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Discontinuance and Withdrawal: Article 62

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The Statute of the International Court of Justice

A Commentary

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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.

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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. Intervention:

> is based, *inter alia*, on the need for the avoidance of repetitive litigation as well as the need for harmony of principle, for a multiplicity of cases involving the same subject-matter could result in contradictory determinations which obscure rather than clarify the applicable law.[1]

[1] *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia), Application for Permission to Intervene, Sep. Op. Weeramantry, ICJ Reports (2001), pp. 630, 636 (para. 17). *Cf.* also Report by M. Leon Bourgeois, presented to and adopted by the Council of the League of Nations, Procès-Verbal of the Tenth Session of the Council, pp. 163, 165 (para. 8).

B. Historical Development

I. Antecedents

Unlike the related, but distinct procedure of intervention under Art. 63, there was no forerunner provision in the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907[2] and apparently 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.[3] 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. 2

There were various proposals for what subsequently became intervention. Among these, Art. 48 of the Plan of the Five Neutral Powers (Norway, Denmark, Sweden, Holland and Switzerland) read simply:[4] 'Lorsque un différend soumis a la Cour touche les intérêts d'un Etat tiers, celui-ci a le droit d'intervenir au procès'. Article 21 of a Swedish Governmental Commission's draft convention read:[5] 3

Lorsque un différend soumis a la Cour est relatif a 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.

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 a 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 intente l'affaire.

II. The Statute of the Court

The procedural device of intervention under what became Art. 62 was introduced into the draft Statute of the PCIJ by the Advisory Committee of Jurists during their discussions of what is now Art. 63.[6] Intervention was one of the particular procedural achievements mentioned by Baron Descamps in his summary of the work of the Advisory Committee.[7] Despite its innovatory character, the records of the discussions in the Advisory Committee of Jurists are 'inconclusive and apparently garbled'.[8] 4

[2] *Cf.* Chinkin on Art. 63 MN 5–7.

[3] 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.

[4] Draft for the establishment of a Permanent Court of International Justice provided for in Covenant of the League of Nations (1920), Art. 14, Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice, pp. 300–323.

[5] *Ibid.*, pp. 236–251, Draft of a Convention drawn up by a Swedish Governmental Commission in 1919.

[6] For a summary of the drafting process *cf. Case concerning the Continental Shelf* (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, ICJ Reports (1981), pp. 3, 13–14 (paras. 22–23).

[7] Address by Baron Descamps, President of the Advisory Committee of Jurists at the Closing Session of the Committee on 24 July 1920, Procès-Verbaux, *supra*, fn. 3, pp. 752, 754.

[8] Rosenne, *Intervention*, p. 23.

5 The text of what was then Art. 60 in the draft Statute put forward by the Advisory Committee[9] was adopted verbatim as Art. 62 of the PCIJ Statute:

> 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 as a third party. It will be for the Court to decide upon this request.

Article 62 was initially drafted in French with the English version being seen as the translation. The adopted text of Art. 62 of the PCIJ Statute read:

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

The texts in French and English have remained remarkably consistent since first adopted as part of the Statute of the PCIJ. There was almost no discussion of Art. 62 by the Committee of Jurists that prepared the ICJ Statute in 1945. The only change in 1945 was the dropping of the words 'as a third party' after 'to be permitted to intervene' in the English text, words which had not been included in the French text of the Statute of the PCIJ. The ICJ has discussed the reason for their exclusion in the texts in both languages of its Statute. The phrase was omitted at the instance of a drafting committee of the Committee of Jurists preparing the Statute of the ICJ, which considered it to be 'misleading'. The Rapporteur indicated that no change was intended in the sense of the provision and that the change of wording was not deemed to be significant.[10]

6 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 Art. 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 interet d'ordre juridique est pour lui en cause—the criterion stated in Art. 62.[11]

The Chamber did not comment on the difficulties of translation, in particular the lack of equivalence between 'which may be affected' and 'pour lui en cause.'

C. Characteristics of Intervention

I. Characteristics of Intervention under Art. 62

7 Intervention under Art. 62 applies only to contentious proceedings.[12] It is therefore available only to States, but since Art. 62 refers to 'a State' wishing to intervene, it is apparently not limited to States parties to the Statute of the Court. A provision allowing the International Labour Office, or other international institutions to request intervention

[9] Draft Scheme presented to the Council of the League by the Advisory Committee of Jurists for the institution of the Permanent Court of International Justice, mentioned in Art. 14 of the Covenant of the League of Nations, LNOJ, Special Supplement No. 2, September 1920.

[10] UNCIO XIV, p. 613; *Tunisia/Libya Continental Shelf case, supra*, fn. 6, ICJ Reports (1981), pp. 3, 15 (para. 25); Sep. Op. Oda, *ibid.*, pp. 23, 24 (para. 3) *Case concerning the Continental Shelf* (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, ICJ Reports (1984), pp. 3, 27 (para. 44).

[11] *Case concerning the Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras), Application for Permission to Intervene, ICJ Reports (1990), pp. 92, 114 (para. 52).

[12] In *Acquisition of Polish Nationality*, PCIJ, Series B, No. 7, pp. 7 *et seq.*, Romania was advised that Art. 62 was inapplicable to the advisory jurisdiction of the PCIJ.

was rejected by the sub-committee of the Third Committee of the First Assembly of the League of Nations.[13]

Intervention under Art. 62 is a procedural device to protect third party interests in litigation between other States. It is not a procedure whereby the Court can obtain further information about the issues raised by the case before it from non-parties to the proceedings.[14] 8

Intervention has been characterized by the Court as 'incidental to the proceedings'[15] that are already before the Court or chamber.[16] The provisions of the 1978 Rules of Court concerning intervention (Arts. 81, 83–85) appear in Part III, headed 'Proceedings in Contentious Cases, Section D, Incidental Proceedings'. The incidental nature of intervention ensures that the case is not transformed into a new dispute, a 'different case with different parties'.[17] It also means that a request to intervene cannot withstand dismissal of the case in which intervention is requested. 9

Article 62 sets out the conditions for intervention. It is subjectively phrased; the only express requirement is that a State 'considers' that its interest might be affected. It is an 'interest of a legal nature' that the third State must consider to be potentially affected by the litigation between other States, not a right[18] appertaining to the third State. It must apprehend that the 'decision' in the case will affect its interests. It is for the Court (not the parties) to decide upon the response to the request. Although intervention under Art. 62 has been termed 'discretionary intervention,' it remains uncertain whether the Court must grant a request to intervene where all the conditions of Art. 62 are satisfied, or whether it retains some residual discretion to reject an application. 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'.[19] This was rejected, and the Court has asserted that it has no discretion to reject a request solely on policy grounds.[20] But this view is not unanimously accepted. It has been argued that the concept of a 'request' suggests potential refusal, despite compliance with the stipulated criteria. Article 62 does not use the word 'right', and in its absence the Court must retain some overall discretion to refuse a request.[21] 10

II. Distinction between Arts. 62 and 63

Intervention under Art. 62 is distinct from the procedure provided for under Art. 63, which is also termed intervention. In the *SS Wimbledon case*, the PCIJ described the 11

[13] Records of First Assembly, Committee I, pp. 400, 499–500, 537.

[14] *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, pp. 92, 130 (paras. 89–90).

[15] *Haya de la Torre* (Colombia/Peru), ICJ Reports (1951), pp. 71, 76; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua/United States), Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 425 (para. 74); *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, Order, ICJ Reports (1990), pp. 3, 4; Judgment, *ibid.*, pp. 92, 127 (para. 84).

[16] *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, ICJ Reports (1990), pp. 92, 134 (para. 98).

[17] *Ibid.*, p. 134 (para. 98).

[18] The ICJ has discussed the difference between interest and right in *Barcelona Traction, Light and Power Company, Limited (New Application: 1962)* (Belgium/Spain), ICJ Reports (1970) pp. 3, 36 (para. 46).

[19] 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, supra*, fn. 3, p. 593.

[20] *Tunisia/Libya Continental Shelf case, supra*, fn. 6, ICJ Reports (1981), pp. 3, 12 (para. 17).

[21] Fitzmaurice, G., 'The Law and Procedure of the International Court of Justice, 1951–1954: Questions of Jurisdiction, Competence and Procedure', *BYIL* 34 (1958), pp. 1–161, p. 127. Fitzmaurice asserted that intervention under Art. 62 is not as of right and that the Court must exercise a 'quasi-discretionary' power to maintain a difference between Arts. 62 and 63.

relationship between the two articles:

> The first of these forms of intervention is that dealt with in Art. 62 of the Statute and Arts. 58 and 59 of the Rules of Court; it is based on an interest of a legal nature advanced by the intervening party and the Court should only admit such intervention if, in its opinion, the existence of this interest is sufficiently demonstrated.
>
> On the other hand, however, when the object of the suit before the Court is the interpretation of an international convention, any State which is a party to this convention has, under Art. 63 of the Statute, the right to intervene in the proceedings instituted by others and, should it make use of the right thus accorded, the construction given by the judgment of the Court will be equally binding upon it as upon the original applicant parties.[22]

Nevertheless the two procedures have been closely associated, for example throughout the drafting of the various Rules of Procedure. The inclusion of both procedures within the same sections of the 1978 Rules of Court emphasizes their commonalities. Rosenne comments that the:

> procedural consolidation of the two types of intervention has been achieved by the Court's avoiding the jurisprudential issues which were raised at the earlier stages, of whether the two types of intervention are identical.[23]

D. Requests to Intervene under Art. 62

I. Applications made before the PCIJ and ICJ

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

- *SS Wimbledon*, (United Kingdom, France, Italy, and Japan/Germany), by Poland.[24]

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

- *Nuclear Tests cases* (Australia/France; New Zealand/France), by Fiji.[25]
- *Case concerning the Continental Shelf* (Tunisia/Libya), by Malta.[26]
- *Case concerning the Continental Shelf* (Libya/Malta), by Italy.[27]
- *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras), by Nicaragua.[28]
- *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon/Nigeria), by Equatorial Guinea.[29]
- *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)*

[22] *The SS Wimbledon* (United Kingdom, France, Italy, Japan/Germany), Question of Intervention by Poland, PCIJ, Series A, No. 1, pp. 11, 12.

[23] Rosenne, *Intervention*, p. 72.

[24] *SS Wimbledon case*, *supra*, fn. 22, PCIJ, Series A, No. 1, pp. 11 *et seq.*

[25] *Nuclear Tests* (Australia/France; New Zealand/France), Application for Permission to Intervene, Orders of 12 July 1973, ICJ Reports (1973) pp. 320 *et seq.*, 324 *et seq.*; *Nuclear Tests cases* (Australia/France; New Zealand/France) Application by Fiji for Permission to Intervene, Orders of 20 December 1974, ICJ Reports (1974), pp. 530 *et seq.*, 535 *et seq.*

[26] *Tunisia/Libya Continental Shelf case*, *supra*, fn. 6, ICJ Reports (1981), pp. 3 *et seq.*

[27] *Libya/Malta Continental Shelf case*, *supra*, fn. 10, ICJ Reports (1984), pp. 3 *et seq.*

[28] *Land, Island and Maritime Frontier Dispute case*, *supra*, fn. 11, ICJ Reports (1990), pp. 3 *et seq.*; Judgment, *ibid.*, pp. 92 *et seq.*

[29] *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon/Nigeria), Application for Permission to Intervene, Order, ICJ Reports (1999), pp. 1029 *et seq.*

case (New Zealand/France), by Australia, the Solomon Islands, the Federated States of Micronesia, the Marshall Islands and the Samoa Islands.[30] The last four States also made declarations of intervention under Art. 63.

- *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia), by the Philippines.[31]

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 Art. 62 in each other case.[35] However it was thought that this would further complicate an already complex situation. 13

II. Lack of Power in the Court to Order Intervention

The Court has upon occasion commented upon the lack of any request to intervene, but it has no power to require a State to do so.[36] For example in an advisory opinion concerning transit rights in which many States had an interest, *Railway Traffic between Lithuania and Poland*, the PCIJ noted that no State had intervened.[37] 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.[38] 14

III. 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 15

[30] *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/France), Order, ICJ Reports (1995), pp. 288, 306 (para. 67).

[31] *Pulau Ligitan case, supra*, fn. 1, ICJ Reports (2001), pp. 575 *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; *Legal Status of Eastern Greenland*, PCIJ, Series A/B, No. 53, p. 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. 4081–4082,.

[33] *Case concerning Trial of Pakistani Prisoners of War* (Pakistan/India), 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 case, supra*, fn. 33, Pleadings, p. 168.

[35] Rosenne, *Intervention*, pp. 7–8.

[36] In the *Nicaragua case, supra*, fn. 15, ICJ Reports (1984), pp. 392, 431 (para. 88), the Court held there was no procedural rule enabling it to direct a State to become a party to any form of proceedings, nor was there any practice on the matter. The Court was considering original proceedings, for example through joinder, but it is likely that the same attitude would prevail with respect to intervention.

[37] *Railway Traffic between Lithuania and Poland (Railway Sector Landwarów-Kaisiadorys)*, PCIJ, Series A/B, No. 42, pp. 107, 118. Given that the reference was made in the course of advisory proceedings, in which Art. 62 does not apply, this should however not be taken as a reference to intervention in the technical sense.

[38] '[T]he intervention of the Canadian Government under Art. 62 . . . should have been sought, in order that its views might be made known.' *Barcelona Traction case, supra*, fn. 18, Sep. Op. Fitzmaurice, ICJ Reports (1970), pp. 65, 80 (para. 28).

between intervention under Art. 62 and the principle with respect to the so-called indispensable third party. In the *Monetary Gold case*, 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.[39] 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 the Statute of the Court, Art. 59.[40] Nevertheless in that case Albania's legal interests would not only be affected by its decision but they constituted the very subject matter of the decision. Accordingly the proceedings could not be continued in the absence of Albania.[41] Unlike intervention, the indispensable third party rule is not provided for within the Statute of the Court, but rests upon the principle of consent.[42]

16 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 part of the 'very subject matter of the decision' it would doubtless justify intervention under Art. 62 'which lays down a less stringent criterion'.[43] 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.[44] It reiterated that the Court has no power to order either intervention or joinder.[45] In the decision on the merits in the *Land and Maritime Boundary case*, the Court rejected Nigeria's argument that the case was inadmissible because of the absence before the Court of São Tomé.[46]

IV. Successful Requests to Intervene

17 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'[47] 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.[48]

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

[39] *Case of the Monetary Gold Removed from Rome in 1943* (Italy/France, United Kingdom and United States), ICJ Reports (1954), pp. 19, 32.

[40] *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, ICJ Reports (1990), pp. 92, 114 (para. 54).

[41] The *Monetary Gold* principle was applied in the *East Timor case* (Portugal/Australia), ICJ Reports (1995), pp. 90 *et seq.* to prevent the Court from deciding the case in the absence of Indonesia.

[42] *Land and Maritime Boundary case, supra*, fn. 29, Merits, ICJ Reports (2002), pp. 303, 421 (para. 238). *Cf.* also Tomuschat on Art. 36 MN 20–24 and Bernhardt on Art. 59 MN 67–72.

[43] *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, ICJ Reports (1990), pp. 92, 116 (para. 56).

[44] *Ibid.*, p. 122 (para. 73).

[45] *Ibid.*, p. 134 (para. 99), citing the *Libya/Malta Continental Shelf case, supra*, fn. 10, ICJ Reports (1984), pp. 3, 25 (para. 40) and the *Nicaragua case, supra*, fn. 15, ICJ Reports (1984), pp. 392, 431 (para. 88).

[46] *Land and Maritime Boundary case, supra*, fn. 29, Merits, ICJ Reports (2002), pp. 303, 421 (para. 238).

[47] Elias, *The ICJ*, p. 91.

[48] *Pulau Ligitan case, supra*, fn. 1, Sep. Op. Weeramantry, ICJ Reports (2001), pp. 630, 631 (para. 4).

in the *SS Wimbledon*, 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.[49] However, Poland also referred to Art. 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 Art. 63, a suggestion that was accepted by Poland.[50] Poland did 'not insist that the grounds submitted by it as justification for intervention under Art. 62 should be taken into consideration'. The PCIJ determined the question on the basis of Art. 63 and found it unnecessary to consider whether intervention under Art. 62 would have been justified.[51]

There have only been two successful requests to intervene under Art. 62 before the ICJ. Fiji's request in *Nuclear Tests*[52] and those of Australia, the Solomon Islands, the Federated States of Micronesia, the Marshall Islands and the Samoa Islands in the 1995 rerun of the *Nuclear Tests case* were all dismissed when the main case was found to be inadmissible, emphasizing the incidental nature of the procedure. The requests of Malta in the *Tunisia/Libya Continental Shelf case*, of Italy in the *Libya/Malta Continental Shelf case*, and of the Philippines in the *Pulau Ligitan case* 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. 19

E. Procedural Matters

I. Timing

Allowing intervention by a third party into proceedings commenced by other States has the potential to delay those proceedings to the parties' detriment. The 'orderly and expeditious' progress of proceedings necessary to the sound administration of justice would be disrupted if third parties could request intervention at any time.[53] The issues of timing of an application to intervene and the subsequent time limits for procedural steps have therefore been addressed in all versions of the Rules of Court. 20

Article 58 of the 1922 Rules of Court stated: 21

> 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.[54]

This article was not changed in 1926 or 1931. In 1936 it was renumbered as Art. 64, para. 1, but remained in essence the same.[55]

[49] *The SS Wimbledon*, Series A, No. 1, pp. 9–10.

[50] *The SS Wimbledon*, Series C, No. 3, vol. I, 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 *SS Wimbledon case*, pp. 106–108.

[51] *The SS Wimbledon*, Series C, No. 3, vol. I, Request of the Polish Government to the PCIJ (22 May 1923), pp. 102–104.

[52] *Nuclear Tests cases*, *supra*, fn. 25, Orders of 20 December 1974, ICJ Reports (1974), pp. 530 *et seq.*, 535 *et seq.*

[53] *Pulau Ligitan case*, *supra*, fn. 1, ICJ Reports (2001), pp. 575, 585 (para. 21).

[54] Rules of Court, PCIJ, Series D, No. 2, pp. 560, 572–573.

[55] 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.

The same time specification was maintained 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, Art. 64 was again renumbered, to Art. 69, but again without changing the time requirement.

Article 81, para. 1 of the 1978 Rules of Court changed the relevant time for the filing of an application to intervene. It states that:

> An application for permission to intervene under the terms of Article 62 of the Statute, signed in the manner provided for in Article 38, paragraph 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.

22 The current Rules of Court therefore require an application to intervene to be made 'as soon as possible' and in any case 'before the closure of the written proceedings'. In the *Libya/Malta Continental Shelf case*, it was argued that as Italy's application to intervene was made only two days before the time limit for the filing of the counter-memorials, it was out of time. The Court held that this was within the time stipulated in Art. 81, para. 1 of the Rules.

23 The date of the closure of written proceedings may be undetermined. 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 further round of pleadings after the counter-memorial. Nicaragua's application was in fact within the specified time as it was filed two months before the date for the counter-memorials, but the Court noted that this meant that the date for the closure of written proceedings remained to be determined after the filing of the counter-memorial.[56]

24 Similarly, in the *Pulau Ligitan case*, the Special Agreement provided for the possibility of one or more round of written pleadings—the exchange of rejoinders—'if the Parties so agree or if the Court decides so . . . '. The Philippines' application was made on 13 March 2001 after the third round of written pleadings terminated on 2 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 Art. 81, para. 1 of the Rules.[57]

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.

II. Access to Written Information

25 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.[58] There are opposing tensions. 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.

[56] *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, ICJ Reports (1990), pp. 92, 98 (para. 12).

[57] *Pulau Ligitan case, supra*, fn. 1, ICJ Reports (2001), pp. 575, 586 (paras. 24–26).

[58] Moore, J.B., 'The Organisation of the Permanent Court of International Justice', *Columb. L R* 22 (1922), pp. 497–511, p. 507.

The first Rules of Court favoured access to the parties' documentation. Article 38 of the 1922 Rules of Court stated: 26

> 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.[59]

This Rule privileged third parties 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 Art. 62 and to assist a State wishing to intervene in framing its request.[60]

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:

> 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.[61]

This Rule ensured that the parties were able to put their views about third party 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 Art. 48 in the 1972 Rules of Court.

Article 78 of the 1978 Rules of Court allows a State considering intervention 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.

Article 85, para. 1 of the Rules of Court provides that a State that has had its request to intervene accepted has access to the pleadings in the case. This makes it clear that until that point, an intervening State has no greater rights than any other State under Art. 53 of the Rules. Article 53 of the Rules of Court applies to 'a State entitled to appear' while intervention under Art. 62 is open to any State. 27

Article 53 of the Rules of Court reiterates that the Court must ascertain the views of the parties before deciding whether to allow third parties access to the written documents of the case. The article does not state that the parties' views are determinative. However, 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 and Equatorial Guinea received the pleadings of the parties in their respective cases before filing their requests to intervene.[62] 28

[59] *Supra*, fn. 54, p. 569.

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

[61] PCIJ, Series D, No. 1, 3rd edn., pp. 28, 43.

[62] *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, ICJ Reports (1990), pp. 92, 98 (para. 13); *Land and Maritime Boundary case, supra*, fn. 29, ICJ Reports (1999), pp. 1029, 1035 (para. 17).

29 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, as a third party, 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 party than of the parties, especially where the third party is handicapped by its ignorance of the exact scope of the claims.[63] One response is that it is exactly because a third party is seeking a privilege that it should have to achieve higher standards of precision than that asked of parties commencing their own litigation.

30 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.[64] 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 pleadings'.[65] A State seeking to intervene that has had access to the pleadings is better able to comply with the requirements of Art. 81 of the Rules, discussed below.[66]

III. Procedures for Consideration of a Request to Intervene

31 The Rules of Court also specify the Court's procedures when an application to intervene under Art. 62 is made. These 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.[67]

In 1926, these procedures were amplified to allow for oral proceedings. A new paragraph was added to Art. 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.[68]

[63] *Tunisia/Libya Continental Shelf case*, *supra*, fn. 6, Sep. Op. Oda, ICJ Reports (1981), pp. 23 *et seq.*; Sep. Op. Schwebel, *ibid.*, pp. 35 *et seq.*

[64] *Pulau Ligitan case*, *supra*, fn. 1, ICJ Reports (2001), pp. 575, 590 (para. 39).

[65] *Ibid.*, p. 585 (para. 22). [66] *Cf. infra*, MN 74. [67] *Supra*, fn. 54, p. 573.

[68] Revised Rules of Court, PCIJ, Series D, No. 1, 1st edn., pp. 33, 57.

These provisions were not amended in 1931. In 1936, Art. 59 of the Rules was renumbered as Art. 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 Art. 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'.[69]

Article 64 of the 1945 Rules of Court largely reiterated the same procedures, apart from a new subpara. 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 Art. 64, paras. 4 and 5 of the 1936 Rules of Court as Art. 64, paras. 5 and 6 of the 1945 Rules of Court.

The 1978 Rules of Court are more detailed with respect to the procedures to be followed 32
when a State has made a request to intervene. They are spelled out in Arts. 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: (a) the Secretary-General of the United Nations; (b) the Members of the United Nations; (c) other States entitled to appear before the Court; (d) any other States which have been notified under Art. 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, giving the Court discretion in the form of its determination.

Objections by either or both of the parties to the application to intervene in their 33
written or oral observations are given full consideration but are not determinative of the outcome. Article 62 specifies that it is for the Court to decide upon a request to intervene. Even if neither party objects to the intervention, the Court must determine whether the criteria of Art. 62 have been met. However, if either party does object, Art. 84, para. 2 of the Rules requires the Court to hold a hearing. 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 was unclear on this point.

[69] *Supra*, fn. 61, p. 50.

It 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 intervention as a party or as a third 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 (eventually successful) request to intervene.[70]

IV. When the Court Should Consider a Request to Intervene

34 Article 84 of the Rules affords 'litigants an important protection against protracted uncertainty'[71] by requiring that an application to intervene be dealt with 'as a matter of priority', although the Court has a discretion to act otherwise. It is unclear whether this requires a request to intervene to be dealt with at the earliest phase of proceedings. In the *Nuclear Tests cases*, where the proceedings were conducted under the 1972 Rules, the ICJ deferred consideration of Fiji's request to intervene until it had pronounced on France's objections to jurisdiction and admissibility.[72] The dismissal of New Zealand's and Australia's case before determination on the merits meant that it never did so.

35 In the *Nuclear Tests (Request for Examination) 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 Art. 62 does not limit the phase of proceedings when such an application may be made. Accordingly, it should be admissible at any stage at which a third party's legal interest may be affected by the decision in the case. In the particular circumstances of the case, it was argued that the provisional measures phase might be the only time a request to intervene could have any practical effect.[73] The Court's dismissal of New Zealand's request precluded any decision on this point, but in light of the rejection of El Salvador's Declaration of Intervention under Art. 63 at the provisional measures stage in the *Nicaragua case*, this must remain unclear.[74]

F. Requirements for Intervention

I. The Rules of Court[75]

36 Unlike the text of Art. 62, the relevant Rules of Court have been changed a number of times. The changes have not resolved the ambiguities and uncertainties. One of the areas

[70] *Land and Maritime Boundary case, supra*, fn. 29, ICJ Reports (1999), pp. 1029, 1034 (para. 11).

[71] Lachs, M., 'The Revised Procedure of the International Court of Justice', in *Essays on the Development of the International Legal Order in Memory of Haro F. Va Panhuys* (Kalshoven, F., Kuyper, P., Lammers, J., eds., 1980), pp. 21–52, 40.

[72] *Nuclear Tests cases, supra*, fn. 25, Orders of 12 July 1973, ICJ Reports (1973), pp. 320 *et seq.*, 324 *et seq.*

[73] *Nuclear Tests (Request for Examination) case, supra*, fn. 30, ICJ Reports (1995), pp. 288, 295 (paras. 24–25). The Applications of the Marshall Islands, Micronesia, Samoa and the Solomon Islands were all in similar terms.

[74] The issue of oral proceedings with respect to an application to intervene also arises under Art. 63, *cf. Nicaragua case, supra*, fn. 15, Declaration of Intervention of the Republic of El Salvador, Order, ICJ Reports (1984), pp. 215 *et seq.* *Cf.* also Chinkin on Art. 63 MN 45–49.

[75] *Cf.* Rosenne, *Intervention*, pp. 39–78.

that successive Rules of Court have addressed is what the third party must include in a request to intervene. The initial draft of the 1922 Rules of Court stated in its Art. 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.[76]

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 Art. 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: 37

a) Have third parties interested in a case the right of intervention only when the original parties have accepted the compulsory jurisdiction of the Court?
b) Is there any difference in this regard between Art. 62 and Art. 63 of the Statute?
c) 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 Art. 31 of the Statute?[77]

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 as the object and form of intervention, the need for a jurisdictional link between the parties and the State requesting intervention, and the parameters of the requisite legal interest to support intervention. In light of the lack of consensus a 'meagre'[78] Rule was adopted in 1922 that avoided these controversial issues, leaving them to be decided by the Court as they arose.[79] 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.[80]

The Article was not amended in 1926 or 1931. In 1936, it was renumbered as Art. 64 and slightly reworded but the requirements for an application to intervene remained the same. The ICJ has noted about these revisions that: 38

when the Permanent Court revised its Rules it had not had any real experience of the operation of Article 62 in practice; and in consequence its further debates on the Rules do not throw a great deal of light on the problems involved in the application of that Article.[81]

[76] Rules of Court, Draft prepared by the Secretariat, PCIJ, Series D, No. 2, pp. 253, 266.
[77] Questions to be submitted for discussion at a full meeting of the Court on 7 February 1922, *ibid.*, pp. 289–291.
[78] Lachs, *supra*, fn. 71, pp. 21, 39.
[79] *Tunisia/Libya Continental Shelf case*, *supra*, fn. 6, ICJ Reports (1981), pp. 3, 14 (para. 23).
[80] *Supra*, fn. 54, p. 573.
[81] *Tunisia/Libya Continental Shelf case*, *supra*, fn. 6, ICJ Reports (1981), pp. 3, 14 (para. 24).

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.

39 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, para. 2 of the 1978 Rules of Court is as follows:

> 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.

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.[82]

The request to intervene must be made through an application. As a matter of form, the application to intervene must set out how it satisfies each of the requirements of Art. 81, para. 2 of the Rules, with separate paragraphs addressed to each. The requirements (a)–(c) are not formal (such as those relating to timing, or the submission of a list of documents under Art. 81, para. 3 of the Rules), but involve the Court in assessing the substance of an application to intervene. The Rules provide no guidelines to the Court with respect to its exercise of discretion in assessing whether a State has satisfied the requirements for a request to intervene, and the Court has recognized that there remain many 'doubts and uncertainties which surround the exercise of the procedural facility of intervention under Art. 62 of its Statute'.[83]

40 The Court's approach to each of the requirements set out in the Rules must be considered in turn. Although they are to be set out separately in an application to intervene, in many ways they overlap. The paucity of applications under Art. 62 has meant that the jurisprudence has developed on an *ad hoc* basis and lacks a coherent framework. Indeed, Rosenne has observed that each case is considered on its own merits and that there is no 'precedent' from one case to the next.[84] Accordingly, it is necessary to look at the Court's holdings on each of these requirements in each of the cases where it has had to respond to a request to intervene under Art. 62.

II. Interest of a Legal Nature

41 Under Art. 62, a State must base its request upon an 'interest of a legal nature'. A request to intervene does not require a third State to identify legal rights that need protection, but rather an 'interest of a legal nature which may be affected by the decision in the case'.

A request to intervene is necessarily speculative, for neither the third party nor the Court can know at this preliminary stage what the outcome of the proceedings will be. Article 62 appears to address and resolve this problem for it demands only that the interest 'may be affected', not that it 'will be affected' or even that it is 'likely to be affected'. This wording suggests that the third party should not be put to a high standard of proof. In the *Land, Island and Maritime Frontier Dispute case*, Nicaragua asserted that

[82] Rosenne, *Intervention*, p. 67.
[83] *Libya/Malta Continental Shelf case*, *supra*, fn. 10, ICJ Reports (1984), pp. 3, 28 (para. 46).
[84] Rosenne, *Intervention*, p. 33.

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 proof and that it must 'demonstrate convincingly what it asserts', that is to identify the interest of a legal nature and to show how it may be affected.[85] The Court has emphasized that it is for the State wishing to intervene to choose the means of discharging that burden of proof, including whether it submits documentary evidence with its application.[86] In the *Land, Island and Maritime Frontier Dispute case*, the Court simultaneously stressed the subjective wording of Art. 62,[87] 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'. The Court has not interpreted the term 'affected' in the context of Art. 62, although in the *Nicaragua case* it did discuss the meaning of 'affected' in the context of the United States' reservation to its declaration under Art. 36, para. 2.[88]

The Court has to decide whether a State requesting intervention has shown that it has 42
a valid interest of a legal nature.[89] There is no definition of this expression in Art. 62. Article 62 does not specify that the interest be a 'legal'[90] or 'lawful' interest,[91] but rather that it is one of a legal nature. Nor need the interest be direct, substantial or specific to the State in question. Despite the apparent broadness of the wording of Art. 62, the Court has on a number of occasions rejected a request to intervene on the basis that the State has not shown that it has an appropriate interest of a legal nature.

In the *Tunisia/Libya Continental Shelf case*, Malta had to word its application in light 43
of the parties' special agreement bestowing jurisdiction on the Court. This 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'.[92] 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. Malta apprehended that its interests in that area of seabed might be affected by the Court's decision, both through its formal operation and through the Court's enunciation of substantive elements of law applicable to continental shelf delimitation. 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

[85] *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, ICJ Reports (1990), pp. 92, 117 (para. 61).

[86] *Pulau Ligitan case, supra*, fn. 1, ICJ Reports (2001), pp. 575, 587 (para. 29).

[87] '. . . it is not for the Court itself—or in the present case the Chamber—to substitute itself for the State in that respect.' *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, ICJ Reports (1990), pp. 92, 117 (para. 61).

[88] Declaration of 26 August 1946. The reservation excluded 'disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties before the Court, or (2) the United States of America specially agrees to jurisdiction', *ICJ Yearbook* (1946–1947), pp. 217–218.

[89] In the *Application for Review of Judgement No. 273 of United Nations Administrative Tribunal*, 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.

[90] In the *South West Africa cases* (Ethiopia/South Africa; Liberia/South Africa), Second Phase, ICJ Reports (1966), pp. 6, 20–22 (paras. 10–15), the ICJ gave a narrow interpretation to the concept of legal interest.

[91] *Pulau Ligitan case, supra*, fn. 1, ICJ Reports (2001), pp. 575, 590 (para. 40).

[92] Art. 1 of the agreement, cited in *Tunisia/Libya Continental Shelf case, supra*, fn. 6, Merits, ICJ Reports (1982), pp. 9, 23 (para. 4).

is a shared interest with other States and is insufficient to establish an interest within the terms of Art. 62.[93] 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. For example, Judge Oda stressed that any demarcation of the continental shelf between Libya and Tunisia was not merely an abstraction but involved a specific maritime area.[94] Other third party claims within the same area would make the parties' claims in effect claims to rights *erga omnes*, justifying a third party in requesting intervention rather than relying upon Art. 59 to protect its interests.

44 In the *Libya/Malta Continental Shelf 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. This rejection presented third States with an apparently insoluble dilemma. If a third State thinks its proprietary 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 may be rejected as going beyond mere intervention and raising a new dispute, which is not within the terms of the special agreement by which the parties granted the Court jurisdiction. At the same time, if the third party presents its interests in general terms, its request may be refused as was the case with Malta in the *Tunisia/Libya Continental Shelf case*. This position appeared insupportable and indeed Judge Ago considered that the rejection of Italy's request to intervene sounded the 'death-knell' for Art. 62.[95]

45 In the first successful request to intervene under Art. 62 before the ICJ, the *Land, Island and Maritime Frontier Dispute case*, 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'.[96] Nicaragua stated its legal interest in those areas in general terms, without claiming a specific right inside 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.[97]

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.[98] 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'

[93] *Tunisia/Libya Continental Shelf case, supra*, fn. 6, ICJ Reports (1981), pp. 3, 8 (para. 13). In the *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, ICJ Reports (1990), pp. 92, 124 (para. 76), 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'.

[94] *Tunisia/Libya Continental Shelf case, supra*, fn. 6, Sep. Op. Oda, ICJ Reports (1981), pp. 23, 31 (para. 19); Sep. Op. Schwebel, *ibid.*, pp. 35 *et seq.*

[95] *Libya/Malta Continental Shelf case, supra*, fn. 10, Diss. Op. Ago, ICJ Reports (1984), pp. 115, 129 (para. 22). *Cf.* also *infra*, MN 54.

[96] *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, ICJ Reports (1990), pp. 92, 116 (para. 58).

[97] *Ibid.*, p. 117 (para. 60). The specific aspects of Nicaragua's legal interest are set out *ibid.*, p. 108 (para. 37).

[98] *El Salvador v. Nicaragua*, Central American Court of Justice, reprinted in *AJIL* 11 (1917), pp. 674–696.

between the riparian States. The Chamber held that it could not prejudge the issue on the merits, in considering a request to intervene.[99] It had to determine the question of Nicaragua's legal interest from the perspective of either a judgment in favour of El Salvador, or one in favour of Honduras. 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'.[100] The Chamber upheld Nicaragua's request to intervene with respect to the status of the Gulf.

The chamber found Nicaragua had no legal interest with respect to sovereignty over certain islands, nor in the maritime delimitation between El Salvador and Honduras; rather the question is whether a legal interest of Nicaragua would be 'affected' by such maritime delimitation. It occurs frequently in practice that 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—El Salvador and Honduras in the instant case—in no way signifies that by such an operation itself the legal interest of a third riparian State of the Gulf, Nicaragua, may be affected.[101]

Nicaragua's claim to intervene was accepted, but it was restricted to the maritime area where both parties claimed there was some form of collective regime impacting upon Nicaragua as the third riparian State. In its restriction of the scope of the intervention to what it considered proper, the Chamber took the same approach as the Court had taken in its response to Cuba's declaration of intervention under Art. 63 in *Haya de la Torre*.[102] 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 *Tunisia/Libya* and *Libya/Malta Continental Shelf cases*.

In the *Land and Maritime Boundary case*, Nigeria contested the Court's jurisdiction, 46
which was based upon declarations made under Art. 36, para. 2. Unlike the other boundary proceedings where a third State had sought intervention, there was no special agreement between the parties and no community of interest between them in the integrity of their dispute. In its preliminary objections, Nigeria had argued for the inadmissibility of the case on the basis of the indispensable third party principle. It argued that 'the question of maritime delimitation necessarily involves the rights and interests of third States.'[103] 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.

It could not determine at the preliminary objections phase whether this would prevent it from rendering full judgment on Cameroon's application. It added that '[*w*]*hether such*

[99] The Chamber asserted 'it must not in any way anticipate its decision of these matters on the merits'. *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, pp. 92, 118 (para. 62).

[100] *Ibid.*, p. 121 (para. 72). [101] *Ibid.*, p. 124 (para. 77).

[102] *Haya de la Torre case, supra*, fn. 15, ICJ Reports (1951), pp. 71, 76. *Cf.* also Chinkin on Art. 63 MN 15.

[103] *Land and Maritime Boundary case, supra*, fn. 29, Preliminary Objections, ICJ Reports (1998), pp. 275, 322 (para. 112).

third States would choose to exercise their rights to intervene in these proceedings pursuant to the Statute remained to be seen'.[104] In light of this virtual invitation to intervene, it is not surprising that Equatorial Guinea chose to do so and that the full Court unanimously accepted Equatorial Guinea's request. The other State in the Gulf of Guinea, São Tomé and Principe, did not request intervention.

The legal interests claimed by Equatorial Guinea were in 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.' It emphasized that it was not intervening with respect to the land boundary and was not asking the Court to determine its maritime boundaries. 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.

47 The legal interest asserted by the third State, the Philippines, in the *Pulau Ligitan case* did not lie in the subject matter of the dispute before the Court. The Philippines denied having any territorial claim over Pulau Ligitan and Pulau Sipadan, the subject matter of the case between Indonesia and Malaysia, but asserted that it does have a claim of sovereignty in North Borneo. It 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 Philippines' request required the Court first to consider whether Art. 62 precludes the interest of a legal nature of a State seeking intervention 'in anything other than the operative decision of the Court' in the case before it.[105] What constitutes the 'decision' in a case is undefined. The Court observed that the English word 'decision' can be given a narrower or broader meaning, but that the French text clearly has a broader meaning. In accordance with the broader meaning that is compatible with both authentic texts, it determined that the meaning is not limited to the *dispositif* alone of a judgment but may extend to the 'reasons which constitute the necessary steps to the *dispositif*'.[106]

48 The Court then had to determine whether an intervening State can assert an interest in something other than the subject matter of the case before it. When the PCIJ began drafting its Rules of Procedure in 1922 it became apparent that there was no consistent approach to this question:

> Some Members of the Permanent Court took the view that only an interest of a legal nature in the actual subject of the dispute itself would justify intervention under Art. 62; others considered that it would be enough for the State seeking to intervene to show that its interests might be affected by the position adopted by the Court in the particular case.[107]

49 It is clear that an intervening State must not introduce a new case before the Court, nor enter pleadings on that new case. The Court accepted that the Philippines was not looking to the Court to prejudge any dispute that might exist between the Philippines

[104] *Ibid.*, p. 324 (para. 116), emphasis added in the *Land and Maritime Boundary case, supra*, fn. 29, ICJ Reports (1999), pp. 1029, 1030 (para. 2).

[105] *Pulau Ligitan case, supra*, fn. 1, ICJ Reports (2001), pp. 575, 596 (para. 47).

[106] *ibid.*, p. 596 (para. 47). *Cf.* also Bernhardt on Art. 59 MN 34 as well as Zimmermann/Thienel on Art. 60 MN 5 and also Damrosch on Art. 56 MN 12–14, 21.

[107] *Tunisia/Libya Continental Shelf case, supra*, fn. 6, ICJ Reports (1981), pp. 3, 14 (para. 23).

and Malaysia. The Court considered that '[w]hether a stated interest in the reasoning of the Court and any interpretations it might give is an interest of a legal nature' justifying intervention 'can only be examined by testing whether the legal claims which the State seeking to intervene has outlined might be thus affected'.[108] The Court must examine such claims '*in concreto* and in relation to all the circumstances of a particular case'.[109] The extended nature of the claim beyond the subject matter of the dispute before the Court required the Philippines to show with particular clarity the existence of an interest of a legal nature[110] and that it should be able to do this 'on the basis of its documentary evidence upon which it relies to explain its own claim'.[111] 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. The Court concluded that:

> 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 Art. 62.[112]

III. Purposes of Intervention

Article 81, para. 2 (b) of the Rules of Court introduced the requirement that a State must specify the precise purpose 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'.[113] Yet, Art. 62 makes no reference to the purpose of intervention and nor did any of the earlier Rules of Court. The identification of a proper purpose for intervention is linked with that of identification of the intervening State with one of the parties, an issue that was raised in 1922 but left undecided. The different purposes of intervention led to opinions that there should be different types of intervention to avoid all claims having to be brought within the same legal framework, or having the same consequences.[114] 50

The Court has linked its analysis of the proper purpose for intervention to that of the requirement of a legal interest. 51

In the *Tunisia/Libya Continental Shelf case*, the Court determined that the purpose for intervening must not be vaguely expressed, for that would make it difficult for the parties to know the issues they must answer. Malta's expressed purpose of intervention was to 'submit its views to the Court on the issues raised in the pending case, before the Court has given its decision in that case'.[115] 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.[116] Nor did Malta seek to intervene in respect of interests in common with either party, but as an independent participant wishing to raise its own

[108] *Pulau Ligitan case, supra*, fn. 1, ICJ Reports (2001), pp. 575, 597 (para. 55).

[109] *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, ICJ Reports (1990), pp. 92, 117 (para. 61), affirmed in the *Pulau Ligitan case, supra*, fn. 1, ICJ Reports (2001), pp. 575, 597 (para. 55).

[110] *Pulau Ligitan case, supra*, fn. 1, ICJ Reports (2001), pp. 575, 598 (para. 59).

[111] *Ibid.*, p. 603 (para. 81). [112] *Ibid.* (para. 83).

[113] *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, ICJ Reports (1990), pp. 92, 128 (para. 85).

[114] *Cf.* notably *Tunisia/Libya Continental Shelf case, supra*, fn. 6, Sep. Op. Oda, ICJ Reports (1981), pp. 23 *et seq.*; Sep. Op. Schwebel, *ibid.*, pp. 35 *et seq.*; *Libya/Malta Continental Shelf case, supra*, fn. 10, Sep. Op. Mbaye, ICJ Reports (1984), pp. 35 *et seq.*; Diss. Op. Oda, *ibid.*, pp. 90 *et seq.*

[115] *Tunisia/Libya Continental Shelf case, supra*, fn. 6, ICJ Reports (1981), pp. 3, 9 (para. 14).

[116] For a discussion on the purpose of Malta's request *cf.* Jessup, P.C., 'Intervention in the International Court', *AJIL* 75 (1981), pp. 903–909.

concerns. Malta's application to intervene failed because it was in effect asking the Court to prejudge the merits of Malta's claim against Tunisia in a different dispute, which Malta had not put before the Court.[117] This was not a proper purpose for intervention.

52 In the *Libya/Malta Continental Shelf case*, Italy similarly did not wish to ally itself with either of the parties, but to present and seek protection for its own interests. Italy had to overcome the hurdle of lack of precision raised in Malta and was therefore more explicit in its statement of purpose. The purpose of Italy's request was to 'ensure defence before the Court of its interest of a legal nature',[118] that is to ensure respect for its sovereign rights over areas of its continental shelf. Italy argued that there was no dispute between itself and the parties; it merely wished to preserve its rights. This position was supported by Libya, which argued that as there was no dispute between the parties and the third party, there could be no intervention.

The Court held that it was for itself to determine whether the request raised a new dispute and to isolate the true object of the claim by having regard to all the circumstances of the case,[119] including the nature of the subject matter, the nature of the purported legal interest, and the potential impact of its judgment. The majority decided that the Court would inevitably be led 'to make a finding as to Italy's rights to the extent they are opposed to Malta's and Libya's claims'.[120] The Court concluded that it is not a valid purpose of intervention to allow a third State to introduce an extraneous dispute or to use the opportunity to assert additional individual rights. This approach prevents a third State that has a proprietary claim over the subject matter of a dispute between other States from raising its claim before the Court. In the words of Judge Jennings:

> I am unable to see why, if A and B are engaged in litigation about an item of property which I believe in fact belongs to me, I should be required to stand by, and may not be permitted formally to alert the Court to what I believe to be my rights.[121]

53 Italy also 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 Art. 62 are met.[122]

54 In the *Land, Island and Maritime Frontier Dispute case*, Nicaragua had to avoid the pitfalls of the *Tunisia/Libya Continental Shelf case* and the *Libya/Malta Continental Shelf case*. It claimed that its purposes for intervention were to protect its legal rights in the Gulf of Fonseca 'by all legal means available', and to 'inform the Court of the nature of the legal rights of Nicaragua which are in issue in the dispute'.[123] El Salvador argued that

[117] *Pulau Ligitan case, supra*, fn. 1, ICJ Reports (2001), pp. 575, 597 (para. 53).

[118] *Libya/Malta Continental Shelf case, supra*, fn. 10, ICJ Reports (1984), pp. 3, 11 (para. 17). Judge Sette-Camara thought it inappropriate to link interest and purpose in this way, for 'an interest of a legal nature' is demanded by Art. 62 and should not be confused with the added requirement of 'precise object'. *Ibid.*, Diss. Op. Sette-Camara, pp. 71, 81 (para. 52).

[119] 'The Court must ascertain the true object and purpose of the claim and in doing so it cannot confine itself to the ordinary meaning of the words used; it must take into account the Application as a whole.' *Ibid.*, p. 19 (para. 29), citing the *Nuclear Tests cases, supra*, fn. 25, Judgments, ICJ Reports (1974), pp. 253, 262 (para. 29), pp. 457, 466 (para. 30).

[120] *Libya/Malta Continental Shelf case, supra*, fn. 10, ICJ Reports (1984), pp. 3, 21 (para. 33).

[121] *Ibid.*, Diss. Op. Jennings, pp. 148, 149 (para. 5).

[122] *Ibid.*, p. 25 (para. 40).

[123] *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, ICJ Reports (1990), pp. 92, 108 (para. 38).

this formulation was insufficiently precise. It asserted that the application failed 'to indicate [Nicaragua's] position with respect to the fundamental issue in the case, which is to define the object of the litigation'.[124] 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.[125] El Salvador asserted that:

> 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 [as Italy did] 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.[126]

The Chamber 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'.[127] The case reinforces the dilemma of intervention noted above:[128] '[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'.[129] To require an intervening State to give an exhaustive account of its legal interests in its request to intervene, or during the oral proceedings would render Art. 62 meaningless.

The Chamber held that there is no requirement for a dispute to have been identified 55
in negotiations between the intervener and the original parties before an application to intervene can be made.[130] It considered 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.[131] It is a proper purpose for a State to inform the Court of its legal rights in the case to ensure those rights would not be affected in its absence.[132] Further, an assertion by the intervening State that it seeks to protect those rights by all legal means does not imply that the intervener seeks a favourable pronouncement on its own claims. 'The "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'.[133]

Nicaragua's position appears indistinguishable from that of Italy. It appears that the chamber was willing to allow some effectiveness to the procedure of intervention under Art. 62, although the precise basis for the distinction between the positions of Italy and Nicaragua in their respective claims remains unclear.

Following carefully the language used by the Chamber in the *Land, Island and* 56
Maritime Frontier Dispute case, in its application to intervene in the *Land and Maritime Boundary between Cameroon and Nigeria*, Equatorial Guinea made a classic exposition of the protective purpose of Art. 62. Equatorial Guinea sought to 'protect the legal rights of the Republic of Equatorial Guinea . . . by all legal means available'.[134] It made it clear

[124] Merits, ICJ Reports (1985), p. 111 (para. 45). [125] *Ibid.*, p. 129 (para. 88).
[126] *Ibid.* (para. 88).
[127] *Ibid.*, p. 130 (para. 89). [128] *Cf. supra*, MN 44. [129] Greig, pp. 285, 306.
[130] *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, ICJ Reports (1990), pp. 92, 114 (para. 51). [131] *Ibid.*, pp. 111–112 (para. 45).
[132] This approach was affirmed in *Land and Maritime Boundary case, supra*, fn. 29, ICJ Reports (1999), pp. 1029, 1034 (para. 14).
[133] *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, ICJ Reports (1990), pp. 92, 131 (para. 92).
[134] *Land and Maritime Boundary case, supra*, fn. 29, ICJ Reports (1999), pp. 1029, 1032 (para. 4).

that it was not introducing a new dispute with respect to its own boundaries but was seeking:

> to present and to demonstrate its legal rights and interests to the Court and, as appropriate, to state its views as to how the maritime boundary claims of Cameroon or Nigeria may or may not affect the legal rights and interests of Equatorial Guinea.[135]

Its second purpose was thus 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 . . . '.[136] 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.[137]

57 The Philippines laid out three purposes for its intervention in the *Pulau Ligitan case*. The first was to preserve its historical and legal rights with respect to its claims over North Borneo to the extent that they may be affected by the Court's decision with respect to the areas claimed by the parties. Second, the Philippines sought to inform the Court of the nature and extent of these rights. The Court noted that the Philippines had formulated the first purpose of its request in language similar to that in other applications to intervene. Such formulations 'have not been found by the Court to present a legal obstacle to intervention'.[138] The second purpose was also deemed proper:

> [s]o far as the object of [a State's] intervention is 'to inform the Court of the nature of the legal rights [of that State] which are in issue in the dispute,' it cannot be said that the object is not a proper one: it seems indeed to accord with the function of intervention.[139]

58 The Philippines' third stated objective was 'to appreciate more fully the indispensable role of the Honourable Court in comprehensive conflict prevention and not merely for the resolution of legal disputes'. It did not amplify this in its oral arguments and the Court rejected its relevance as a purpose of intervention. Judge *ad hoc* Weeramantry considered this to be a function of the Court, not of intervention.[140]

59 Although the Court may consider the third State's purpose in requesting intervention to be improper, the very act of requesting intervention may in fact give the State what it wants, that is to draw the Court's attention to its position.[141] Despite the refusal of Italy's request to intervene, the Court indicated that it would have to frame its judgment in the dispute between the parties in such a way as clearly to exclude third party interests.[142] In the subsequent judgment in the *Libya/Malta Continental Shelf case*, the boundary between Libya and Malta was deliberately limited to those areas where no third party claim existed.[143] In the words of Judge Schwebel, the boundary 'cuts off the line at the

[135] *Ibid.*, (para. 3). [136] *Ibid.* [137] *Ibid.*, p. 1034 (para. 14).

[138] *Pulau Ligitan case, supra*, fn. 1, ICJ Reports (2001), pp. 575, 606 (para. 87).

[139] *Ibid.* (para. 88). The Court was referring to its judgment in *Land and Maritime Boundary case, supra*, fn. 29, ICJ Reports (1999), pp. 1029 *et seq.*, and that of the chamber in the *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, ICJ Reports (1990), pp. 92 *et seq.*

[140] *Ibid.*, Sep. Op. Weeramantry, pp. 630, 649 (para. 40).

[141] 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; *Libya/Malta Continental Shelf case, supra*, fn. 10, Sep. Op. Nagendra Singh, ICJ Reports (1984), pp. 31 *et seq.*

[142] *Ibid.*, p. 26 (paras. 42–43); Diss. Op. Oda, pp. 90, 102 (para. 27); Diss. Op. Jennings, pp. 148, 157 (para. 27).

[143] 'The present decision must . . . be limited in geographical scope so as to leave the claims of Italy unaffected, that is to say that the decision of the Court must be confined to the area in which . . . that State has no claims to continental shelf rights.' *Libya/Malta Continental Shelf case, supra*, fn. 10, Merits, ICJ Reports (1985), pp. 13, 26 (para. 21).

limit of Italian claims'.[144] In this way the Court adhered to its protective assurance that it would not prejudice third party claims.[145] This approach was not accepted by a number of the dissenting judges who expressed the view that it was inconsistent to reject Italy's application to intervene, and subsequently to adjudicate only on part of the claim presented by the parties,[146] thereby undermining the right of the parties to determine the ambit of their dispute before the Court. The Court took a similar approach in the *Land and Maritime Boundary case*, holding that it could not rule on Cameroon's claims in a way that might affect Equatorial Guinea and São Tomé and Principe's rights.[147] In this way the intervening State, Equatorial Guinea and the non-intervening State, São Tomé and Principe were accorded the same consideration.

The relationship between the parties and an intervening State has been controversial 60
from 1922 onwards. This is most explicit in the context of a jurisdictional link but is also relevant to the purpose of intervention. In none of the above cases did the State requesting intervention under Art. 62 have as its objective to be identified with either of the parties to the proceedings. It has been noted however that '[a]n intervenor may make an independent claim, or it may side with one of the previous parties'.[148] For example in the *SS Wimbledon case*, Poland wished to intervene on the side of the four applicant States against Germany, and in the *Nuclear Tests cases*, Fiji's interests were aligned with those of Australia and New Zealand against France. The requests in the *SS Wimbledon case* and in the *Nuclear Tests cases* were made before 1978, when the Rules of Court did not require an intervener to state the precise purpose of its request.

Although the concerns of Australia and the Pacific Island States were compatible with 61
those of New Zealand in the *Nuclear Tests (Request for Examination) case*, their requests for intervention stress their own legal interests. The case was after 1978 (in 1995), but as it was a continuation of New Zealand's 1974 *Nuclear Tests case*, the applicable Rules of Court were those of 1972. Nevertheless, the States requesting intervention furnished the information required by the 1978 Rules of Court. The expressed purpose for their requests for intervention was to protect their own legal interests. In its application to intervene, the government of the Marshall Islands pointed out that most requests for intervention are in the context of boundary disputes 'where the third party interest is to a greater or lesser extent opposed to those of the parties to the proceedings'.[149] 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 case* and the purported purpose of intervention, *i.e.* to uphold obligations owed *erga omnes*, was not considered by the Court.

The concept of a 'public interest' intervention had been indirectly suggested in the 62
Railway Traffic between Lithuania and Poland case, where the PCIJ affirmed third party interests in freedom of transit and communications, noting that 'nevertheless no third

[144] *Ibid.*, Diss. Op. Schwebel, pp. 172, 176.

[145] *Cf.* Conforti, B., 'L'Arrêt de la CIJ dans l'affaire Libye-Malta', *RGDIP* 90 (1986), pp. 314–343, pp. 334–338.

[146] *Libya/Malta Continental Shelf case, supra*, fn. 10, Merits, Diss. Op. Mosler, ICJ Reports (1985), pp. 114, 117; Diss. Op. Oda, pp. 123, 130; Diss. Op. Schwebel, pp. 172, 176.

[147] *Land and Maritime Boundary case, supra*, fn. 29, Merits, ICJ Reports (2002), pp. 303, 421 (para. 238).

[148] Hudson, M.O., *The Permanent Court of International Justice. A Treatise* (1934), p. 371, citing the Procès-Verbaux, *supra*, fn. 3, p. 745.

[149] *Nuclear Tests (Request for Examination) case, supra*, fn. 30, ICJ Reports (1995), pp. 288, 294 (para. 19).

State has considered it necessary or expedient to intervene'.[150] This might be taken as an indication that such a request would have been granted. 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.[151] Judge Schwebel made this suggestion in the context of El Salvador's declaration of intervention under Art. 63, which was dismissed. The possibility of intervention in order to protect a third party interest shared with other members of the international community has not been directly addressed by the majority of the ICJ, although its holding in the *Tunisia/Libya Continental Shelf case* that a shared interest with other States is insufficient to establish an interest within the terms of Art. 62 suggests that it would not be accepted as a proper purpose for intervening.[152]

63 It seems that a State that wishes to present common arguments with one of the parties should seek to join the proceedings, or commence its own action, if it can establish jurisdiction. In the *Land, Island and Maritime Frontier Dispute case*, the Chamber stated that the difference between intervention and bringing a new party into a case 'is not only a difference in degree; it is a difference in kind'.[153]

IV. Jurisdictional Link

64 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 Art. 62 and Art. 36 on the Court's jurisdiction (as there is for example in Art. 53).[154] The issue of whether an intervening State requires a jurisdictional nexus has been highly controversial from the outset of the PCIJ.

65 In 1922, when Art. 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 Art. 36 of the PCIJ Statute, the jurisdictional aspect of Art. 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.[155] 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'.[156] The President of the Court, Judge Loder, rejected restricting intervention to those States that had accepted the Court's jurisdiction as contrary to the Statute[157] 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.

[150] *Landwarów-Kaisiadorys case, supra*, fn. 37, PCIJ, Series A/B, No. 42, pp. 107, 118. *Cf.* however *supra*, fn. 37, for comment on the Court's use of the term 'intervention'.

[151] *Nicaragua case, supra*, fn. 15, Provisional Measures, Diss. Op. Schwebel, ICJ Reports (1984), pp. 190 *et seq.*; Declaration of Intervention of the Republic of El Salvador, ICJ Reports (1984), Diss. Op. Schwebel, pp. 215, 223.

[152] *Tunisia/Libya Continental Shelf case, supra*, fn. 6, ICJ Reports (1981), pp. 3, 9 (paras. 12–13).

[153] *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, ICJ Reports (1990), pp. 92, 133 (para. 97).

[154] *Cf.* von Mangoldt/Zimmermann on Art. 53 MN 52–55.

[155] *Tunisia/Libya Continental Shelf case, supra*, fn. 6, ICJ Reports (1981), pp. 3, 14 (para. 23).

[156] PCIJ, Series D, No. 2, p. 87.

[157] PCIJ, Series D, No. 2, p. 96.

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 Art. 62 requires a jurisdictional link between the intervener and the parties, the other that this would be importing into Art. 62 a condition that is not specified within the article.[158] This view asserts that the only relevant conditions are those specified in Art. 62 and acceptance of the Court's Statute incurs acceptance of the possibility of a State seeking to intervene. That Art. 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.[159] 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.[160]

66 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 59 of the 1922 Rules of Court was silent on both issues. 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*.[161] Despite all the discussions, the Rules of Court of 1933, 1936, 1946 and 1972 cast no further light on these questions.

67 The ICJ did not have to face these conflicting views directly before the Chamber acceded to Nicaragua's request to intervene in the *Land, Island and Maritime Frontier Dispute case*. In earlier cases, notably 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.[162]

68 Article 81, para. 2 (c) of the 1978 Rules of Court introduced the 'sweeping and surprising innovation'[163] 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'.[164] In the *Libya/Malta Continental Shelf case*, diverse views were again expressed.[165]

[158] *Pulau Ligitan case, supra*, fn. 1, Sep. Op. Weeramantry, ICJ Reports (2001), pp. 630, 633 (para. 9).
[159] *Ibid.* (para. 10). [160] Moore, *supra*, fn. 58, pp. 497, 507.
[161] PCIJ, Series D, No. 2, Add. 3, p. 304.
[162] *E.g. Nuclear Tests cases, supra*, fn. 25, Orders of 20 December 1974, ICJ Reports (1974), Declaration Onyeama, pp. 531–532 and pp. 536–537; Declaration Dillard and Waldock, *ibid.*, p. 532 and p. 537; Declaration Jiménez de Aréchaga, *ibid.*, pp. 533–534 and pp. 537–538; Declaration by Barwick, *ibid.*, pp. 533 and 538.
[163] *Libya/Malta Continental Shelf case, supra*, fn. 10, Diss. Op. Sette-Camara, ICJ Reports (1984), pp. 71, 76 (para. 32). [164] *Ibid.*
[165] *Ibid.*, Sep. Op. Nagendra Singh, pp. 31 *et seq.*; Sep. Op. Mbaye, pp. 35 *et seq.*; Sep. Op. Jiménez de Aréchaga, pp. 55 *et seq.*; Diss. Op. Sette-Camara, pp. 71 *et seq.*; Diss. Op. Oda, pp. 90 *et seq.*; Diss. Op. Ago, pp. 115 *et seq.*; Diss. Op. Schwebel, pp. 131 *et seq.* and Diss. Op. Jennings, pp. 148 *et seq.*

69 Once the Chamber in the *Land, Island and Maritime Frontier Dispute case* 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 party interests in intervention against those of the parties in their litigation. If a jurisdictional nexus is not required for intervention, parties could find their proceedings intruded upon by a third party, which could not commence proceedings against either of them. This could undermine the requirement of party consent to the Court's jurisdiction, and could 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 party claims.

70 In the *Land, Island and Maritime Frontier Dispute case*, the Chamber determined that a jurisdictional link between Nicaragua and the parties was not required for intervention as a non-party. Article 81, para. 2 (c) of the Rules does not mean that third party interveners have to show a jurisdictional link, for that would entail the Rules modifying the Statute. It merely allows 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'.[166] In reaching this position, the Court stressed the character of intervention as incidental proceedings, which makes it inappropriate for the presentation of new claims. Intervention is to protect a third party's interests in litigation; it is not for a third party to 'tack on a new case, to become a new party, and so have its own claims adjudicated by the Court'.[167] It is available where a State with an interest it needs to protect cannot become a party because it cannot establish jurisdiction. This is consistent with the conclusion that it is an improper purpose of intervention to introduce a new dispute before the Court. Since intervention does not create a new case, the consent of the parties is not necessary. When States become parties to the Statute, they accept the Court's competence to make determinations under Art. 62. This is quite separate from their acceptance of the principle of consent to the Court's competence to hear and determine a case.[168] Similarly, since it is for the Court to determine a request to intervene in accordance with Art. 62, the parties cannot by their consent allow a third party to intervene.

71 In the *Land and Maritime Boundary case*, the full Court confirmed the Chamber's approach. Like Nicaragua, Equatorial Guinea did not seek to become a party in the case and claimed no basis of jurisdiction between itself and either of the parties.[169] The Court 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. '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'.[170]

[166] *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, ICJ Reports (1990), pp. 92, 135 (para. 100).

[167] *Ibid.*, pp. 133–134 (para. 97).

[168] Judge Jennings has asserted that the principle of consent is served, not negated, by allowing for intervention. The requesting State has not consented to other States litigating about matters that affect its interests, and facilitating intervention could allow an expression of consent. *Libya/Malta Continental Shelf case, supra*, fn. 10, Diss. Op. Jennings, ICJ Reports (1984), pp. 148–149 (paras 1–3).

[169] *Land and Maritime Boundary case, supra*, fn. 29, ICJ Reports (1999), pp. 1029, 1032 (para. 5).

[170] *Ibid.*, pp. 1034–1035 (para. 15).

Although its finding that the Philippines had not established an appropriate legal interest in the *Pulau Ligitan case* made it unnecessary for the Court to consider the question of jurisdiction, it explicitly confirmed that no jurisdictional link is required where the intervening State does not seek to become a party to the case.[171] This leaves open the possibility of intervention as a party where such a jurisdictional link would still be required, a position that was expressly affirmed in the *Land, Island and Maritime Frontier Dispute case* and the *Pulau Ligitan case.*[172] Since the Court has never found this to be the case, there is no jurisprudence on the consequences of such a determination. 72

By not insisting on a jurisdictional link for intervention as a non-party, the Court has removed at least one hurdle for third parties seeking intervention. This approach has clarified the protective nature of the procedure and facilitated a request for intervention by a third party in the face of objections by the parties. In this respect, the Court has accorded a priority to third party rights over party autonomy. 73

V. Furnishing of Documents

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.[173] 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'. 74

In its written observations to the Philippines' application to intervene in the *Pulau Ligitan case,* Indonesia argued that the Philippines' application was not in conformity with the Rules of Court because it provided no documentary evidence to support its assertion of a legal interest. The Court responded that the provision does not require a State to submit documentary evidence, only that if it does so, it should provide a list of that evidence.[174]

G. The Status of an Intervening State

The status of an intervening State as a party or non-party[175] to the proceedings has been another point of uncertainty since 1922. In the Advisory Committee's introduction of the procedure of intervention in 1922, three positions were identified: 75

> 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?[176]

[171] *Pulau Ligitan case, supra,* fn. 1, ICJ Reports (2001), pp. 575, 588–589 (paras. 35–36).

[172] *Land, Island and Maritime Frontier Dispute case, supra,* fn. 11, ICJ Reports (1990), pp. 92, 134 (para. 99); *Pulau Ligitan case, supra,* fn. 1, ICJ Reports (2001), pp. 575, 588 (para. 35).

[173] 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.

[174] *Pulau Ligitan case, supra,* fn. 1, ICJ Reports (2001), pp. 575, 587 (para. 29).

[175] 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 enigma;' Elias, *The ICJ,* p. 95.

[176] Report of Mr de Lapradelle, Chairman of the Drafting Committee, *Procès-Verbaux, supra,* fn. 3, p. 745. Elias noted that the case of the intervening State seeking the exclusion of one of the parties is more a case of substitution than intervention. It has had no practical application; Elias, *The ICJ,* p. 94.

The Advisory Committee of Jurists answered this question in the affirmative, provided the conditions of what became Art. 62 were met. However, the first draft of the 1922 Rules of Court, where Art. 48 stated that the intervener 'shall take part in the proceedings as a joint party'[177] was rejected and the adopted Art. 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 Art. 62, or the rights and obligations of an intervening State. 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.*

76 The procedural consequences of a successful request to intervene were first specified in Art. 65 of the 1936 Rules of Court. The Rules were minimalist and dealt only with the filing of memorials and counter-memorials. In particular they did not resolve the status of the intervening State as party or non-party to the proceedings. Article 65 stated that 'if the party intervening expresses a desire to file a memorial on the merits',[178] 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 Art. 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 whether the application should be granted,' determine time limits for the intervening State to file a memorial on the merits and for the parties to respond.[179]

77 Article 65 of the 1946 Rules of Court repeated Art. 65 of the 1936 Rules of Court. Article 85 of the 1978 Rules of Court is more detailed about the consequences of intervention but still does not denote the intervening State as either a party or a non-party. 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 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.

78 In the *Land, Island and Maritime Frontier Dispute case*, the Chamber, mindful of the fact that this was the first successful claim under Art. 62, discussed the procedural rights of an intervening State. It emphasized that third party procedural rights do not correspond with those of the parties: 'It is therefore clear that a State which is allowed to intervene in a case, does not, by reason only of being the intervener, become also a party to the case'.[180]

Therefore a non-party intervener 'does not acquire the rights, or become subject to the obligations, which attach to the status of a party'.[181] An intervener can acquire that status

[177] *Supra*, fn. 76. [178] *Supra*, fn. 61, p. 50.

[179] *Ibid.*, and already Art. 59 of the Revised Rules of Court, *supra*, fn. 68.

[180] *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, ICJ Reports (1990), pp. 92, 134 (para. 99). [181] *Ibid.*, p. 135 (para. 102).

'provided there be the necessary consent by the parties to the case'.[182] Any intervener (party or non-party) 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 a non-party intervening State to be heard by the Court or Chamber only on the subject of the intervention, not on the case as a whole. This restriction meant that in the *Land, Island and Maritime Frontier Dispute case*, Nicaragua could not address the interpretation of the special agreement concluded between the parties on 24 May 1986 because that remained *res inter alios acta* with respect to Nicaragua. In the *Land and Maritime Boundary case*, the Court granted Equatorial Guinea permission to intervene 'to the extent, in the manner and for the purposes set out in its Application'.[183] In its oral presentation, Equatorial Guinea asked the Court: 79

> not to delimit a maritime boundary . . . in areas lying closer to Equatorial Guinea than to the coasts of the two Parties or to express any opinion which could prejudice [its] interests in the context of our maritime boundary negotiations with our neighbours.[184]

Other consequences of intervention are not spelled out in Art. 85 of the Rules, in particular the extent to which the intervening State is bound by the decision in the case. The view has been expressed that a third party cannot be allowed the benefit of intervention without some corresponding commitment, a matter of some concern to the Court in the *Tunisia/Libya Continental Shelf case*.[185] By analogy with Art. 63, a non-party intervening State must be bound by the judgment to the extent that it relates to the intervention. Although a non-party intervener seeks protection of its own rights, where the judgment recognizes the rights of other States 'the intervening State will certainly lose all present or future claim in conflict with those rights'.[186] It should be able to enforce the part of the judgment relevant to itself to the same extent as the parties. 80

The composition of the Court to determine claims of intervention has been the subject of argument, and the third party status of an intervening State has been emphasized in this context. One issue is whether an intervening State can appoint a judge *ad hoc*.[187] In 1922, the PCIJ rejected a proposal to provide intervening States with this right.[188] In the *SS Wimbledon case*, Poland stated that it was renouncing its right to appoint a judge *ad hoc*, because it did not consider it necessary.[189] In the *Haya de la Torre case*, Cuba made no such request with respect to its declaration of intervention.[190] When Malta sought to nominate a judge *ad hoc* 'for the purpose of the intervention proceedings', it was refused because a State seeking intervention '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'.[191] 81

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, and not by the Chamber 82

[182] *Ibid.*, p. 134 (para. 99).

[183] *Land and Maritime Boundary case, supra*, fn. 29, ICJ Reports (1999), pp. 1029, 1035 (para. 18).

[184] *Land and Maritime Boundary case, supra*, fn. 29, Merits, ICJ Reports (2002), pp. 303, 329–330 (para. 29).

[185] *Cf.* Bernhardt on Art. 59 MN 63–66.

[186] *Tunisia/Libya Continental Shelf case, supra*, fn. 6, Sep. Op. Oda, ICJ Reports (1981), pp. 23, 27 (para. 29).

[187] *Cf.* also Kooijmans on Art. 31 MN 44–46.

[188] PCIJ, Series D, No. 2, pp. 177, 215.

[189] *The SS Wimbledon*, PCIJ, Series C, No. 3, vol. I, pp. 118 *et seq.*

[190] *Haya de la Torre case, supra*, fn. 15, ICJ Reports (1951), pp. 71 *et seq.*

[191] *Tunisia/Libya Continental Shelf case, supra*, fn. 6, ICJ Reports (1981), pp. 3, 6 (para. 8).

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.[192] Nicaragua argued that the characterization of intervention as incidental proceedings and principles of procedural equity supported its claim. The Court held that it is for the tribunal seised of a principal issue to deal with all subsidiary matters, including incidental proceedings arising from the case. An intervening State must take the procedural position in the case as it finds it, and only the body with jurisdiction on the merits can effectively decide whether the requirements of Art. 62 have been met.[193] After this decision, Nicaragua amended the application to intervene it had made on 17 November 1989 and did not put before the Chamber 'any request that it reconstitute itself or that it exclude from its own competence *ratione materiae* those aspects of the case that [it] had requested that the full Court exclude from the mandate of [the] Chamber'.[194]

83 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.[195] 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 elected 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 Art. 17 of the Rules of Court.[196] 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,[197] 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',[198] 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.

84 It is not known whether an intervening State can seek any remedy other than a declaration of its interests. In the *SS Wimbledon case*, Poland stated that it did not claim damages as its interest in free access to the Kiel Canal could be upheld by a declaration, and in no other case has the question arisen.[199] In the *Pulau Ligitan case*, the Court rejected the suggestion that Art. 85 of the Rules provides remedies.[200] Awarding damages

[192] *Land, Island and Maritime Frontier Dispute case*, supra, fn. 11, 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, ICJ Reports (1987), pp. 10 *et seq.* *Cf.* also Lauterpacht, *Administration of Justice*, pp. 87–98, as well as Zimmermann, A., 'Bemerkungen zum Verhältnis von ad hoc Kammern des Internationalen Gerichtshofes und Intervention—Die Entscheidung im Streitfall vor dem IGH zwischen El Salvador und Honduras', *ZaöRV* 50 (1990), pp. 646–660.

[193] *Cf.* also Palchetti on Art. 26 MN 36.

[194] Agent for Nicaragua, cited in the *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, ICJ Reports (1990), pp. 92, 110 (para. 42).

[195] *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, Order of 28 February 1990, ICJ Reports (1990), Diss. Op. Shahabuddeen, pp. 18 *et seq.*

[196] *Cf.* Palchetti on Art. 26 MN 35.

[197] 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 case*, Diss. Op. Tarassov, ICJ Reports (1990), pp. 11, 13.

[198] *Ibid.*, Diss. Op. Shahabuddeen, pp. 18, 19.

[199] 'It [Poland] also states that it does not intend to ask the German Government for any special damages for the prejudice caused . . . .' *SS Wimbledon case, supra*, fn. 22, PCIJ, Series A, No. 1, pp. 11, 12–13.

[200] *Pulau Ligitan case, supra*, fn. 1, ICJ Reports (2001), pp. 575, 607 (para. 92).

to an intervening State is inconsistent with the aim of protecting third party interests from prejudice by a decision between other States. An award of damages assumes that loss has occurred and must be compensated. In these circumstances, intervention is not appropriate, for the intervening State would appear more like a separate claimant than a third party protecting its interests.

However, the procedural rights of intervening States are restricted both before and 85
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.

H. Relationship between Arts. 62 and 59

Article 59 might appear to negate the need for intervention, as it denies the precedential 86
effect of any decision of the Court.[201] However, if Art. 59 is seen as the major protection for third parties, Art. 62 would be redundant. While the majority in the *Libya/Malta Continental Shelf case* considered that 'the rights claimed by Italy would be safeguarded by Art. 59 of the Statute',[202] other judges did not agree. Judge Jennings, for example, stated that the purpose of Art. 59 is solely to prevent legal principles accepted by the Court in a particular case from being binding also upon other States or in other disputes.'[203] He emphasized that Art. 59 cannot alter the persuasive effect of Court decisions, and added that in a dispositive judgment such as one allocating rights and duties, it provides a purely technical protection. However, in the complexities of international negotiations and disputes, a technical protection is unlikely to be determinative.[204] Judge Jennings labelled the majority's attitude as revealing an 'enervating bilateralism' and would not accept that Art. 59 could displace Art. 62.[205] Similarly, Judge Oda emphasized that Art. 59 may not be accepted as guaranteeing that a decision of the Court in a case regarding title *erga omnes* would not affect a claim by a third State to the same title.[206]

The framing of its judgment in the *Libya/Malta Continental Shelf case* in such a way as 87
clearly to exclude Italy's interests suggests that the Court was not wholly confident that

[201] *Cf.* 'If "trench upon" was intended perhaps to go further than the language of the Statute, [*i.e.* Art. 62] then it should be borne in mind that it would be hardly possible, given Art. 59 of the Statute.' *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, ICJ Reports (1990), pp. 92, 130 (para. 90). But *cf.* also Bernhardt on Art. 59 MN 68.

[202] *Libya/Malta Continental Shelf case, supra*, fn. 10, ICJ Reports (1984), pp. 3, 26 (para. 42).

[203] *Ibid.*, Diss. Op. Jennings, pp. 148, 157 (para. 27). Judge Jennings was referring to the objective of Art. 59 as defined by the PCIJ in *Certain German Interests in Polish Upper Silesia*, (Germany/Poland), PCIJ, Series A, No. 7, pp. 3, 19.

[204] '[T]he slightest acquaintance with the jurisprudence of this Court shows that Art. 59 does by no manner of means exclude the force of persuasive precedent. So the idea that Art. 59 is protective of third States' interests in this sense, at least is illusory.' *Libya/Malta Continental Shelf, supra*, fn. 10, Diss. Op. Jennings, ICJ Reports (1984), pp. 148, 157 (para. 27) *Cf.* also Bernhardt on Art. 59 MN 46–48, 58.

[205] '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.' *Libya/Malta Continental Shelf case, supra*, fn. 10, Diss. Op. Jennings, ICJ Reports (1984), pp. 148, 159 (para. 34).

[206] *Ibid.*, Diss. Op. Oda, pp. 90, 102 (para. 27).

Art. 59 was adequate to protect third party interests.[207] Judge Sette-Camara suggested that Art. 59 goes to the doctrine of *res judicata* and not that of precedent[208] 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 parties.

88 Even if the view that Art. 59 is applicable to the doctrine of *res judicata* and not to that of precedent were accepted, it does not resolve the problem for third parties. In the *Land, Island and Maritime Frontier Dispute case*, the Chamber recognized:

> that a decision on the status of the waters of the Gulf of Fonseca would not be limited to the parties: a decision . . . of the Chamber rejecting El Salvador's contentions, and finding that there is no condominium in the waters of the Gulf which is opposable to Honduras, would be tantamount to a finding that there is no condominium at all.
>
> Similarly, a finding that there is no such 'community of interests' as is claimed by Honduras, between El Salvador and Honduras in their capacity as riparian States of the Gulf, would be tantamount to a finding that there is no such 'community of interests' in the Gulf at all.[209]

89 In the subsequent decision in the *Land, Island and Maritime Frontier Dispute case*, the Chamber reiterated that Nicaragua was a non-party intervener and that it was not therefore bound by the judgment under Art. 59, nor was the judgment *res judicata* with respect to Nicaragua.[210] In the words of the Chamber, 'the right to be heard . . . does not carry with it the obligation of being bound by the decision'. In the *Land and Maritime Boundary case*, the Court asserted that the protection afforded third parties by Art. 59 may be insufficient in maritime boundary delimitations.[211] Although a Court decision is formally *res inter alios acta*,[212] in practice it will create expectations in other members of the world community that will influence their future actions. Rosenne emphasizes that Art. 59 cannot be read in isolation from other provisions of the Statute and the Charter which impose an obligation upon member States to uphold the Court's decisions. Even parties are only bound by the decision in the case itself; in any subsequent proceedings arising out of different facts, that is where *res judicata* does not apply, parties and non-parties are in an identical position with respect to Art. 59; neither are legally bound, but both can anticipate a consistent decision.

I. Intervention under Other Conventions

90 Despite the uncertainties and ambiguities in Art. 62, similar provisions have been included in other conventions that provide for international adjudication. Generally, provisions for arbitral procedures provide for intervention only with the parties' consent, although Art. 36 of the 1928 General Act of Arbitration (Pacific Settlement of International Disputes) allows for intervention in the terms of Art. 62 of the PCIJ Statute 'in judicial or arbitral procedure'.

[207] *Ibid.*, pp. 90, 102 (para. 27); Diss. Op. Jennings, pp. 148, 157 (para. 27).
[208] *Ibid.*, Diss. Op. Sette-Camara, pp. 71 *et seq.*
[209] *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, ICJ Reports (1990), pp. 92, 122 (para. 70).
[210] *Land, Island and Maritime Frontier Dispute case, supra*, fn. 11, Merits, ICJ Reports (1992), pp. 351, 609–610 (paras. 421–424).
[211] *Land and Maritime Boundary case, supra*, fn. 29, Merits, ICJ Reports (2002), pp. 303, 421 (para. 238).
[212] *Libya/Malta Continental Shelf case, supra*, fn. 10, ICJ Reports (1984), pp. 3, 17 (para. 26).

Article 31 of the Statute of the ITLOS[213] provides for intervention in similar terms to Art. 62. There is no requirement that the intervening State must have accepted the Tribunal's jurisdiction under Art. 287 of the UN Convention on the Law of the Sea. However, there is a final paragraph to Art. 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'. 91

Article 10 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes[214] deals with procedures for third party members by providing when such a member may make submissions and the procedures to be followed. It states: 92

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 [Dispute Settlement Body] (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.

Article 36, para. 1 of the European Convention on Human Rights 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 submit written comments and take part in hearings.[215] 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. 93

J. Evaluation

The poor legislative history, the decision taken in 1922 not to attempt to resolve the difficult issues of Art. 62 in the Rules of Court but to leave them to be decided in the circumstances of the cases as they arose,[216] 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'.[217] Provision for third parties to participate in proceedings before the ICJ is restrictive. Although the *Land, Island and Maritime* 94

[213] Annex VI of the UN Convention on the Law of the Sea.

[214] Annex 2 of the 1994 WTO Agreement.

[215] 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 on Art. 34 MN 40–43 and *infra*, MN 101.

[216] *Tunisi/Libya Continental Shelf case, supra*, fn. 6, ICJ Reports (1981), pp. 3, 14 (para. 23).

[217] *Pulau Ligitan case, supra*, fn. 1, Sep. Op. Weeramantry, ICJ Reports (2001), p. 630 (para. 2).

Frontier Dispute case, the *Land and Maritime Boundary case*, and the *Pulau Ligitan case* have clarified that an intervening State does not have to establish its own jurisdictional link, at least when it does not seek to become a party in the proceedings, there is still considerable lack of certainty over other issues. Indeed, Rosenne has stated that 'there is probably only one thing that can be said with any degree of confidence . . . that Art. 62 is not intended to open the door to "political intervention" '.[218]

95 In considering the new procedure of intervention in 1920 the Advisory Committee of Jurists looked to municipal law for some guidance.[219] The degree to which intervention procedures in domestic courts (where there is compulsory jurisdiction) should be applied in international tribunals (where there is no compulsory jurisdiction) is not clear. Nor does intervention operate within the same parameters within all municipal systems. In the *Pulau Ligitan case*, Judge Weeramantry favoured comparison with domestic legal systems because they could throw light on the international jurisprudence on intervention and reinvigorate a 'cramped and ineffectual' international procedure.[220] He thought that domestic comparisons could be especially useful with respect to controversial issues such as what constitutes a legal interest, relevant factors favouring intervention, the object of intervention, and the exercise of the court's discretionary powers.

Judge Weeramantry analyzed policies for and against intervention through comparison between intervention in domestic (civil, common law and socialist legal systems) and international courts.[221]

96 Judge Weeramantry considered that some policy considerations are common to domestic and international litigation:

—Economy of justice, allowing the Court to consider together issues that might otherwise require separate proceedings.
—Protection of third party rights without requiring the third party to commence separate proceedings.
—The public interest in disposing of cases in the least time.
—Enabling the Court to have a fuller background to the issues.
—'Third parties furnish elements of law and fact; this insures the decision will conform to the truth, and therefore with justice, so that the authority and credibility of justice do not suffer.'
—Parties may collude against a third party.
—Avoidance of the risk of contrary judgments on the same matter.
—A second judge will take a first decision into account, especially if it made changes in legal doctrine.
—The same judge would be even more inclined to follow the first decision.
—It avoids repetitive judgments.
—It allows the court to make a more harmonious and effective judgment on the basis of the direct and indirect interests of all involved parties.

97 Judge Weeramantry considered, however, certain factors to be pertinent only to international litigation:

—Art. 62, and its drafting history, shows the intention to provide for third party intervention despite Art. 59.
—The ICJ has a conflict prevention role as well as a dispute resolution role.

[218] Rosenne, *Intervention*, p. 32. [219] *Procès-Verbaux, supra*, fn. 3, pp. 592–594, 608–610.
[220] *Pulau Ligitan case, supra*, fn. 1, Sep. Op. Weeramantry, ICJ Reports (2001), pp. 630, 634 (para. 13).
[221] *Ibid.*, pp. 630, 637–643 (paras. 20–23). Judge *ad hoc* Weeramantry refers to a comprehensive compilation of the use of intervention in domestic jurisdictions, Habscheid, W., *Les conditions de l'intervention volontaire dans un procès civil*, submitted to the ICJ in the *Tunisia/Libya Continental Shelf case, supra*, fn. 6, Pleadings, vol. III, pp. 459–484.

—The persuasive authority of ICJ decisions influences, *de facto* the legal interests of all States.
—There is no appeal from decisions of the ICJ making it important that decisions are based on as full and accurate information as possible.
—The Court uses its previous decisions as having precedential effect and has no power of annulment.
—Only parties can seek revision of decisions.

Nevertheless Judge Weeramantry thought that there are also factors that weigh against intervention before the ICJ: 98

—States may be dissuaded from using the Court if they fear third party intrusion into their disputes.
—States may seek to do indirectly through intervention what they cannot do directly, unless a jurisdictional link is required.
—International law has not historically favoured third party interference in bilateral disputes.
—Unrestricted intervention would potentially allow every State to identify some legal interest in any dispute.
—Art. 59 provides adequate third party protection.
—A State can enjoy the benefits of entering proceedings without incurring the obligations of parties; it can enjoy a 'free ride.'
—A private suitor has an interest in keeping third parties from 'meddling' in his/her suit.
—The procedure could be used to prejudge the merits of a different dispute that is not before the Court.[222]
—The intervener could use the procedure to obtain a 'quasi-advisory opinion'.
—The Court 'would not neglect its responsibilities as custodians of justice for the entire international community.'
—The Court can take into account the interests of third States without the need for intervention.[223]
—The Court does not decide title 'in the absolute' but rather determines which of the parties has offered a better proof of title. Its decision therefore does not foreclose third party interests.[224]

Finally Judge Weeramantry considered differences between domestic and international litigation. 99

—The lack of compulsory jurisdiction before the ICJ.
—The complexity of international relations.
—The issue of jurisdictional link does not arise in domestic litigation where there is compulsory jurisdiction.
—If a jurisdictional link is required in many instances a third State would be unable to intervene in matters of importance to it.
—The pre-eminence of the ICJ gives greater weight to its pronouncements than is the case with domestic courts.
—The obstacle presented to a third party by having no right of access to the parties' pleadings.
—The distinction between arbitration and intervention with respect to the weight and authority of decisions of the Court with respect to third parties.
—The need for the ICJ to take a wider perspective than a domestic court because of its place in the development of international law.

[222] Judge Weeramantry commented that this was the basis for the rejection of Malta's claim to intervene. It was also the case with respect to the claim of the Philippines.

[223] The Court did this in the *Libya/Malta Continental Shelf case, supra*, fn. 10, ICJ Reports (1984), pp. 3 *et seq.*, with respect to Italy and in the *Land and Maritime Boundary case, supra*, fn. 29, ICJ Reports (1999), pp. 1029 *et seq.*, with respect to São Tomé.

[224] This is especially applicable to boundary disputes, the context for most third party requests to intervene.

—The ICJ cannot order joinder of a third State but must take account of its interests when they form the very subject matter of the case (the indispensable third party principle).
—The Court's role in preventive diplomacy and comprehensive conflict resolution.

100 The favoured approach towards intervention in international adjudication depends upon the way in which these various conflicting principles are reconciled in the context of the particular case. As was long ago recognized, 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.[225] 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 party in protecting what it perceives as its interest. Allowing third party intervention means that the case differs from that presented to the Court by the parties, but denying third party access to the Court risks upholding party autonomy at the expense of third party interests.

101 Nevertheless, despite its long history, the Court has remained reluctant to extend third party intervention. This is the case even though intervention under Arts. 62 and 63 are the only third party procedures under the Court's contentious jurisdiction and these procedures are limited to States.[226] 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 Art. 66, para. 2.

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[225] Report by Mr Leon Bourgeois, *supra*, fn. 1.

[226] Miller has proposed that intervention should be made available for other international actors; Miller, in Gross, *Future of the ICJ*, vol. II, pp. 550, 560.