must be affected'.²⁸⁸

²⁸¹ Art. 59 of the 1922 Rules of Court; Art. 64 of the 1936 and 1946 Rules of Court; Art. 69 of the 1972 Rules of Court.

²⁸² Indonesia made this argument in the *Pulau Ligitan* case, Application by the Philippines for Permission to Intervene, ICJ Reports (2001), pp. 575, 587, para. 27; as did Nicaragua in the *Territorial and Maritime Dispute* case, Application by Costa Rica for Permission to Intervene, ICJ Reports (2011), pp. 348, 362, para. 45.

²⁸³ *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, ICJ Reports (2011), pp. 348, 363, para. 48; *Pulau Ligitan*, Application by the Philippines for Permission to Intervene, ICJ Reports (2001), pp. 575, 587, para. 29.

²⁸⁴ In its judgment in *Territorial and Maritime Dispute*, the Court analysed this requirement under the heading 'The Evidence in Support of the Request to Intervene', while at the same time insisting upon its impact but it the Court analysed it in relation with the necessary degree of specificity of Costa Rica's application and with the substantive requirements (*Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, ICJ Reports (2011), pp. 348, 362-3, paras. 44-51).

²⁸⁵ *Ibid.*, p. 363, para. 49.

²⁸⁶ Judge Oda has expressed the opposite view that the burden is on the parties to the main proceedings to show that the third parties' interests will not be affected by the decision in that case; *Pulau Ligitan*, Application by the Philippines for Permission to Intervene, Diss. Op. Oda, ICJ Reports (2001), pp. 609, 618, para. 14.

²⁸⁷ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene Judgment, ICJ Reports (1990), pp. 92, 117, para. 61.

²⁸⁸ *Ibid.*

2. Access to Written Pleadings

The chances for a State to meet this accommodating standard of proof are also dependent on its knowledge of the ins and outs of the main case. From the outset, the question of the extent to which the Court's records should be open to inspection or kept secret was hotly debated, especially in the context of intervention.²⁸⁹ There are opposing tensions between the principle of intervention and the principle of confidentiality.²⁹⁰ A government cannot make an informed decision whether to request intervention unless it knows the basis of the parties' case. However, the parties to legal proceedings may seek to maintain the privacy of their arguments and documentation, for as long as is compatible with public proceedings before the Court. 107

The first Rules of Court favoured access to the parties' documentation. Article 38 of the 1922 Rules of Court stated: 108

The Court or the President, if the Court is not sitting, may, after hearing the parties, order the Registrar to hold the cases and counter-cases of each suit at the disposal of the government of any State which is entitled to appear before the Court.²⁹¹

This Rule privileged third States over the parties. Its object was described as being to assist a State in determining whether it has a legal interest in the proceedings within the terms of Article 62 and to assist a State wishing to intervene in framing its request.²⁹²

Article 44, para. 2 of the 1936 Rules of Court allowed the Court (or the President if the Court is not sitting), 'after obtaining the views of the parties', to decide to allow the Registrar to hold the documents of the written proceedings in a case at the disposal of the government of any member of the League of Nations, or any State entitled to appear before the Court. Article 44, para. 3 then stated: 109

The Court ... may, with the consent of the parties, authorise the documents of the written proceedings in regard to a particular case to be made accessible to the public before the termination of the case.²⁹³

This Rule ensured that the parties were able to put their views about third State access to their written proceedings and created no special procedure for a State desiring to intervene. Article 44, para. 2 was amended in the 1945 Rules of Court to spell out that the 'written proceedings' of a case comprise the 'pleadings and annexed documents' and to make it applicable to members of the United Nations and States entitled to appear before the ICJ. It was renumbered as Article 48 in the 1972 Rules of Court.

²⁸⁹ Moore, *supra*, fn. 262, p. 507.

²⁹⁰ Judge Weeramantry identified the opposing imperatives in the following terms:

There is a tension here between the principle of intervention and the principle of confidentiality, for the latter may in certain cases shut out a legitimate intervention by denying the intending intervener the information necessary for it to formulate its intervention. The discretion of the Court must therefore be very carefully exercised, especially when the lack of knowledge of the parties' pleadings is offered as an excuse for what might be a belated intervention. An intervener's actual pleadings could in certain cases be heavily dependent upon a knowledge of the pleadings of the parties. The mere publication of the special agreement would not give the intervenient the full information it might require.

(*Pulau Ligitan*, Application by the Philippines for Permission to Intervene, Diss. Op. Weeramantry, ICJ Reports (2001), pp. 630, 650-1, para. 44).

²⁹¹ Rules of Court, PCIJ, Series D, No. 2, p. 569.

²⁹² Fachiri, *The Permanent Court of International Justice, its Constitution, Procedure and Work* (1925), p. 104.

²⁹³ PCIJ, Series D, third addendum to No. 2, pp. 994, 1009.

- 110 Without being specific to intervention, Article 53 of the 1978 Rules of Court allows a third State to seek access to the parties' pleadings:

The Court, or the President if the Court is not sitting, may at any time decide, after ascertaining the views of the parties that copies of the pleadings and documents annexed shall be made available to a State entitled to appear before it which has asked to be furnished with such copies.

- 111 Article 53 of the Rules of Court reiterates that the Court must ascertain the views of the parties before deciding whether to allow third States access to the written documents of the case. The article does not state that the parties' views are determinative. In fact, it appears that they are. No party objected to the release of pleadings in the *Nuclear Tests* cases and Fiji received them (along with various other States that did not seek intervention). Malta's, Italy's, and the Philippines' requests for pleadings were rejected after the Court had ascertained that at least one of the parties objected. Nicaragua, Equatorial Guinea, Costa Rica, and Honduras received the pleadings of the parties in their respective cases before filing their requests to intervene.²⁹⁴

- 112 Finally, Article 85, para. 1 of the Rules confirms that a state seeking to intervene does not have a right to access the pleadings. It provides indeed that a State that has had its request to intervene accepted has access to the pleadings in the case. This makes it clear *a contrario* that until that point, an intervening State has no greater rights than any other State under Article 53 of the Rules.

- 113 Lack of access to the parties' pleadings makes it difficult for a State requesting intervention to frame its application. Malta argued that at least one reason for its lack of precision in specifying its purpose for intervention was the refusal to grant it access to the parties' pleadings. Without the pleadings, it could only speculate on the arguments that might have been submitted by the parties. The Court did not answer this complaint. It was a point of concern in at least some of the separate opinions that Libya and Tunisia had not formulated their claims with precision. Judges Oda and Schwebel thought it important that more precision should not be asked of a third State than of the parties, especially where the third State is handicapped by its ignorance of the exact scope of the claims.²⁹⁵

- 114 In the *Pulau Ligitan* case, the Philippines argued that it suffered a handicap in identifying its interest through not having access to the parties' pleadings. Without them, it could not be sure which treaties were to be relied upon by the parties.²⁹⁶ The Court responded that there is nothing in the Rules or its practice that makes 'an inextricable link' between seeking access to pleadings and an application to intervene or 'that the requirement of the timeliness of the Application for permission to intervene may be made conditional on whether or not the State seeking to intervene is granted access to the

²⁹⁴ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene Judgment, ICJ Reports (1990), pp. 92, 98, para. 13; *Land and Maritime Boundary*, Order of 21 October 1999, ICJ Reports (1999), pp. 1029, 1035, para. 17; *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, ICJ Reports (2011), pp. 348, 354, para. 10; *ibid.*, Application by Honduras for Permission to Intervene, ICJ Reports (2011), pp. 420, 426, para. 6.

²⁹⁵ *Continental Shelf* (Tunisia/Libya), Application by Malta for Permission to Intervene, Sep. Op. Oda, ICJ Reports (1981), pp. 23 *et seq.*; *ibid.*, Sep. Op. Schwebel, pp. 35 *et seq.*

²⁹⁶ *Pulau Ligitan*, Application by the Philippines for Permission to Intervene, ICJ Reports (2001), pp. 575, 590, para. 39. Judge Oda said that the 'whole procedure' (including that the Philippines had had no access to the pleadings and that Malaysia referred to its pleadings in its written observations and the oral hearings) struck him as 'being rather unfair to the intervening State'; *ibid.*, Diss. Op. Oda, ICJ Reports (2001), pp. 609, 619-20, para. 16.

pleadings'.²⁹⁷ A State seeking to intervene that has had access to the pleadings is better able to comply with the requirements of Article 81 of the Rules.

F. Procedures for Consideration of a Request to Intervene

The procedures for consideration of a request to intervene are identical for the two forms of intervention (Articles 62 and 63) and the Rules of the Court deal with them in the same provisions (Articles 83 and 84). The Rules have been refined since 1922. Article 59 of the 1922 Rules of Court stated that:

Such application shall be immediately communicated to the Parties, who shall send to the Registrar any observations which they may desire to make within a period to be fixed by the Court, or by the President, should the Court not be sitting.²⁹⁸

In 1926, these procedures were amplified to allow for oral proceedings. A new paragraph was added to Article 59 of the Rules, which stated:

Such observations shall be communicated to the State desiring to intervene and to all parties. The intervener and the original parties may comment thereon in Court; for this purpose the matter shall be placed on the agenda for a hearing ... The Court will give its decision on the application in the form of a judgment.

If the application is not contested, the President, if the Court is not sitting, may, subject to any subsequent decision of the Court as regards the admissibility of the application, fix, at the request of the State by which the application is made, time limits within which such State is authorised to file a case on the merits and within which the other parties may file their counter-cases. These time limits, however, may not extend beyond the beginning of the session in the course of which the case shall be heard.²⁹⁹

These provisions were not amended in 1931. In 1936, Article 59 of the Rules was renumbered as Article 64, with some rewording and breaking up of the provisions into numbered sub-paragraphs. Article 64, para. 3 of the 1936 Rules of Court essentially reiterated the position of Article 59 of the 1922 Rules. It required the application to be communicated to the parties, who had to send their observations in writing to the Registrar within time limits specified by the Court, or the President if the Court is not sitting. Article 64, para. 4 required that the application be placed on an agenda for hearing. The article clarified that 'if the parties have not, in their written observations opposed the application to intervene, the Court may decide there shall be no oral argument'. Article 64, para. 5 reiterated that 'the Court will give its decision on the application in the form of a judgment'.³⁰⁰

²⁹⁷ *Ibid.*, ICJ Reports (2001), pp. 575, 585, para. 22.

²⁹⁸ Rules of Court, PCIJ, Series D, No. 2, p. 573.

²⁹⁹ Revised Rules of Court, 1926, PCIJ, Series D, No. 1, 1st edn., pp. 33, 57.

³⁰⁰ PCIJ, Series D, third addendum to No. 2, p. 1016. As explained in the study by the Registry of the Court, '[d]uring the *travaux préparatoires* of the 1926 revision of the Rules of Court, the Registrar proposed, in order to take into account the procedure adopted in connection with Poland's intervention in the *S.S. Wimbledon* case, Article 59 of the Rules should be amended by adding the following sentence: "The Court will give its decision on the application in the form of a judgment", and this proposal was adopted. It was incorporated into Article 59 of the 1931 Rules of Court and retained in the 1936 (Art. 64), 1946 (Art. 64) and 1972 (Art. 69) revisions.' (*ICJ Yearbook* (2014-2015), p. 97).

- 117 Article 64 of the 1945 Rules of Court largely reiterated the same procedures, apart from a new sub-para. 4, which required the Registrar to transmit copies of the application to intervene to members of the United Nations and to other States entitled to appear before the Court. This new provision required the renumbering of Article 64, paras. 4 and 5 of the 1936 Rules of Court as Article 64, paras. 5 and 6 of the 1945 Rules of Court.
- 118 The 1978 Rules of Court are more detailed with respect to the procedures to be followed when a State has made a request to intervene. They are spelled out in Articles 83 and 84.

Article 83

- (1) Certified copies of the application for permission to intervene under Article 62 of the Statute ... shall be communicated forthwith to the parties to the case, which shall be invited to furnish their written observations within a time-limit to be fixed by the Court or by the President if the Court is not sitting. (2) The Registrar shall also transmit copies to:
- the Secretary-General of the United Nations;
 - the Members of the United Nations;
 - other States entitled to appear before the Court;
 - any other States which have been notified under Article 63 of the Statute.

Article 84

- (1) The Court shall decide whether an application for permission to intervene under Article 62 of the Statute should be granted ... as a matter of priority unless in view of the circumstances of the case the Court shall otherwise determine.
- (2) If, within the time-limit fixed under Article 83 of these Rules, an objection is filed to an application for permission to intervene, or to the admissibility of a declaration of intervention, the Court shall hear the State seeking to intervene and the parties before deciding.

The former requirement that the Court give its decision in the form of a judgment was deleted in the 1978 Rules of Court,³⁰¹ giving the Court discretion in the form of its determination. In practice, the Court decides by a judgment, when one of the parties objected and hearings were organized, and by an order when no such objection was raised.³⁰²

- 119 Objections by either or both of the parties to the application to intervene in their written or oral observations are given full consideration but are not determinative of the outcome. Article 62, para. 2 specifies that it is for the Court to decide upon a request to intervene, which is in accordance with for the principle of statutory jurisdiction³⁰³ and the 'sound administration of justice'.³⁰⁴ Even if an objection from either party is not determinative, Article 84, para. 2 of the Rules requires the Court to hold a hearing in that circumstance. The hearing is sometimes necessary to set out clearly the parties' position in relation to intervention. It may be unclear whether a party is in fact objecting or whether it is just putting forward its views. In the *Land and Maritime Boundary* case, Nigeria's written response stated that whether or not the request to intervene is accepted 'it will in Nigeria's view make no difference to the legal position of Nigeria'. Equatorial Guinea read this as making no objection to its request, but Nigeria argued that Cameroon had misrepresented Equatorial Guinea's position with respect to whether the latter was seeking

³⁰¹ *ICJ Yearbook* (2014–2015), p. 97

³⁰² *Ibid.*, p. 99.

³⁰³ *Cf. supra*, MN 25–27.

³⁰⁴ *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, Judgment, ICJ Reports (2011), pp. 348, 358, para. 25.

intervention as a party or as a non-party. The Court found that neither Cameroon nor Nigeria objected to the request to intervene as a non-party intervener and no oral proceedings were held to consider Equatorial Guinea's (successful) request to intervene.³⁰⁵

Quite often, the parties' express their objection by contesting that the conditions for admissibility are met, which necessitates substantial developments. In the *Territorial and Maritime Dispute* case, Colombia did not object to the request to intervene by either Costa Rica or Honduras. In contrast, Nicaragua considered that neither Costa Rica's nor Honduras' request satisfied the requirements of the Statute and Rules of Court.³⁰⁶ The Court interpreted Nicaragua's response as an objection to the requests to intervene and oral hearings were held in consecutive weeks in October 2010. In the *Jurisdictional Immunities of the State* case, Germany asserted that it did not 'formally' object to Greece's application for permission to intervene. It nevertheless drew the Court's attention to 'certain considerations' which it considered indicated that Greece's request did not comply with the requirements of Article 62.³⁰⁷ The Court determined not to hold oral hearings to consider the request but decided that Greece should be given an opportunity to comment on the Parties' observations, and that they in turn should be able to submit further written observations.³⁰⁸

G. The Status of the Intervener

I. The Distinction between Intervention as a Party and Intervention as a Non-party

The status of an intervening State as a party or non-party³⁰⁹ to the proceedings has been another point of uncertainty since 1922. It is closely connected to the appreciation of the relationship between the third State and the parties and to the question of the jurisdictional link.³¹⁰ In the Advisory Committee's introduction of the procedure of intervention in 1922, three positions were identified:

a [third] party may wish to take sides with the plaintiff or the defendant; a [third] party may claim certain exclusive rights; or a [third] party may request that one of the two requesting States should withdraw on the ground that it is not the real *dominus* of the right which it claims. In this latter case intervention tends to become exclusion, but as a rule a State is content to take joint action with one of the parties: should this be allowed?³¹¹

The Advisory Committee of Jurists answered this question in the affirmative, provided the conditions of what became Article 62 were met. However, the first draft of the 1922

³⁰⁵ *Land and Maritime Boundary*, Order of 21 October 1999, ICJ Reports (1999), pp. 1029, 1034, para. 11.

³⁰⁶ *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, ICJ Reports (2011), pp. 354–5, para. 13; *ibid.*, Application by Honduras for Permission to Intervene, ICJ Reports (2011), pp. 420, 427, para. 13.

³⁰⁷ *Jurisdictional Immunities of the State*, Application by the Hellenic Republic for Permission to Intervene, ICJ Reports (2011), pp. 494, 496, para. 5. Italy did not object to Greece's application.

³⁰⁸ *Ibid.*, p. 496, para. 6.

³⁰⁹ The concept of a non-party intervener has been variously described as a 'participant', or a 'quasi-party'. Elias rejected the concept of a non-party intervener, calling it 'ludicrous to accept the existence of such an entity'; Elias (1983), p. 95.

³¹⁰ *Cf. supra*, MN 77.

³¹¹ Report of Mr de Lapradelle, Chairman of the Drafting Committee, Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), p. 745.

Rules of Court, where Article 48 stated that the intervener 'shall take part in the proceedings as a joint party'³¹² was rejected and the adopted Article 59 of the Rules was silent on the point. Nor did the subsequent revisions of the Rules of Court clarify either the status of a State intervening under Article 62, or the rights and obligations of an intervening State. But it appears from the discussions on the various modifications and amendments of the Rules that the PCIJ judges shared the idea that the intervener could be a party to the case, in its own right or in support of one of the original parties.³¹³

- 123 Neither the PCIJ nor the ICJ had to decide on these points until Nicaragua's request to intervene was accepted in the *Land, Island and Maritime Frontier Dispute* case.³¹⁴ Instead of making a definitive choice on the status of the intervener, the Chamber consecrated the two possibilities. Thus in case law, the distinction between intervention as a party and intervention as a non-party appeared:

[A] State which is allowed to intervene in a case, does not, by reason only of being an intervener, become also a party to the case. It is true, conversely, that, provided that there be the necessary consent by the parties to the case, the intervener is not prevented by reason of that status from itself becoming a party to the case.³¹⁵

Paragraph 99 of the judgement is all but clear. In the first sentence, it seems to oppose intervener and party, but the second sentence advances the opposing view, according to which the intervener may become a party, with the parties' consent. The Chamber added that such an intervener 'may ask for rights of its own to be recognized by the Court in its future decision, which would be binding for that State in respect of those aspects for which intervention was granted'.³¹⁶ Thus, according to the Chamber, three characteristics distinguish intervention as a party from the normal form of intervention: first, the parties' consent; second, the possibility for the third State to ask the Court to adjudge its claims; and third, the binding effect on the intervener of that part of the judgment on the merits which answers to its claims. Each one of them seems to run contrary to the essential characteristics of intervention.

- 124 The reintroduction of the parties' consent as a condition of admissibility of intervention runs contrary to the principle of statutory jurisdiction and the firm consequence that intervention needs not a jurisdictional link.³¹⁷ Moreover, intervention as a party seems to be at the free choice of the third State, who must specify in the application whether it intends to intervene as a party or as a non-party. Still this is precisely the hypothesis which the Chamber of the Court sought to neutralize in *Land, Island and Maritime Frontier Dispute* case. In its Application, Nicaragua declared that 'intends to submit itself to the

³¹² Cf. *supra*, MN 35–36.

³¹³ Elaboration of the Rules of Court of March 11th, 1936, PCIJ, Series D, fourth addendum to No. 2, 1943, pp. 268–70.

³¹⁴ See the summary of views by Judge Oda (*Pulau Ligitan*, Application by the Philippines for Permission to Intervene, Diss. Op. Oda, ICJ Reports (2001), pp. 609 *et seq.*).

³¹⁵ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 134–5, para. 99.

³¹⁶ *Ibid.*, p. 134, para. 99; *Pulau Ligitan*, Application by the Philippines for Permission to Intervene, ICJ Reports (2001), pp. 575, 588, para. 35; *Territorial and Maritime Dispute*, Application by Honduras for Permission to Intervene, ICJ Reports (2011), pp. 420, 432, para. 28; *ibid.*, Application by Costa-Rica for Permission to Intervene, ICJ Reports (2011), pp. 348, 361, para. 39.

³¹⁷ Cf. *supra*, MN 91–102.

binding effect of the decision to be given'. The Chamber opposed to this statement the following reasoning:

the force of *res judicata* does not operate in one direction only: if an intervener becomes a party, and is thus bound by the judgment, it becomes entitled equally to assert the binding force of the judgment against the other parties. A non-party to a case before the Court, whether or not admitted to intervene, cannot by its own unilateral act place itself in the position of a party, and claim to be entitled to rely on the judgment against the original parties.³¹⁸

The possibility given to the third State to put forward its own claims comes at odds with the limitations put on the object of intervention, which must not aim at introducing a new dispute or putting forward the third State's claims.³¹⁹ Finally, recalling the binding effect of the judgment on the intervener as a party is tautological, since Article 59 of the Statute applies to all parties. The Chamber seemed to interpret this principle *a contrario* and reached the unexpected conclusion that the judgment on the merits could not have any binding force towards the intervener as a non-party: 'the right to be heard ... does not carry with it the obligation of being bound by the decision'.³²⁰ Thus, the Chamber confined the binding effect to the *res judicata* hypothesis, and considered that Article 59 of the Statute proscribes any such effect towards a non-party: 125

The terms on which intervention was granted, as stated in paragraph 102 of the 1990 Judgment, were that Nicaragua would not, as intervening State, become party to the proceedings. The binding force of the present Judgment for the Parties, as contemplated by Article 59 of the Statute of the Court, does not therefore extend also to Nicaragua as intervener.³²¹

This conclusion was criticized by two out of the five members of the Chamber.³²² More generally, the view has been expressed that a third State cannot be allowed the benefit of intervention without some corresponding commitment, a matter of some concern to the Court in the *Continental Shelf (Tunisia/Libya)* case.³²³ Finally, this conclusion is at odds with Article 63 of the Statute, under which the intervener is partially bound by the Court's judgment, without becoming a party to the proceedings.³²⁴ 126

In reality, the Chamber's argumentation tends more to establish a simplified form for the introduction of a new case, between the parties and the third State, which would allow the latter to make its own claims. Despite the Chamber's denegation,³²⁵ intervention as a party comes close to an alternative to the joining of cases, provided that the subject-matter of the dispute remains essentially the same and that the parties' consent is 127

³¹⁸ *Land, Island and Maritime Frontier Dispute*, Judgment, ICJ Reports (1992), pp. 351, 610, para. 424.

³¹⁹ *Cf. supra*, MN 77–83.

³²⁰ *Land, Island and Maritime Frontier Dispute*, Judgment, ICJ Reports (1992), pp. 351, 609–10, paras. 421–4.

³²¹ *Ibid.*, p. 609, para. 421 and p. 610, para. 424.

³²² *Land, Island and Maritime Frontier Dispute*, Judgment, Decl. Oda, ICJ Reports (1992), pp. 619–20 and Sep. Op. Torres-Bernárdez, *ibid.*, pp. 629, 730–1, para. 208. As summed up by Quintana, 'Judge Oda rendered a declaration stating that in his view Nicaragua would certainly be bound by those parts of the judgment concerning the matters on which it was admitted to intervene and judge *ad hoc* Torres Bernárdez, rendered a separate opinion in which he contended that there cannot be rights without correlative obligations, establishing a parallel to the legal consequences of intervention under Article 63.' (Quintana, *ICJ Litigation*, pp. 899–900).

³²³ *Cf. Brown* on Art. 59 MN 58–67.

³²⁴ *Cf. Miron/Chinkin* on Art. 63 MN 62–67.

³²⁵ Intervention under Article 62 of the Statute is for the purpose of protecting a State's "interest of a legal nature" that might be affected by a decision in an existing case already established between other States, namely

secured. If this understanding is correct, then the status of the intervener as a party has hardly any distinct meaning. As Judge Abraham put it:

In reality, it follows from that Judgment and from the Judgment on the merits delivered by the same Chamber in the same case ... that a third State which is allowed to intervene as a party does not acquire the status of intervener on receiving that authorization, but purely and simply that of a party. From that moment, the proceedings are no longer between two parties, but between three, and there is no intervener. In short, the third State uses the application for permission to intervene as a way to join the proceedings, not as an intervener—which is the usual object of such an application—but as a party.³²⁶

- 128 This view is nonetheless minority and the Court has maintained the duality of status,³²⁷ Honduras' unique attempt to intervene in the *Territorial and Maritime Dispute* case being rejected on account of the lack of a legal interest,³²⁸ the Court did not further clarify the scope of this distinction.

II. The Procedural Rights of the Intervener

- 129 The procedural consequences of a successful request to intervene were first specified in Article 65 of the 1936 Rules of Court. The Rules were minimalist and dealt only with the filing of memorials and counter-memorials. Article 65 stated that 'if the party intervening expresses a desire to file a memorial on the merits', it may do so within time limits fixed by the Court and the parties may file counter-memorials also within fixed time limits. Article 65, para. 2 of the 1936 Rules repeated a provision introduced in Article 59 of the 1926 Rules of Court that provided for a particular situation where the Court has not decided upon a request to intervene, and the parties have not objected. In such a case the President may, if the Court is not sitting and 'without prejudice to the decision of the Court on the question of whether the application should be granted', and determine time limits for the intervening State to file a memorial on the merits and for the parties to respond.³²⁹ Article 65 of the 1946 Rules of Court repeated Article 65 of the 1936 Rules of Court.
- 130 Article 85 of the 1978 Rules of Court is more detailed about the consequences of intervention but make no reference to the effect of the judgment on the intervener. Article 85 states:

- (1) If an application for permission to intervene under Article 62 of the Statute is granted, the intervening State shall be supplied with copies of the pleadings and documents

the parties to the case. It is not intended to enable a third State to tack on a new case, to become a new party, and so have its own claims adjudicated by the Court. A case with a new party, and new issues to be decided, would be a new case. ... As the Court observed in 1984, 'There is nothing in Article 62 to suggest that it was intended as an alternative means of bringing an additional dispute as a case before the Court—a matter dealt with in Article 40 of the Statute—or as a method of asserting the individual rights of a State not a party to the case.'

Land, Island and Maritime Frontier Dispute, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 132–3, para. 97, quoting *Continental Shelf (Libya/Malta)*, Application by Italy for Permission to Intervene, ICJ Reports (1984), pp. 3, 23, para. 37.

³²⁶ *Territorial and Maritime Dispute*, Application by Honduras for Permission to Intervene, Diss. Op. Abraham, ICJ Reports (2011), pp. 447, 452, para. 18.

³²⁷ Cf. *supra*, MN 91–102.

³²⁸ Cf. *supra*, MN 51.

³²⁹ *Ibid.*, and already Art. 59 of the Revised Rules of Court, *supra*, fn. 299.

annexed and shall be entitled to submit a written statement within a time-limit to be fixed by the Court. A further time-limit shall be fixed within which the parties may, if they so desire, furnish their written observations on that statement prior to the oral proceedings. If the Court is not sitting, these time-limits shall be fixed by the President.

- 2) The time-limits fixed according to the preceding paragraph shall, so far as possible, coincide with those already fixed for the pleadings in the case.
- 3) 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.

In the *Land, Island and Maritime Frontier Dispute* case, the Chamber, mindful of the fact that this was the first successful claim under Article 62, discussed the procedural rights of an intervening State. It emphasized that the interveners' procedural rights do not correspond with those of the parties.³³⁰ Therefore 'the intervening State ... does not acquire the rights, or become subject to the obligations, which attach to the status of a party'.³³¹ Interestingly, at this stage of this reasoning, the Chamber did not make the distinction between intervention as a party and intervention as a non-party, and this confirms the hypothesis according to which the intervener as a party has the status of a party.³³² 131

Any intervener has the right to be heard, through submission of a written statement and participation in the hearings. The intervening State must comply with the time limits set by the Court. Article 85, para. 3 of the Rules allows the intervener to be heard by the Court or Chamber only on the subject of the intervention, not on the case as a whole. This is the logical consequence of the requirement according to which the application for permission to intervene shall set out the precise object of intervention.³³³ 132

Other consequences of intervention are not spelled out in Article 85 of the Rules. The composition of the Court to determine claims of intervention has been the subject of argument. One issue is whether an intervening State can appoint a judge *ad hoc*.³³⁴ In 1922, the PCIJ rejected a proposal to provide intervening States with this right.³³⁵ Successive Rules of Court have remained silent on this point.³³⁶ In the *Wimbledon* case, Poland stated that it was renouncing its right to appoint a judge *ad hoc*, because it did not consider it necessary.³³⁷ The question was settled in the negative in the *Continental Shelf (Tunisia/Libya)* case: when Malta sought to nominate a judge *ad hoc* 'for the purpose of the intervention proceedings', it was refused on ground that the would-be intervener 'has no other right than to submit a request to be permitted to intervene, and has yet to establish any status in relation to the case'.³³⁸ At the same time, the Court rejected Malta's 133

³³⁰ *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 134, para. 99.

³³¹ *Ibid.*, p. 135, para. 102.

³³² *Cf. supra*, MN 127.

³³³ *Cf. supra*, MN 87-90.

³³⁴ *Cf. also* Kooijmans/Bordin on Art. 31 MN 37-41.

³³⁵ Preparation of the Rules of Court of January 30th, 1922, PCIJ, Series D, No. 2, pp. 177, 215.

³³⁶ In contrast ITLOS Rules of the Tribunal, ITLOS/8, 25 September 2018, Rule 103, para. 4 states that an

intervening State party is not entitled to choose a judge *ad hoc*.

³³⁷ *Wimbledon*, PCIJ, Series C, No. 3, vol. I, pp. 118 *et seq.*

³³⁸ *Continental Shelf (Tunisia/Libya)*, Application by Malta for Permission to Intervene, ICJ Reports (1981),

p. 3, 6, para. 8.

request for the *ad hoc* judges appointed by the Parties not to sit during the proceedings on the admissibility of intervention.

134 In the *Land, Island and Maritime Frontier Dispute* case, in rejecting Nicaragua's claim that its request to intervene should be heard by the full Court,³³⁹ and not by the Chamber selected by El Salvador and Honduras, the Court reiterated the position that a State requesting intervention has no status at that stage in the proceedings.³⁴⁰ A number of judges dissented on various grounds. Allowing a Chamber to determine a request for intervention was thought to constitute a denial to the third State of the right to have its request to intervene judicially considered in the usual way.³⁴¹ It was pointed out that of the five judges appointed to the Chamber, only two were permanent members of the Court. Both El Salvador and Honduras had appointed a judge *ad hoc*, and although the term of office of the fifth, the President of the Chamber, had expired, he continued to sit in accordance with Article 17 of the Rules of Court.³⁴² Further, El Salvador and Honduras had put their views on the selection of judges to the Chamber. A decision of a Chamber has the authority of a decision of the Court. This combination of circumstances emphasizes most strongly the disadvantaged status of an intervening State. It has no input into the composition of the Chamber,³⁴³ must see its application considered by a Chamber 'all of whose five members it is reasonably entitled to feel have been practically hand-picked by the existing Parties',³⁴⁴ and has no recourse to the full Court, or any other judicial tribunal. Further, the Court allowed no oral proceedings to enable Nicaragua to make its arguments on this point.

135 However, the procedural rights of intervening States are restricted both before and after a request is granted. The rejection of Nicaragua's application to have its request heard by the full Court, or to reform the Chamber, highlights its non-party status, while the autonomy of the parties in the presentation of their case to a forum whose composition they had selected was enhanced. Any inclusion of a third State into proceedings commenced by other States impacts upon the parties' formulation and presentation of their case, and the Court has ensured that this impact is kept to the minimum.

³³⁹ Cf. supra, MN 19.

³⁴⁰ *Land, Island and Maritime Frontier Dispute*, Application for Permission to Intervene, Order of 28 February 1990, ICJ Reports (1990), pp. 3, 5. The Court had acceded to the parties' request for a Chamber and their choice of judges in its Order of 8 May 1987 in the same case, Constitution of Chamber, ICJ Reports (1987), pp. 10 *et seq.* Cf. also Lauterpacht, *Administration of Justice*, pp. 87-98, as well as Zimmermann, 'Bemerkungen zum Verhältnis von ad hoc-Kammern des Internationalen Gerichtshofes und Intervention—Die Entscheidung im Streitfall vor dem IGH zwischen El Salvador und Honduras', *ZöRv* 50 (1990), pp. 646-60.

³⁴¹ *Land, Island and Maritime Frontier Dispute*, Application for Permission to Intervene, Order of 28 February 1990, Diss. Op. Shahabuddeen, ICJ Reports (1990), pp. 18 *et seq.*

³⁴² Cf. Palchetti on Art. 26 MN 35.

³⁴³ Judge Tarassov said of the intervening State that 'its procedural position before a Chamber is not on a par with the position of the initial parties. Such an inequality might be especially harmful to the intervening party if it were to seek reformation of the existing composition of a Chamber or a modification of that Chamber's mandate'. *Land, Island and Maritime Frontier Dispute*, Application for Permission to Intervene, Order of 28 February 1990, Diss. Op. Tarassov, ICJ Reports (1990), pp. 11-3.

³⁴⁴ *Ibid.*, Diss. Op. Shahabuddeen, ICJ Reports (1990), p. 19.

H. Intervention in Other Fora

Despite the uncertainties and ambiguities in Article 62, similar provisions have been included in other conventions that provide for a permanent forum for international adjudication. The situation is however different in respect to arbitration. 136

Article 31 of the Statute of the ITLOS provides for intervention in similar terms to Article 62.³⁴⁵ There is no requirement that the intervening State must have accepted the Tribunal's jurisdiction under Article 287 of the UNCLOS.³⁴⁶ However, there is a final para. to Article 31 that clarifies the position with respect to the binding nature of the judgment on the intervening State. Article 31, para. 3 states that '[i]f a request to intervene is granted, the decision of the Tribunal in respect of the dispute shall be binding upon the intervening State Party in so far as it relates to matters in respect of which that State Party intervened'. 137

Article 10 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes³⁴⁷ deals with procedures for third members by providing when such a member may make submissions and the procedures to be followed. It states: 138

1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.
2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a 'third party') shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.
3. Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.
4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding. Such a dispute shall be referred to the original panel wherever possible.

The WTO has taken a much less restrictive approach to participation by third parties in proceedings before it than has the ICJ. It has been argued that this liberal stance stems from the fact of compulsory jurisdiction in the WTO dispute settlement procedures.³⁴⁸

Article 36, para. 1 of the European Convention on Human Rights³⁴⁹ gives the right to an applicant's State of nationality to submit written comments and to take part in hearings (unless of course that State is the defendant). Article 36, para. 2 allows 'in the interest of the proper administration of justice' the President of the Court to invite a State party to the Convention that is not a party to the proceedings or 'any person concerned' to 139

³⁴⁵ Annex VI UNCLOS. See also Rules of the Tribunal, ITLOS/8, 25 September 2018, Rules 99–104. For a brief comment see Staker, 'Annex VI. Article 31: Request to Intervene', in *United Nations Convention on the Law of the Sea: A Commentary* (Proelss, ed., 2017), pp. 2430–34.

³⁴⁶ Cf. Art. 99, para. 3 of the Rules of ITLOS.

³⁴⁷ Annex 2 of the Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 3, 1867 UNTS 154.

³⁴⁸ Iwasawa, *JIEL* (2002), pp. 287–305.

³⁴⁹ 4 November 1950, ETS No. 5.

submit written comments and take part in hearings.³⁵⁰ Article 5, para. 2 of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights allows a State party with an interest in the case to submit a request to the Court to be permitted to join the case.³⁵¹

140 In all these cases, intervention is provided for by the Statute of the permanent adjudicatory body, and this is in line with the idea of statutory jurisdiction and the incidental nature of the proceedings. The situation is different in arbitration. Normally, the statute of the arbitral body is constituted by the special agreement creating it. Thus, it would seem logical that intervention in arbitral procedures would only be possible with the parties' consent or by an extensive interpretation by the tribunal of its inherent powers.³⁵² As Professor Abi-Saab put it in 1999 before the Institute of International Law, '[t]he constitution of *ad hoc* tribunals is totally controlled by the Parties. The question of intervention does not arise except to the extent they allow it in the jurisdictional title'.³⁵³

141 In practice, special agreements on inter-state arbitration rarely have specific provisions on intervention.³⁵⁴ And if they refer for application to the PCA Rules, one must note that the 2012 Arbitration Rules do indeed provide for the possibility of a third (State or private party) to intervene, but as a form of alternative to the introduction of a new case and the joining of the two connected proceedings.³⁵⁵ By contrast, the PCA Optional Rules for Arbitrating Disputes between Two States do not contain any provision on intervention.

142 The situation may arise when arbitration is instituted under a general convention, like for instance, the 1928 General Act of Arbitration (Pacific Settlement of International Disputes),³⁵⁶ whose Article 36 allows for intervention in the terms of Article 62 of the PCIJ Statute 'in judicial or arbitral procedure'. But this is an exceptional provision, with no equivalent in other multilateral conventions providing for adjudication. Thus, Annex VII UNCLOS on arbitration contains no provision on intervention (whereas the statute of ITLOS does). The question arises whether intervention by a third State is possible in this case.³⁵⁷ It has been raised, to some extent, before the Arbitral Tribunal in the *South China Sea Arbitration*, where a number of States, Vietnam in particular, expressed interests in the dispute.³⁵⁸ Even if Vietnam was granted access to some elements of the written

³⁵⁰ The latter part of the provision refers to the possibility of hearing an *amicus curiae*. No such provision exists in the ICJ Statute. Cf. Dupuy/Hoss on Art. 34 MN 39–41.

³⁵¹ 10 June 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT(III).

³⁵² Discussing this inherent power related to the good administration of justice, under the form of an enquiry over general principles of procedural law, the *Guano Case* (Chile/France) (1901), RIAA, vol. XV, pp. 77–387, 315.

³⁵³ 'Reply of Mr. Georges Abi-Saab (18 July 1995)', *Annu. de l'Inst. de Droit Internat.* 68-I (1999), p. 161.

³⁵⁴ The situation of mixed arbitral tribunals is different (cf. Amerasinghe, *Jurisdiction of International Tribunals* (2003), pp. 314–22).

³⁵⁵ Cf. Art. 17, para. 5 of the 2012 PCA Arbitration Rules: 'The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.'

³⁵⁶ 26 September 1928, 93 LNTS 343.

³⁵⁷ Forteau, 'Third-Party Intervention as a Possible Means to Bridge the Gap between the Bilateral Nature of Annex VII Arbitration and the Multilateral Nature of UNCLOS', in *The Rule of Law in the Seas of Asia: Navigational Chart for Peace and Stability—International Symposium on the Law of the Sea* (Ministry of Foreign Affairs of Japan, ed., 2015), pp. 160–74. For a negative view, see Treves, in Fabri/Sorel (2005), p. 75.

³⁵⁸ This concerns both the States having a particular claim over some of the maritime features (see *supra*, fn. 204) or more generally, States having an interest in the interpretation of Art. 121 UNCLOS.

procedure, the "Tribunal stated that it would address the permissibility of intervention in these proceedings "only in the event that Viet Nam in fact makes a formal application for such intervention".³⁵⁹ It did not, and the answer to the question whether intervention is possible in arbitral proceedings, in the absence of a statutory provisions or in the absence of consent of the parties, remains open.

I. Evaluation

The poor legislative history, the decision taken in 1922 not to attempt to resolve the difficult issues of Article 62 in the Rules of Court but to leave them to be decided in the circumstances of the cases as they arose, and the subsequent *ad hoc* nature of the case law have all inhibited the emergence of 'any coherent body of judicial authority in this important area of procedural law'.³⁶⁰ Provision for third States to participate in proceedings before the ICJ is restrictive and the Court has not interpreted Article 62 and Rule 81 in an expansive way. The rejection of the applications to intervene by Costa Rica and Honduras indicates that the apparently greater willingness to allow intervention that was seen in the acceptance of the requests of Nicaragua and Equatorial Guinea has not been maintained, at least in land and maritime disputes. The Court reverted to its earlier restrictive jurisprudence on the admissibility of requests to intervene. It has also reduced the motivation for intervention in maritime boundary disputes by avoiding demarcation in overlapping areas. However, acceptance by the Court of Greece's request to intervene by fifteen votes to one may indicate that the Court is more receptive to intervention in non-boundary disputes. 143

Nevertheless some issues remain outstanding. Although the Court has clarified that intervention is a case of statutory jurisdiction over incidental proceedings, and thus determined that an intervening State does not have to establish a jurisdictional link, it also paved the way to confusion, by creating two categories of intervention under Article 62: intervention as a party and intervention as a non-party. This distinction, of little impact in practice, obscures both the conditions and the purposes of intervention. 144

Consequently, intervention under Article 62 ranges among the divisive issues, and the judges regularly make proposals for amending the Rules.³⁶¹ The favoured approach towards intervention in international adjudication depends upon the way in which various conflicting principles are reconciled in the context of the particular case. As was recognized long ago, on the one hand a restrictive approach preserves party autonomy in the integrity of the dispute, while a broader approach fosters the harmonious development of the law and allows third parties influence in the development of the law. In particular, in determining its response to a request to intervene, the Court has to balance the interests of the parties in the integrity of their dispute as submitted to the Court against those of the third State in protecting what it perceives as its interest. Allowing intervention means that the case differs from that presented to the Court by the parties, but denying third 145

³⁵⁹ *South China Sea Arbitration* (Philippines v. China), PCA Case No. 2013-19, Award of 12 July 2016, para. 43.

³⁶⁰ *Pulau Ligitan*, Application by the Philippines for Permission to Intervene, Sep. Op. Weeramantry, ICJ Reports (2001), p. 630, para. 2.

³⁶¹ *Territorial and Maritime Dispute*, Application by Honduras for Permission to Intervene, Diss. Op. Donoghue, ICJ Reports (2011), pp. 471, 491-2, para. 59. See also *ibid.*, p. 484, para. 35.

States access to the Court risks upholding party autonomy at the expense of third States' interests.

146 Nevertheless, despite its long history, the Court has remained reluctant to extend intervention. This is the case even though intervention under Articles 62 and 63 are the only procedures open to third States under the Court's contentious jurisdiction and these procedures are limited to States.³⁶² The Court has also been unwilling to accept *amicus curiae* briefs even from States in its contentious jurisdiction, although both States and international organizations may furnish information to the Court under its advisory jurisdiction, according to Article 66, para. 2.

147 This being said, the Internet partially changed the picture. It gave States the opportunity to informally transmit to the Court (or, for the matter, to an arbitral tribunal) their legal position on matters before it. It has become usual for official legal notes to be posted on official websites, in the course of proceedings. The *South China Sea Arbitration* is a topical case of excessive informal communications. Even if these documents do not become part of the proceedings, they are generally considered by the judges or even taken into account. There is good and bad in these informal briefs. For an international court or tribunal, they are a supplementary source of information. At the same time, they are completely outside the institutional and procedural framework, which contains rules protective of the sincerity of the proceedings and, as such, are essential to the good administration of justice. These documents may appear late in the proceedings (since, under Article 56 of the Rules they would be considered as readily available), and this lateness would not allow the Parties to consider them thoroughly and discuss them in an adversarial manner. Moreover, since they are not part of the proceedings, their probative value may not be appreciated on an objective basis. This is obviously problematic if they were to influence the decision, one way or the other. How does this relate to intervention proceedings? Since ultimately the function of intervention is to inform the Court of the legal interests of third States, informal *amicus curiae* briefs are both a way to circumvent the high threshold set out for intervention and the few legal consequences arising from it. For the third State, the act of intervention becomes a political gesture, taking position on a legal matter, in a solemn and highly publicized manner.

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³⁶² Miller has proposed that intervention should be made available for other international actors; Miller, in Gross, *The Future of the ICJ*, pp. 550, 560.