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HAGUE INTERNATIONAL TRIBUNALS

INTERNATIONAL COURT OF JUSTICE

Interests of a Legal Nature Justifying Intervention before the ICJ

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Abstract
According to Article 62 of the ICJ Statute, a third state can be granted permission to intervene before the Court provided 'that it has an interest of a legal nature which may be affected by the decision in the case'. The interest of a legal nature is a crucial requirement under Article 62 and the scope of intervention largely depends on the definition of such a requirement. In light of the recent case law of the Court, the author explores the different types of legal interest that could justify permitting a third state to intervene before the ICJ.

Key words
incidental proceedings; International Court of Justice; intervention; legal interest; third states

1. INTRODUCTION

Intervention under Article 62 of the ICJ Statute is an incidental proceeding aimed at protecting third states whose legal interests may be at issue in contentious cases before the ICJ.[1] Together with Article 63 of the Statute, this provision ensures the participation of third states in a pending litigation before the Court. The two separate forms of intervention envisaged by the Statute apply to distinct situations and require different conditions to be fulfilled. According to Article 63, a third state can intervene when it is a party to a multilateral treaty whose construction is in question before the Court. According to Article 62, a third state can intervene when its legal interests may be affected by the decision of the Court in the main proceedings.

Permission to intervene under Article 62 has been granted only in a very limited number of cases.[2] The case law of the ICJ has gradually narrowed the field of application of intervention through a very restrictive interpretation of the conditions to

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1 *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Application to Intervene, Judgment of 21 March 1984, [1984] ICJ Rep. 3, at 18 ff., para. 28.

2 Intervention has been granted by the ICJ in three cases: *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application by Nicaragua for Permission to Intervene, Judgment of 13 September 1990, [1990] ICJ Rep. 92; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Application by Equatorial Guinea for Permission to Intervene, Order of 21 October 1999, [1999] ICJ Rep. 1029;

be met to accord permission to intervene.[3] The definition of the 'interest of a legal nature' required under Article 62 to grant a third state permission to intervene is a crucial issue in that regard. Broadening or narrowing the scope of intervention largely depends upon the kind of legal interest that the ICJ regards as sufficient to justify intervention. Yet, this notion is still largely uncertain.[4]

In 2011, the Court adopted three decisions concerning the applications by Costa Rica, Greece, and Honduras for permission to intervene.[5] These decisions merit particular attention because, on the one hand, two of them address directly the notion of 'legal interest' and, on the other hand, they provide a number of elements that are quite useful in defining with more precision the different types of legal interest justifying the involvement of third states in proceedings before the Court.

The present analysis will first take into account the contribution of the recent decisions to the general definition of the legal interest that a third state must prove in order to be permitted to intervene in a contentious case before the ICJ. Second, it will attempt to identify the different legal interests that, in practice, could justify permitting a third state to intervene before the ICJ, provided that the other requirements of intervention are met.

2. General qualification of the legal interest

While the capacity in which a state may intervene is not specified by the relevant provisions of the ICJ Statute and the Rules of Court,[6] in its case law, the Court has accepted that a third state may be permitted to intervene either as a party or as a non-party to the main proceedings.[7] Yet, in both situations, the state seeking to intervene must demonstrate that it has an 'interest of a legal nature that may be affected by the decision' of the Court in the main proceedings. In other words, the existence of such a legal interest is a requirement common to intervention as a party

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Jurisdictional Immunities of the State (Germany v. Italy), Application by the Hellenic Republic for Permission to Intervene, Order of 4 July 2011 (not yet published).

3 See, e.g., G. Guyomar, *Commentaire du règlement de la Cour internationale de justice adopté le 14 avril 1978: Interprétation et pratique* (1983), 533; D. W. Greig, 'Third Party Rights and Intervention before the International Court', (1992) 32 Virg. JIL 285, at 373.

4 See, in particular, S. Rosenne, *Intervention in the International Court of Justice* (1993), 196; E. Doussis, 'Intérêt juridique et intervention devant la Cour internationale de justice', (2001) 105 RGDIP 55, at 56; P. Palchetti, 'Opening the International Court of Justice to Third States: Intervention and Beyond', (2002) 6 MPYUNL 139, at 142 ff.

5 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Honduras for Permission to Intervene, Judgment of 4 May 2011 (not yet published); *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Costa Rica for Permission to Intervene, Judgment of 4 May 2011 (not yet published); *Jurisdictional Immunities of the State (Germany v. Italy), supra* note 2. For a commentary on these decisions, see S. Forlati, 'Intervento nel processo ai sensi dell'Art. 62 dello statuto: quale coerenza nella giurisprudenza della Corte internazionale di giustizia', (2011) 94 *Rivista di diritto internazionale* (forthcoming).

6 Neither Art. 62 of the Statute of the International Court of Justice nor Art. 81 of the Rules of Court clarifies in which capacity a third state may seek intervention.

7 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), supra* note 2, para. 99. The possibility for a third state to intervene as a non-party had already been envisaged by Judge Oda in his 1981 Separate Opinion; see *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Application by Malta for Permission to Intervene, Judgment of 14 April 1981, [1981] ICJ Rep. 3, at 23 ff. (Judge Oda, Separate Opinion).

and intervention as a non-party; thus, it is a general requirement under Article 62 of the Statute.[8]

2.1. The distinction between interests and rights

In the judgments concerning the applications for permission to intervene submitted, respectively, by Honduras and Costa Rica, the Court clarified that, under Article 62, the 'State seeking to intervene as a non-party does not have to establish that one of its *rights* may be affected; it is sufficient for that State to prove that its *interest* of a legal nature may be affected'.[9] This does not preclude a would-be intervener from showing that it actually possesses *rights*, which may be affected by the decision of the Court. But it is not required to do so under Article 62, which provides for a less demanding standard of proof.

The statement of the Court just cited is confined to states seeking to intervene as *non-parties* and it may be wondered whether, despite the general wording of Article 62 of the ICJ Statute and of Article 81 of the Rules of Court, a state seeking to intervene as a *party* should rather demonstrate that one of its *rights* may be affected by the decision of the Court in the main proceedings. The Court has never granted permission to intervene as a party. But, arguably, in that case, the Court will be asked to make findings on precise legal claims of the third state that are closely related to the main dispute.[10] Thus, the third state would have to show that something more than its legal interest is involved in the dispute brought before the Court.

The distinction between rights and legal interests has been put into question by some judges[11] and definitely supported by others.[12] To be sure, there are difficult cases in which it is not easy to make a distinction between a right and a legal interest. Yet, the distinction is generally accepted in legal doctrine.[13] In its case law, the Court has drawn a clear distinction between an interest and a right, notably in the *Barcelona Traction* case,[14] and this distinction lies at the heart of the general requirement established by Article 62 of the Statute. In addition, at the preliminary stage of a decision concerning permission to intervene, it seems reasonable that the third state is merely asked to show that the decision on the main proceedings may

8 The other common requirement is the 'precise object of the intervention' laid down by Art. 81 of the Rules of Court.

9 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Honduras for Permission to Intervene, *supra* note 5, para. 37 (emphasis added). The same distinction is made by the Court in the Judgment concerning the Application by Costa Rica; see *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Costa Rica for Permission to Intervene, *supra* note 5, para. 26 (emphasis added).

10 See subsection 3.1, *infra*.

11 See *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *supra* note 1, at 124 (Judge Ago, Dissenting Opinion); *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Honduras for Permission to Intervene, *supra* note 5 (Judges Al-Khasawneh and Keith, Declarations); *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Costa Rica for Permission to Intervene, *supra* note 5 (Judge Al-Khasawneh, Dissenting Opinion, and Judge Keith, Declaration).

12 See, in particular, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Costa Rica for Permission to Intervene, *supra* note 5 (Judge Abraham, Dissenting Opinion).

13 See Rosenne, *supra* note 4, at 32; P. Palchetti, *supra* note 4, at 153–8; S. Forlati, '"Interesse di natura giuridica" ed effetti per gli stati terzi delle sentenze della Corte internazionale di giustizia', (2002) 85 *Rivista di diritto internazionale* 99.

14 *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment of 5 February 1970, [1970] ICJ Rep. 3, at 35, paras. 44–46.

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affect its 'legal interest' – that is, a position that is still characterized by a certain degree of uncertainty under international law and that could be qualified as a right only at a later stage of the proceedings. When compared to a legal interest, a right identifies a clear entitlement based on law. As clarified by Judge Abraham, each state 'possède un intérêt légitime à protéger l'exercice de ses droits, mais l'on peut avoir un intérêt à protéger sans que celui-ci soit lié, à proprement parler, à un droit correspondant, en tout cas à un droit déjà établi'.[15]

2.2. The legal nature of the interest

The two recent judgments of the ICJ have also made clear that the interest required by Article 62 of the Statute must be 'of a legal nature', excluding that claims 'of a purely political, economic or strategic nature'[16] could fulfil the condition for granting intervention before the Court.

In particular, the legal interest is defined by the Court as 'a real and concrete claim of that State [seeking to intervene], based on law'.[17] First, an interest of a legal nature must be 'based on law'. The same concept was already expressed by Judge Mbaye in his course delivered at The Hague Academy of International Law in 1988: 'l'"intérêt juridique" ... est celui qui peut se justifier par référence à une règle de droit.'[18] Or, in the words of Judge ad hoc Gaja, the interest of a legal nature 'must exist according to international law'.[19] Second, the legal interest must be 'real and concrete' as opposed, it may reasonably be assumed, to 'general interests' that can be regarded as too remote from the specific situation at issue in the main proceedings, as will be discussed in more detail below.

2.3. The 'may be affected' requirement

In order to grant permission to intervene, it is not sufficient for the third state to show that it has a legal interest in the main proceedings before the Court. It should also prove that its interest 'may be affected by the decision of the Court' in that case.[20]

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15 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Costa Rica for Permission to Intervene, *supra* note 5, para. 6 (Judge Abraham, Dissenting Opinion).

16 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Honduras for Permission to Intervene, *supra* note 5, para. 37. The Court made the same distinction in the decision concerning Application by Costa Rica, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Costa Rica for Permission to Intervene, *supra* note 5, para. 26.

17 Ibid.

18 K. Mbaye, 'L'intérêt pour agir devant la Cour internationale de Justice', (1988/II) 209 RCADI 223, at 263.

19 *Jurisdictional Immunities of the State (Germany v. Italy)*, *supra* note 2, para. 2 (Judge ad hoc Gaja, Declaration); see also Art. III(10) of the Resolution of the *Institut de Droit International* on 'Judicial and Arbitral Settlement of International Disputes Involving More than Two States', adopted in 1999 at the Berlin Session: 'Intervention under Article 62 of the Statute of the International Court of Justice and similar texts in other statutes requires the existence of an interest of a legal nature on the part of the intervening State. That means that rights or obligations of this State under public international law can be affected by the decision', available at www.idi-iil.org. It is doubtful whether the interest of the third state seeking to intervene could be based on municipal law. A claim based on municipal law would only be acceptable if consistent with international law. Thus, in the end, the legal interests that can be afforded protection before the ICJ are always ultimately based on international law; see subsection 3.3, *infra*.

20 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Honduras for Permission to Intervene, *supra* note 5, para. 37; and *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Costa Rica

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The Court acknowledged that the legal interest 'to be shown by a State seeking to intervene under Article 62 is not limited to the *dispositif* alone of a judgment. It may also relate to the reasons which constitute the necessary steps to the *dispositif*'.[21] In other words, the legal interest may be linked either to the object of the principal dispute between the main parties or to preliminary questions that the Court would address in order to settle the principal dispute.

It can be recalled that the Court has substantially treated the need for the legal interest to be affected by the final decision in the main proceedings as a separate and additional requirement under Article 62. To a certain extent, this has rendered the proof of the existence of a qualified legal interest more cumbersome. The state seeking to intervene has 'to show in what way that interest may be affected'.[22] It would not be asked to predict the decision of the Court on the merits, but it will have to take into account all the possible outcomes of the decision and demonstrate that there is at least a chance that the final decision in the main proceedings will affect its legal interests in order to be granted permission to intervene. Sometimes, the impact of the future decision on the third state's interest may be straightforward. Most often, this entails a relatively high threshold of proof.

3. Legal interests that may be relevant in seeking intervention before the ICJ

Notwithstanding the general characteristics described above, much uncertainty still surrounds the identification of the legal interests of third states that, in practice, may be affected by a decision of the Court. What follows is an attempt to identify the major categories of legal interests that may justify permission to intervene in light of the recent and less recent case law of the Court.

3.1. Interests in the very subject matter of the main proceedings

A first situation in which a third state may be said to have a legitimate interest in a dispute before the Court entitling it to intervene in the main proceedings is when the third state can show that it has legal interests that 'would not only be affected by a decision, but would form the very subject-matter of the decision' of the Court.[23]

In the *Monetary Gold* case, the Court could not have decided the main dispute between Italy and the United Kingdom without pronouncing on a necessary preliminary question concerning the international responsibility of a third state (Albania).[24] In that case, the existence of a legal interest of a third state forming

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for Permission to Intervene, *supra* note 5, para. 26: 'it must in addition be possible for [the interest of a legal nature] to be affected, in its content and scope, by the Court's future decision in the main proceedings.'

21 *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Application by the Philippines for Permission to Intervene, Judgment of 23 October 2001, [2001] ICJ Rep. 575, at 596, para. 47.

22 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, *supra* note 2, at 117, para. 61.

23 *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, Judgment of 15 June 1954, [1954] ICJ Rep. 19, at 32.

24 The object of the main dispute was to decide the question of whether the claim of the United Kingdom or of Italy to receive the gold removed from Rome in 1943 should have priority. This principal question necessarily entailed a decision on the preliminary question concerning the right of Italy to receive the gold

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the very subject matter of the future decision of the Court was the reason for declining jurisdiction over the case. From a different perspective, a similar interest would certainly have justified intervention by the third state under Article 62 of the Statute.[25]

When a third state can show that its 'interest of a legal nature' would be the object of a preliminary question that the Court must necessarily address in order to resolve the main dispute, as in the *Monetary Gold* case, the condition of intervention is met.

Under such circumstances, the existence of an interest of a legal nature – arguably a right – can hardly be denied. If the international responsibility of a third state is at issue, its interest is undoubtedly based on international law. The third state has a real and concrete interest because it is directly involved in the factual situation brought to the attention of the Court by the parties to the main dispute. The interest of the third state can clearly be affected by the decision of the Court on the merits. As the Court observed, there is not merely a risk of the interest of the third state being affected, but a certainty that the Court has to make findings involving the third state and determine its rights and obligations vis-à-vis at least one of the parties to the dispute. If the 'may be affected' requirement is met when the Court has to 'consider'[26] the legal interests of a third state in its decision, it is met all the more when it has to adjudicate upon the rights or obligations of third states.

The problematic aspect might be the capacity in which the third state should be permitted to intervene. Where the legal entitlement of the third state forms the very subject matter of the decision, and the Court cannot make findings concerning the third state absent its consent to jurisdiction, it seems reasonable to suggest that the decision of the Court may affect the rights, not merely the legal interests, of the third state. If, in such cases, the proper capacity is intervention as a party, then, in the absence of a jurisdictional link, the Court would not be able either to permit intervention or to decide the dispute. In this sense, it is possible to qualify this particular case of intervention as 'necessary intervention'.

Another example of necessary intervention is provided by the *East Timor* case,[27] in which Portugal claimed that Australia, by inter alia concluding a treaty with Indonesia, infringed the right of self-determination of the people of East Timor. The Court considered that the main dispute involved a pronouncement on a preliminary question concerning a third state (Indonesia) and, in particular, whether it could lawfully conclude the treaty with one of the parties to the dispute (Australia).[28] The Court declined jurisdiction, lacking the consent of the third state. On the other hand,

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and therefore on the asserted wrongful act committed by Albania against Italy. However, in order to decide the preliminary question – that is, to settle the dispute between Italy and Albania – would have required the consent of Albania (the third state). Indeed, the Court 'can only exercise jurisdiction over a State with its consent', ibid. Accordingly, the Court declined jurisdiction.

25 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, *supra* note 2, at 116, para. 56.

26 *Jurisdictional Immunities of the State (Germany v. Italy)*, *supra* note 2, para. 25.

27 *East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, [1995] ICJ Rep. 90, at 90.

28 In the words of the Court: 'the very subject-matter of the Court's decision would necessarily be a determination whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf', ibid., at 102, para. 28.

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if Indonesia had requested to intervene, its 'interest of a legal nature which may be affected by the decision of the Court' would have been established.[29]

More generally, it can be said that a qualified interest justifying intervention exists each time the Court in the decision on the merits of the main dispute needs to make findings in respect of the legal situation concerning a third state and those findings are the 'basis for the Court's decision'.[30] Granting permission to intervene is the only way to ensure that the third state can protect its legal interests and that the Court will decide the main dispute taking duly into account such interests.

3.2. Interests that may be directly affected

A different situation is that in which a third state can claim legal interests which do not form the very subject matter of the decision of the Court in the main proceedings, but nonetheless are directly connected to the main dispute and can be affected by the decision of the Court. When a decision of the Court on the claims of the parties to the dispute may entail a ruling on the legal position of third states, such states may be said to have a direct interest in the main dispute. This happens most often in relation to maritime delimitations. In such circumstances, intervention would not be an indispensable condition for the Court to exercise its jurisdiction. However, according to Article 62 of the Statute, the third state may be granted permission to intervene in order to protect its legal interests. To that end, it must prove that the Court's decision on the merits may affect its legal interests.

An example of this situation is provided by the case concerning *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras. For the first time, a Chamber of the Court granted permission to intervene to a third state (Nicaragua) because it had:

> [a] legal interest which may be affected by the decision of the Chamber on the question whether or not the waters of the Gulf of Fonseca are subject to a condominium or a 'community of interests' of the three riparian States.[31]

Nicaragua demonstrated that it had interests based on international law, concerning the concrete situation brought to the attention of the Court in the main proceedings, that could be affected by the decision on the merits of the case.

More generally, maritime delimitations provide typical examples of cases in which intervention under Article 62 may be justified because third states can have legal interests in the geographical area that the Court is asked to delimitate.[32] In the case concerning *Land and Maritime Boundary between Cameroon and Nigeria*, the Court accepted that Equatorial Guinea possessed a legal interest over an area overlapping

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29 Ibid., at 105, para. 34: 'in this case, the effects of the judgment requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful and that, as a consequence, it does not have the treaty-making power in matters relating to the continental shelf resources of East Timor. Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State's consent.'

30 *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment of 26 June 1992, [1992] ICJ Rep. 240, at 261, para. 55. For a discussion of this case, see the accompanying text to note 70, *infra*.

31 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, *supra* note 2, at 122, para. 73.

32 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Honduras for Permission to Intervene, *supra* note 5, paras. 18 ff. (Judge Donoghue, Dissenting Opinion).

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with that concerned by the maritime delimitation forming the object of the main proceedings, and that interest could have been affected by the decision of the Court.[33]

In such cases, when a state asks permission to intervene as a non-party, it seeks protection for the legal interests that might be affected by the decision of the Court and wants those interests *not to be affected*; it asks the Court to avoid prejudicing its legal claims when making findings on the claims of the parties to the main dispute. Intervention finally results in limiting the scope of the Court's jurisdiction by taking into account the existence of the alleged interests of third states.[34] Maritime delimitations provide typical examples of cases in which such a limitation of the scope of the dispute is possible because the Court can draw delimitation lines without establishing their ending point or can have recourse to directional arrows.[35] On the other hand, when a state asks permission to intervene as a party, it seeks protection for its legal interests that may be affected by the decision of the Court but *wants those interests to be affected*; it asks the Court to make findings on its own legal claims in the decision on the merits.[36]

It is against this background that the recent decisions of the Court concerning the applications by Costa Rica and Honduras for permission to intervene are to be assessed. Both concerned maritime delimitations and, in both cases, the Court refused to grant intervention, albeit for different reasons.

The former decision originated from a request to intervene as a non-party in which Costa Rica claimed that it had legal interests in the maritime delimitation between Nicaragua and Colombia, which was part of the subject matter of the main dispute. The Court accepted that Costa Rica had a qualified legal interest, having 'indicated the maritime area in which it considers it has an interest of a legal nature'.[37] However, Costa Rica also had to show that its legal interest might be affected by the decision of the Court.[38] In particular:

> to succeed with its request, Costa Rica must show that its interest of a legal nature in the maritime area bordering the area in dispute between Nicaragua and Colombia needs a protection that is not provided by the relative effect of decisions of the Court under Article 59 of the Statute.[39]

Since the Court can end the line delimiting the maritime areas between the parties to the main proceedings 'before it reaches an area in which the interests of a legal

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33 *Land and Maritime Boundary between Cameroon and Nigeria*, *supra* note 2, at 1034, para. 13.

34 P. Palchetti, 'La protection des intérêts d'Etats tiers par la Cour internationale de Justice: L'affaire de la frontière terrestre et maritime entre le Caméroun et le Nigéria', (2003) 107 RGDIP 865, at 869.

35 Today, intervention as a non-party can be considered as the 'ordinary' form of intervention. The Court has never granted permission to intervene as a party, and 'si un Etat demande à intervenir sans rien préciser quant au statut qu'il revendique, la Cour considérera naturellement qu'il souhaite avoir le statut d'un intervenant qui n'est pas partie à l'instance', *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Honduras for Permission to Intervene, *supra* note 5, para. 16 (Judge Abraham, Dissenting Opinion).

36 The existence of a jurisdictional link represents a major problem in this regard. It is not clear whether what is required is merely a ground of jurisdiction for the Court, or rather the consent of the parties to the main dispute.

37 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Costa Rica for Permission to Intervene, *supra* note 5, para. 66.

38 Ibid., para. 67.

39 Ibid., para. 87.

nature of third States may be involved',[40] the Court concluded that there was no risk that the interests of Costa Rica would be affected by the decision on the main proceedings.[41]

Interestingly, the Court accepted that the indication of a maritime area in which the legal interests of a third state overlap with the legal claims of the parties to the main proceedings constitutes a qualified interest for the purposes of Article 62. However, the would-be intervener must further show that the qualified legal interest may not be sufficiently protected by Article 59 of the Statute. This additional condition is extremely problematic.

First, such requirement is absent in the previous case law of the Court. In similar cases of maritime delimitation, the Court granted permission to intervene on the ground of the existence of an area in which the third state could claim legal interests, provided that that area overlapped with the area disputed by the parties in the main proceedings. Such a situation was regarded as sufficient to show a risk for the third state that its legal interests might be affected by the decision on the merits. As pointed out by a number of dissenting judges, when compared to the 1999 decision of the Court granting permission to intervene to Equatorial Guinea, the denial of Costa Rica's request to intervene appears inexplicable.[42] The Court should have at least provided the reasons for distinguishing the situation of Costa Rica from that of Equatorial Guinea.

Second, the Court has set an excessively high burden of proof on the would-be intervener, which, in the end, would deprive intervention of its purpose. It seems understandable that, in its decision concerning Costa Rica's application to intervene, the Court asked for more than 'restricted or summary' evidence of the legal interest of the third state.[43] However, the decision is less convincing when the Court proceeds further and concludes on this point that, if it were to deny the request for intervention, it could nonetheless take into account the information provided at the preliminary stage of the proceedings in order not to prejudice the legal interests of third states.[44] Either one of two things is possible. Either intervention is granted and, during the main proceedings, the third state can present its views and give full account of its legal interests, and the purpose of the institution of intervention – the protection of third states – is safe. Or the would-be intervener provides all

40 Ibid., para. 89.

41 Ibid., para. 90.

42 See *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Costa Rica for Permission to Intervene, *supra* note 5, para. 14 (Judge Abraham, Dissenting Opinion), para. 10 (Judge Donoghue, Dissenting Opinion), and para. 2 (Judge ad hoc Gaja, Declaration).

43 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Costa Rica for Permission to Intervene, *supra* note 5, para. 49. The Court held that the third state seeking to intervene 'must explain with *sufficient clarity* its own claim . . . and the legal instruments on which it is said to rest, and must show with *adequate specificity* how [the decision of the Court on the main proceedings] might affect its claim', ICJ, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *supra* note 21, at 598, para. 60 (emphasis added). But the Court also accepted that, at the preliminary stage in which the state applies for intervention, it should not provide 'an exhaustive account of these interests'; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, *supra* note 2, at 130, para. 89. On the standard of proof relating to the legal interest, see C. Chinkin, *Third Parties in International Law* (1993), 163–9.

44 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Costa Rica for Permission to Intervene, *supra* note 5, para. 51.

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relevant information during the incidental proceedings concerning the admissibility of intervention (potentially at the hearings, if the parties to the main proceedings object to intervention).[45] If the Court would in any case protect the interests of third states even though they are not allowed to intervene, granting intervention becomes pointless.[46] As observed by Judge ad hoc Gaja:

> It seems paradoxical that, in a case of maritime delimitation, the only way for a third State to submit information about its interest of a legal nature which may be affected by a decision of the Court would be to make an application that the Court considers inadmissible.[47]

Unless the Court intends to transform the incidental proceedings concerning the admissibility of a request of intervention into a sort of amicus curiae procedure.[48]

Finally, a rejection of intervention based on the existence of 'alternative remedies' is unconvincing. The Court seems to draw the conclusion that intervention is not necessary in this case from the fact that it will be possible to delimit the maritime areas between Nicaragua and Colombia without entering the area in which Costa Rica's legal interests are involved, and therefore the third state will be protected anyway by Article 59 of the Statute.[49] In other words, when there is an 'alternative means' that would protect the interests of third states, the Court feels free to reject intervention.

This reasoning does not appear to be consistent with Article 62 and the way it has been interpreted so far by the Court. The fact that 'alternative remedies' may be available does not mean that there are no legal interests that may be affected by the decision of the Court. On the contrary, it confirms the existence of such legal interests. Now, if the conditions for granting intervention are to be found in Article 62 alone – that is, if the conditions of Article 62 are necessary and sufficient

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45 It seems unreasonable that the possibility offered by the Statute to the third state to protect its interests would depend first on the objections made by the parties to the main proceedings and subsequently on the ability of the Court to take these interests into account without permitting intervention. According to the Dissenting Opinion of Judge Abraham: 'en tout état de cause, les éléments fournis par l'Etat requérant lors de la procédure relative à l'autorisation d'intervenir ne sauraient remplacer les informations et observations complètes que cet Etat pourrait soumettre une fois autorisé à intervenir'; ibid., para. 13 (Judge Abraham, Dissenting Opinion). See also the Declaration of Judge ad hoc Gaja, ibid., para. 1 (Judge ad hoc Gaja, Declaration).

46 Judge Abraham observed: 'si la Cour est assez sage, sans avoir besoin à cette fin du concours d'aucun intervenant, pour ne pas rendre de décision qui préjudicierait aux intérêts des tiers, ... il est, en bonne logique, inutile que quiconque lui demande l'autorisation d'intervenir, car la condition à laquelle l'article 62 du Statut subordonne l'intervention ne sera jamais remplie'; ibid., para. 26 (Judge Abraham, Dissenting Opinion). Or, more precisely, the condition can only be met if there are no alternative remedies.

47 See the Declaration of Judge ad hoc Gaja, ibid., para. 4 (Judge ad hoc Gaja, Declaration); see also G. P. McGinley, 'Intervention in the International Court: The Libya/Malta Continental Shelf Case', (1985) 34 ICLQ 671, at 692.

48 See, in particular, M. Bartos, 'L'intervention yougoslave dans l'affaire du Détroit de Corfou', (1975) 14 *Comunicazioni e Studi* 41, at 50; C. Chinkin, *supra* note 43, at 226 ff.; P. Palchetti, *supra* note 4, at 165 ff.; G. Gaja, 'A New Way for Submitting Observations on the Construction of Multilateral Treaties to the International Court of Justice', in U. Fastenrath et al. (eds.), *From Bilateralism to Community Interests: Essays in Honour of Judge Bruno Simma* (2011), 665. For a favourable opinion in that regard, see, e.g., the Declaration of Judge ad hoc Gaja, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Costa Rica for Permission to Intervene, *supra* note 5, para. 5 (Judge ad hoc Gaja, Declaration); and the Dissenting Opinion of Judge Donoghue, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Honduras for Permission to Intervene, *supra* note 5, para. 59 (Judge Donoghue, Dissenting Opinion).

49 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Costa Rica for Permission to Intervene, *supra* note 5, para. 89.

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conditions to permit intervention[50] and these conditions are met – permission to intervene should be granted and cannot depend on additional requirements that the Court would be at liberty to introduce. While there is no agreement on the precise legal entitlement of third states arising under Article 62 of the Statute,[51] there is substantial agreement that this provision accords no discretionary power to the Court, which has explicitly considered that Article 62, paragraph 2, does not 'confer upon it any general discretion to accept or reject a request for permission to intervene for reasons simply of policy'.[52]

Therefore, it seems that Costa Rica made a sufficient showing that it had a legal interest that might be affected by the decision on the merits. In particular, it demonstrated the possibility that the Court might take into account its legal interests by directly addressing the legal situation concerning Costa Rica, even though this interest will only have the effect of restricting the scope of the subject matter in the main proceedings.

The application for permission to intervene introduced by Honduras was similarly rejected because the third state failed to show the existence of legal interests that may be affected by the decision of the Court.[53] Honduras maintained that the disputed area between the parties to the main proceedings overlapped with an area in which it has legal interests. However, the Court considered that its decision on the merits would not affect the legal interests of Honduras because, on the one hand, the northern part of that area was not disputed by the parties and, on the other hand, the decision of the Court concerning the southern part of that area will not take into account the legal position of Honduras. In particular, in a 2007 judgment, the Court determined the maritime boundary between Nicaragua and Honduras, and this decision has the force of *res judicata*.[54] In addition, when determining the maritime boundary between Nicaragua and Colombia, the Court will place no reliance on the 1986 treaty between Honduras and Colombia, which remains *res inter alios acta*.[55] Thus, the Court saw no link between the legal interests of Honduras and the subject matter of the main dispute before it in the main proceedings. One question remains unanswered: namely whether – in the absence of the need to take into account the legal interests of Honduras – the decision of the Court could nonetheless have legal

50 Ibid., para. 4 (Judge Abraham, Dissenting Opinion), and para. 22 (Judges Cançado Trindade and Yusuf, Dissenting Opinion).

51 The debated question is whether Art. 62 confers upon third states a 'right' to intervene. Although the Court seems to reply in the negative (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Honduras for Permission to Intervene, *supra* note 5, para. 35), this statement could be interpreted as meaning that third states do not have 'absolute rights' under Art. 62. In any case, the key aspect is whether the Court has a discretionary power to grant permission to intervene or whether, the conditions of Art. 62 being met, the Court cannot deny intervention.

52 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *supra* note 7, para. 17; see also *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *supra* note 1, at 151 (Judge Jennings, Dissenting Opinion); *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Honduras for Permission to Intervene, *supra* note 5, paras. 5–15 (Judge Abraham, Dissenting Opinion), and para. 32 (Judge Donoghue, Dissenting Opinion). On the policies of intervention, see C. Chinkin, *supra* note 43, at 180–4.

53 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Honduras for Permission to Intervene, *supra* note 5, para. 75.

54 Ibid., paras. 66–70.

55 Ibid., paras. 71–74.

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implications for Honduras and whether such implications could be sufficient for granting intervention.[56]

3.3. Interests that may be affected by implication

The 2011 decision relating to the application to intervene made by Greece provides a good example of a situation in which the interests of a legal nature of a third state may be affected 'by implication' by the decision of the Court in the main proceedings.

In this case, Greece sought to intervene in the dispute between Germany and Italy concerning jurisdictional immunities of states because Germany, in its application, asked the Court to adjudge that Italy had committed a breach of Germany's jurisdictional immunity 'by declaring Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy'.[57] Thus, Greece was considered to have a legal interest in the decision of the Court 'as pertaining to the said Greek judgments and Italy's recognition of their enforceable nature'.[58] In its order, the Court granted permission to intervene with no further justification than to state:

> the Court, in the judgment that it will render in the main proceedings, might find it necessary to consider the decisions of Greek courts in the *Distomo* case, in light of the principle of State immunity, for the purposes of making findings with regard to the third request in Germany's submissions.[59]

Apparently, this was regarded as sufficient to conclude that Greece had a legal interest that may be affected by the decision of the Court.

When trying to evaluate whether Greece had a qualified interest pursuant to Article 62 of the Statute, one is confronted with a major hurdle: nowhere in the order does the Court define the legal interests justifying the permission to intervene accorded to Greece. Thus, the reason for granting permission to intervene remains to a large extent obscure.[60]

The precise identification of the legal interest that may be affected by the decision of the Court plays a fundamental role in the decision to grant permission to intervene because it determines the scope of intervention. The third state will be admitted to present its views during the main proceedings only with respect to the legal interests that risk being prejudiced in the decision on the merits, as a Chamber of the Court

56 This is indeed the position taken by the Dissenting Judges. See, in particular, the Dissenting Opinions of Judge Abraham (ibid., paras. 24–38 (Judge Abraham, Dissenting Opinion)) and Judge Donoghue (ibid., paras. 39–54 (Judge Donoghue, Dissenting Opinion)).

57 Application by Germany instituting proceedings in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy)*, *supra* note 2, at 18.

58 *Jurisdictional Immunities of the State (Germany v. Italy)*, *supra* note 2, para. 23.

59 Ibid., para. 25.

60 On the one hand, the would-be intervener has to produce all the evidence available in order to show that its legal interests may be affected, but, on the other hand, the Court should give a reasoned decision. Thus, Greece seems to have been exempted from the demanding burden of proof applied in the decision concerning Costa Rica's application to intervene. At the same time, even if it is common for the orders of the Court, when compared to judgments, to provide more succinct reasoning, this does not exclude the duty of the Court to assess the existence of the legal interest required by Art. 62.

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had the occasion to clarify: 'But that does not mean that the intervening State is then also permitted to make excursions into other aspects of the case.'[61]

The problematic consequences of the undefined character of Greece's legal interest emerged during the oral proceedings. Germany remarked that 'The Greek presentation, although it dealt with so many different aspects, did not focus on "the interest of a legal nature" which might be affected by the present proceedings as requested by the Court in its Order'.[62] Supposing that intervention was permitted to the limited extent of the question of recognition of Greek judgments in Italy, Greece should have focused on the factual background and the legal findings of the relevant decisions in order to show how the decision of the Court could have affected its interests when addressing the question of the enforcement of the Greek judgments in Italy. However, the intervention of Greece concentrated on the more general question of the evolution of the rule of state immunity under customary international law and on the way in which the Greek judgments denying immunity could be justified by admitting an exception to that rule in case of serious international crimes.[63] In substance, at the hearings, Greece has taken the side of Italy and the question concerning the way in which the decision of the Court could possibly affect Greece remained unanswered.[64]

Turning to the identification of the interest that could have justified Greece's intervention in the main proceedings, a preliminary observation is in order. In this case, the Court is asked to review the Italian decisions recognizing the enforceability of Greek judgments – it is not asked to decide whether the Greek judgments correctly applied the rule on state immunity. Recognition of the enforceability in Italy of the Greek judgments was not dictated by international law; it was based on municipal law.[65] Therefore, at first glance, it is difficult to imagine how the decision of the Court in the main proceedings would possibly affect Greece.

One possibility for the Court will be to consider that, in principle, international law is neutral with respect to the domestic recognition of foreign judgments,[66] and that Italy had no obligation to review the Greek decisions denying immunity

61 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), supra* note 2, at 116, para. 58 and at 135 ff., paras. 102–103. On the limited rights of the intervening state, see J. J. Quintana, 'The Intervention by Nicaragua in the Case between El Salvador and Honduras before an Ad Hoc Chamber of the International Court of Justice', (1991) 38 NILR 199, at 204 ff.

62 *Jurisdictional Immunities of the State (Germany v. Italy)*, Oral Pleadings, CR 2011/20, at 11.

63 Ibid., CR 2011/19.

64 If the legal interest that may be affected remains undefined and the intervening state 'makes excursions in other aspects of the case', a remedy can certainly be envisaged: the Court will not take into account the arguments of the intervening state. However, the problem remains that intervention has not fulfilled its function.

65 In addition, mere recognition of a foreign judgment should be distinguished from enforcement – that is, the adoption of measures of constraint vis-à-vis the foreign state; see, e.g., French Cour de cassation, *SOABI v. Senegal*, 11 June 1991, (1991) 118 *Journal du droit international* 1005: ' l'exequatur . . . ne constitue pas, en lui-même, un acte d'exécution de nature à provoquer l'immunité d'exécution de l'Etat considéré.'

66 In *NML Capital Limited v. Republic of Argentina*, 6 July 2011, [2011] UKSC 31, the UK Supreme Court held that 'there is no principle of international law under which State A is immune from proceedings brought in State B in order to enforce a judgment given against it by the courts of State C, where State A does not enjoy immunity in respect of the proceedings that gave rise to that judgment' (Lord Phillips, para. 29), but, *under English law*, in order to recognize a foreign judgment, the English court has to ascertain that the foreign court had jurisdiction, and duly respected the rules of international law on immunity.

to Germany. Then, Greece would have no interest in the main proceedings. If the reverse is true and a principle of international law renders Germany immune from proceedings brought in Italy to enforce a Greek judgment, then Italy might have breached this specific international obligation. But, there again, if the Court were to adopt that line of reasoning, the decision would in no way affect the legal interests of Greece. The Court would simply establish that Italy has breached an international obligation owed to Germany.

From a different perspective, the Court might deem it necessary to take into account the merits of the Greek judgments – and the way in which the rule on state immunity was applied – as a preliminary question in order to decide whether recognition by the Italian courts was consistent with international law.[67] However, in such a case, the Court would necessarily make findings on the conduct of Greece – that is, on a legal situation that is not directly connected to the main dispute (a situation that raises a new dispute between Greece and Germany) and that falls outside the scope of the institution of intervention as interpreted by the Court in its case law.[68]

The only situation in which the decision of the Court might affect a legal interest of Greece is that in which the appreciation by the Court of the Italian conduct (the recognition of Greek judgments) would have a 'legal implication' for Greece. Indeed, the Court's decision on the lawfulness of the recognition of the Greek judgments by Italian courts might well have implications for the legal situation of Greece. When recognizing the enforceability of the Greek judgments in the *Distomo* case, Italian courts accepted that, in the factual circumstances of that case, an Italian judge – applying the *Ferrini* case law – would have reached a similar conclusion and denied immunity to Germany. Even supposing that the Court finds the Italian ruling to be in contrast with international law, it will make no findings with regard to the conformity of the Greek judgments with international law; it will not rule on the conduct of Greece. However, its decision might have legal implications for Greece because Italy and Greece reached the same ultimate solution with respect to the same factual circumstances. Therefore, it will be most likely that, if the Italian solution is in contrast to international law, then the Greek solution will also be in contrast to international law. In this sense, Greece might have an interest not directly in the decision that the Court will render in the main proceedings of the dispute between Germany and Italy, but in the legal implications of that decision.

Now, the question is whether such an 'interest by implication' could be sufficient to grant permission to intervene under Article 62 of the Statute.

An analysis of the ICJ case law reveals that there are similar cases in which intervention was arguably admissible. In 1973, Fiji applied for permission to intervene

67 For a case in which such reasoning led Belgian courts to deny the enforceability of the Greek judgment in the *Distomo* case, see Tribunal de Bruxelles, order of 26 October 2005, RR.05/3092/B (P. d'Argent, 'Jurisprudence belge relative au droit international public', (2007) 40 RBDI 149, paras. 43–45).

68 Intervention has been denied when the claims of third states involved a new dispute that was separate from the dispute at issue in the main proceedings. Since intervention is an incidental proceeding, it should relate to the subject matter of the dispute before the Court in the main proceedings and should not amount to the submission of a new case. See, in particular, *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), supra* note 7, paras. 31–33; *Continental Shelf (Libyan Arab Jamahiriya/Malta), supra* note 1, at 19 ff., paras. 29–34.

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in the *Nuclear Tests* case between New Zealand and France. It claimed to have been 'affected by French conduct at least as much as New Zealand and that similar legal considerations affect its position'.[69] Fiji declared that it had suffered damage from the same conduct – on the part of France – which gave rise to New Zealand's claims. Thus, the decision of the Court ascertaining that the French conduct was unlawful would have had clear legal implications for Fiji: France's wrongful act would have constituted the necessary legal premise to trigger France's responsibility and claim reparation for the damages suffered. The Court never ruled on the application made by Fiji, as the case was declared moot and the application to intervene was dismissed accordingly.

In 1989, Nauru introduced proceedings against Australia before the ICJ claiming restitution or appropriate reparation because Australia – in its capacity of Administrating Power – failed 'to make any provision or any adequate provision for the rehabilitation of the phosphate lands worked out under Australian administration in the period before 1 July 1967'.[70] Since the League of Nations Mandate as well as the United Nations Trusteeship relating to Nauru was exercised jointly by Australia, New Zealand, and the United Kingdom (the Administering Authority), Australia objected that the Court should refrain from deciding that case, as New Zealand and the United Kingdom were not parties to the proceedings. In particular, the Court could 'not pass upon the responsibility of the Respondent without adjudicating upon the responsibility of New Zealand and the United Kingdom'.[71] The Court did not accept the contention that 'there would be a *simultaneous* determination of the responsibility of all three States'.[72] The *Phosphate Lands* case had to be kept separate from the *Monetary Gold* case. In the latter, the determination of Albania's responsibility was a prerequisite for the decision concerning Italy's claims and there was a logical and necessary link between the preliminary question and the main question put to the Court. In the former case:

> a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru *might well have implications for the legal situation of the two other States concerned*, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia.[73]

New Zealand and the United Kingdom did not ask to intervene.[74]

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69 Application for Permission to Intervene submitted by the Government of Fiji in the *Nuclear Tests Case (New Zealand v. France)*, 18 May 1973, at 3.

70 Application for Permission to Intervene submitted by Nauru, in the case concerning *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, 13 May 1989, at 30, 32.

71 *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *supra* note 30, at 255, para. 39. Australia argued that 'any decision of the Court as to the alleged breach by Australia of its obligations under the Trusteeship Agreement would necessarily involve a finding as to the discharge by [New Zealand and the United Kingdom] of their obligations in that respect, which would be contrary to the fundamental principle that the jurisdiction of the Court derives solely from the consent of States', ibid., at 259, para. 49.

72 Ibid., at 261, para. 55 (emphasis in original).

73 Ibid. (emphasis added).

74 Although the Court did not specify whether they would be entitled to do so, it added that 'the absence of such a request in no way precludes the Court from adjudicating upon the claims submitted to it, provided that the legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for'; ibid., at 261, para. 54.

In both cases, the decision of the Court in the main proceedings was liable to have clear implications for the legal situation of Fiji, New Zealand, and the United Kingdom, even though the Court would not in any event have directly ruled on the legal situation of those states.

In deciding whether such 'interest by implication' qualifies as a legal interest that may be affected by the decision of the Court under Article 62 of the Statute, the crucial question is where to draw the line between legal interests that may actually be affected by the decision of the Court and that justify intervention, and legal interests that are only remotely connected to the main proceedings and do not put the would-be intervener in a situation of 'real and concrete'[75] possibility of being affected, when compared to the multitude of third states that could profess a general interest in the main proceedings.

In the case of Fiji or New Zealand and the United Kingdom, it seems difficult to deny that their legal interest would have been affected by the decision of the Court in a manner completely different from any other third state. They would have been 'specially affected' by the decision of the Court.[76] They had a 'real and concrete' legal interest because it was closely connected to the very subject matter of the main dispute, and a decision of the Court would have had direct legal implications for those third states. Thus, if such an 'interest by implication' is a sufficient basis for granting permission to intervene, the Court could have permitted intervention in both cases. In addition, due to the similarities of the situations of Fiji, New Zealand, and the United Kingdom, and more recently Greece, it seems that the three cases should be treated consistently as far as intervention is concerned.

As discussed above, there is at least a possibility that, to use the words of the Court, 'a finding by the Court regarding the existence or the content of the responsibility attributed to' Italy by Germany 'might well have implications for the legal situation of' Greece. The interest of Greece would be of a legal nature, because it would be based on international law. The involvement of Greece in the main proceedings is more remote than that of Fiji, New Zealand and the United Kingdom in the aforementioned cases, but it is still connected to the subject matter of the main dispute. Therefore, one possibility is to infer that the Court considered the interest of Greece to be sufficiently 'real and concrete' when compared to that of all the other third states possibly concerned by a ruling of the Court pertaining to the jurisdictional immunities of states, and that such 'interest by implication' was sufficient to grant permission to intervene.

3.4. Generalized interests

As anticipated, the Court expressly excluded 'that an interest of a third State in the general legal rules and principles likely to be applied by the decision can justify an intervention'[77] and accordingly denied permission to intervene to third states that

75 Mbaye, *supra* note 18, at 292: in the case of intervention, the legal interest must be 'personnel et concret' and should not be 'impersonnel et théorique'.

76 See note 84, *infra*, and accompanying text.

77 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), supra* note 2, para. 76.

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had invoked such a generalized interest.[78] In other words, a generalized interest of third states in the Court's findings and pronouncements would be 'too remote'[79] for the purposes of Article 62 of the Statute.

Thus, if Greece only had a general interest in the pronouncement of the Court regarding the precise scope of the customary rule on state immunity, such a legal interest would not have justified intervention. At the hearings, Greece declared that the purpose of its intervention was 'to help to determine the current legal position in respect of an evolving issue and to contribute to the progressive development of international law'[80] in an important area of international law. Although apparently aware of the fact that it had to show a real and concrete interest in the case and not merely a general interest,[81] Greece concluded its intervention by pleading against a notion of state immunity that was 'outdated and incompatible with the requirement of justice and the rule of law and human rights'[82] and thus in favour of the denial of state immunity in the case of international crimes. '[T]he effect of the judgment that your Court will hand down in this case concerning jurisdictional immunity will be of major importance, primarily to the Italian legal order and certainly to the Greek legal order',[83] as it will provide guidance to the Greek judges – and, one may add, to the municipal courts of any other third state bound by the rule on state immunity. Yet, such ambiguity could be explained by the fact that the Court did not identify the precise legal interest that justified the intervention of Greece in the main proceedings.

A somewhat different question is whether intervention could be admissible for the protection of *erga omnes* obligations. The interest that a state may have in the protection of *erga omnes* obligations differs from the general interest in the application of principles and rules of international law. Every state is entitled to invoke the responsibility of another state for the breach of *erga omnes* obligations. With respect to intervention, the foregoing analysis shows that the Court has adopted a potentially broad notion of 'interest of a legal nature' that might be affected both by the operative part and by the reasoning of the decision of the Court. Thus, one may wonder whether this notion also covers the legal interest that a third state may have in relation to *erga omnes* obligations.

On the one hand, if the claims of the parties in the main proceedings relate to such obligations, the legal interest of the state seeking to intervene would be connected to the subject matter of the dispute. On the other hand, it is more doubtful whether such a legal interest would be 'real and concrete'. If the requirement of Article 62 of the Statute is to be interpreted consistently with Article 42 of the Draft Articles on State Responsibility, it is difficult to deny that 'specially affected' states have an

78 See also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), supra* note 7, at 17, para. 30.
79 *Sovereignty over Pulau Ligitan and Pulau Sipidan (Indonesia/Malaysia), supra* note 21, at 603 ff., para. 83.
80 *Jurisdictional Immunities of the State (Germany v. Italy)*, Oral Pleadings, CR 2011/19 (translation), para. 8.
81 Ibid., para. 10.
82 Ibid., para. 114.
83 Ibid., para. 126.

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interest that may be affected by the decision of the Court.[84] It is less clear whether 'other states' would have a 'real and concrete' interest pursuant to Article 62 or whether the Court would regard this legal interest as 'too remote' from the subject matter of the dispute. Whereas such a possibility cannot be easily disregarded,[85] the application of Greece for permission to intervene was not based on such a legal interest.

4. Conclusion

The case law examined above reveals that the Court has accepted that a potentially wide range of legal interests could justify the involvement of third states in the main proceedings. There are interests in the very subject matter of the dispute before the Court and a decision of the Court that rules on a preliminary question involving the legal situation of third states inevitably affects their legal interests. There are interests that may be affected because they are directly connected to the main proceedings, and intervention of the third state will ensure that the Court does not make findings relating to the legal situation of third states. There are interests by implication, in respect of which intervention grants the opportunity to the third state to protect its legal position, since a decision of the Court will make findings on claims that have an impact on separate but similar disputes between the third state and one or both parties to the main proceedings. Finally, there are more general interests that could (to different degrees) be taken into account by the Court and that seem to justify some kind of participation of third states in the proceedings.

At the same time, the Court has adopted a very restrictive approach in relation to intervention. First, the Court has permitted intervention only when the legal interest was closely connected with the subject matter of the dispute before it in the main proceedings – that is, when the legal interest was 'real and concrete'. Second, the Court has imposed a heavy burden of proof on the would-be intervener as far as the legal interest that may be affected is concerned. Third, the Court has taken into account additional elements not provided for in Article 62 before granting permission to intervene, such as the existence of alternative remedies.

Thus, while, in principle, intervention could afford protection to a number of legal interests, in practice, the Court has accepted the existence of a qualified legal interest pursuant to Article 62 only in a very limited number of cases. Undoubtedly, the Court has been mainly concerned with the protection of the parties to the main proceedings. Thus, as far as possible, it has limited intrusions of third states in proceedings that are essentially governed by the principle of consent to jurisdiction.

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84 To use the words of the International Law Commission, for a state to be admitted to proceedings as an intervener, 'it must be affected by the [decision of the Court] in a way that distinguishes it from the generality of other [third] States' that may be concerned by the decision of the Court (ILC Commentary on Article 42 of the Draft Articles on State Responsibility, 2001 YILC, Vol. II (Part Two), at 119, para. 12).

85 For the possibility to open intervention to states affected by the breach of an *erga omnes* obligation, see, in particular, Art. 4 of the Resolution of the Institut de droit international on '*Erga Omnes* Obligations in International Law', adopted in 2005 at the Krakow Session (available at www.idi-iil.org); and S. Forlati, 'Azioni dinnanzi alla Corte internazionale di giustizia rispetto a violazioni si obblighi *erga omnes*', (2001) 84 *Rivista di diritto internazionale* 69, at 108.

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It is possible that policy considerations have played a role in this regard and that parties' objections to third states' requests for intervention have induced the Court to adopt a particularly restrictive position with respect to intervention.

Intervention, commonly depicted as a defunct institution, is hardly defunct, but one might say it is in search of a precise identity. It seems that necessary intervention, intervention as a non-party, and participation in the protection of general interests fulfil different functions and could entail different forms of participation in the proceedings. If the uncertainties of the Court's case law could be dispelled, and if the conditions of the different types of participation could be applied consistently, intervention could serve the purpose of protecting a variety of different legal entitlements of third states that may be affected by a decision of the Court.