

Opening the International Court of Justice to Third States: Intervention and Beyond

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I. Introduction

In its judgement in the *Continental Shelf (Libyan Arab Jamahiriya/ Malta) Case, Application by Italy for Permission to Intervene* (hereinafter the *Application by Italy Case*), the ICJ said that “a state which considers that its legal interest may be affected in a pending case has the choice [...] whether to intervene, thus securing a procedural economy of means, [...] or to refrain from intervening, and to rely on Article 59”.¹

¹ *Application by Italy Case*, ICJ Reports 1984, 3 et seq., (26).

While it is true that a state not party to the proceedings may have such a choice, this does not imply, contrary to what the Court seems to suggest, that Article 59 of the Statute ensures the protection of third state's interests to the same extent as intervention.² It has been widely recognized that Article 59, while limiting to the parties the binding force of a decision, does not prevent this decision from having some effect on states that are not parties to the proceedings.³

The Court itself admitted this in the *Certain Phosphate Lands in Nauru Case* when it said that "a finding of 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 other two states concerned".⁴ Besides, pronouncements of the Court on legal questions are generally regarded as an authoritative exposition of the law. It is difficult to see how Article 59 could afford protection to third states in that regard; it seems evident that that provision has no bearing on the force of precedent accorded to decisions of the Court.⁵ Inter-

² See the criticism addressed against that statement of the Court by Judge Schwebel in his Dissenting Opinion, ICJ Reports 1984, 3 et seq., (134). Cf. also D.W. Greig, "Third Party Rights and Intervention Before the International Court", *Va. J. Int'l L.* 32 (1992), 287 et seq., (291).

³ On this question, see, among others, C. De Visscher, *Aspects récents du droit procédural de la Cour internationale de justice*, 1966, 177 et seq.; L. Condorelli, "L'autorité de la décision des juridictions internationales permanentes", in: *Société française pour le droit international, Colloque de Lyon, La juridiction internationale permanente*, 1987, 306 et seq.; A. Zimmermann, "Die Zuständigkeit des Internationalen Gerichtshofes zur Entscheidung über Ansprüche gegen am Verfahren nicht beteiligte Staaten", *ZaöRV* 71 (1995), 1051 et seq.; C. Di Paolo, *Effetti delle sentenze della Corte internazionale di giustizia nei confronti di Stati estranei al giudizio e intervento nel processo*, 1997.

⁴ ICJ Reports 1992, 240 et seq., (261).

⁵ The Court expressly acknowledged the weakness of Article 59 in that regard, when, in its decision in the *Aegean Sea Continental Shelf* case, it stated that, "although under Article 59 of the Statute 'the decision of the Court has no binding force except between the parties and in respect of that particular case', it is evident that any pronouncement of the Court as to the status of the 1928 Act, whether it were to be found to be a convention in force or no longer in force, may have implications in the relations between states other than Greece and Turkey", ICJ Reports 1978, 3 et seq., (16). See also Judge Jennings' Dissenting Opinion appended to the decision of the Court in the judgement concerning application by Italy: "The slight acquaintance with the jurisprudence of this Court shows that Article 59

vention provides for a more adequate form of protection since it enables third states to defend their legal interests by submitting arguments on the issues raised in the case before the Court.⁶ By so doing, they can put the Court in the position of having to decide the case taking into account the broader interests involved in the litigation.

Arts 62 and 63 of the Statute of the Court, however, envisage the possibility to resort to intervention only in specific sets of circumstances. It is clear that the question which legal interests may be protected by way of intervention, and what kind of protection is afforded to intervening states, depends on the scope of these provisions. Yet one may doubt whether these are always adequate ways to address the concern of third states about the possible implications of a Court's decision.

Article 63 deals with the situation in which a third state is concerned with the interpretation to be given by the Court to a convention. The interest of the intervening state does not imply that a specific right of the same state is at issue in the dispute between the parties; it is simply a general interest in the interpretation of a specific rule of a convention. That interest may be explained with reference to the fact that any interpretation of a convention by the Court constitutes an authoritative precedent which tends to influence the attitude of all the States parties to that convention.⁷ The protection given by Article 63 consists in the

does by no manner of means exclude the force of persuasive precedent. So the idea that Article 59 is protective of third states' interests in this sense is illusory", *Application by Italy Case*, ICJ Reports 1984, 3 et seq., (157). Cf. M. Shahabuddeen, *Precedent in the World Court*, 1996; I. Scobbie, "Res Judicata, Precedent and the International Court: A Preliminary Sketch", *Austr.Yb.Int'l L.* 20 (1999), 299 et seq.

⁶ For an assessment of the relation between the protection afforded to third states by Article 59 and intervention, see S. Rosenne, "Article 59 of the Statute of the International Court of Justice Revisited", in: M. Ramamontaldo (ed.), *International Law in an Evolving World. Liber Amicorum Eduardo Jiménez de Aréchaga*, 1994, 1129 et seq. The author concluded that "full protection for third states can only be assured if the Court is in full possession of the relevant facts as that state sees them and as the principal parties can contest them in adversarial proceedings. [...] Article 59 is manifestly insufficient for this purpose".

⁷ This point has been stressed, in particular, by S. Oda, "The International Court of Justice Viewed from the Bench", *RdC* 244 (1993), 9 et seq., (78-79); P. Jessup, "Intervention in the International Court", *AJIL* 75 (1981), 903 et seq.; C. Chinkin, *Third Parties in International Law*, 1993, 153.

opportunity granted to the parties of the convention to submit their views on its construction in order to extend the information on which the Court may rely. In this sense intervention under Article 63 can be assimilated to a form of participation to the proceedings as *amicus curiae*.⁸

Article 62 covers the more general situation in which a third state considers that its legal interests are affected by the decision of the Court. Recent judgements of the Court have helped to clarify some aspects of the legal régime of this form of intervention, namely the question of the precise object of the intervention and that of the need of a jurisdictional link between the state seeking to intervene and the parties to the case. It is now accepted that a state may be admitted to intervene, even in the absence of any jurisdictional link with the parties and without acquiring the status of a party, if its intervention aims merely at informing the Court of the existence of a legal interest of its own which may be affected by the decision of the Court.⁹ Yet there is still some

⁸ See, in this sense, K. Günther, "Zulässigkeit und Grenzen der Intervention bei Streitigkeiten vor dem IGH", *GYIL* 34 (1991), 254 et seq., (287); A. Davì, *L'intervento davanti alla Corte internazionale di giustizia*, 1984, 233, who, however, held the view that this conception of intervention under Article 63 should be revised by the Court. It must be underlined that, while the form of intervention provided by Article 63 comes close to a participation as *amicus curiae*, the intervening state under that article is bound by the interpretation of the treaty given by the Court. Para. 2 of Article 63 provides that, if a state uses its right to intervene, "the construction given by the judgement will be equally binding upon it".

⁹ In its successful application for permission to intervene in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application by Nicaragua for Permission to Intervene*, (hereinafter the *Application by Nicaragua Case*), Nicaragua stated that the object of its intervention was to protect its legal rights and to inform the Court of the nature of these rights, ICJ Reports 1990, 92 et seq., (128). Since then, states which have submitted an application, for permission to intervene, to the Court have defined the object of their application by employing similar formulations. See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon/ Nigeria), Application by Equatorial Guinea for Permission to Intervene*, (hereinafter *Application by Equatorial Guinea Case*), Order of 21 October 1999, ICJ Reports 1999, 1030 et seq., (1032); *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application by The Philippines for Permission to Intervene*, (hereinafter *Application by The Philippines Case*), Judgment of 23 October 2001, para. 84, available at the Court's website (<http://www.icj-cij.org>).

uncertainty concerning the identification of the notion of “interest of a legal nature” provided for in Article 62. When is there a legal interest sufficient to justify intervention? Related to this is the question what kind of protection can an intervening state expect from the Court. Is the purpose of intervention under Article 62 only that of enabling third states to present their views to the Court on questions in issue in the case, as a kind of *amicus curiae*, or does it aim at something more than that?¹⁰

In the first part of this study, the question as to the nature and scope of the form of intervention provided for by Article 62 will be considered. This point will be examined, in particular, in the light of recent developments in the Court’s position. Once this question has been discussed, it will be assessed whether new procedures, in particular participation of an *amicus curiae*, should be envisaged.

Apart from the cases where intervention aims simply at protecting a third state’s legal interest and where the jurisdictional link is not required, it is not yet clear whether a state which is able to establish a jurisdictional link with the parties to the case could be allowed to intervene as a party. On this point, see the resolution on “Judicial and Arbitral Settlement of International Disputes Involving More Than Two states” adopted in 1999 by the Institute of International Law on the basis of Judge Bernhardt’s reports. Article 18 of that resolution provides that, “with the consent of all parties to the case, an intervening state may become a full party to the proceedings with the corresponding rights and obligations”. For the text of the resolution, see *Yearbook/ Institute of International Law* 68 (1998), Vol. II, 376.

¹⁰ Non-party intervention has been sometimes associated with a form of participation as *amicus curiae*, mainly because the stated object of the intervention is to inform the Court of rights of third states and because the intervenor does not become a party and, therefore, is not bound by the decision of the Court. See, for instance, R.Y. Jennings, “The Role of the International Court of Justice”, *BYIL* 68 (1997), 1 et seq., (8). Indeed, the view has been held that, since intervention under Article 62 fulfils in principle the function of an *amicus curiae* brief, there would be no need to provide for participation to the proceedings as *amicus curiae*. R. Bernhardt, “Judicial and Arbitral Settlement of International Disputes Involving more than Two States. Report – Final Version”, *Yearbook/ Institute of International Law* 68 (1998), Vol. I, 60 et seq., (112-114).

II. Towards an Enlargement of the Scope of Intervention under Article 62?

1. Intervention Limited to the Subject-Matter of the Dispute before the Court

The type of interest which justifies intervention under Article 62 differs from that envisaged under Article 63. While in the latter case, as we have seen, the interest of the intervenor consists in an abstract interest in the interpretation to be given by the Court to a convention, the Court has consistently held that in the case of Article 62 a state cannot intervene “simply on an interest in the Court’s pronouncement in the case regarding the applicable general principles and rules of international law”,¹¹ this interest being considered as too general in nature.¹² A state seeking to intervene under Article 62 has to specify the content of its legal interest with reference to a given claim. In the cases so far submitted to the Court the interest has been mainly identified with specific rights or titles that the states seeking to intervene claimed to possess against the parties to the dispute.¹³ The Court has been very strict in

¹¹ *Continental Shelf (Tunisia/ Libyan Arab Jamahiriya), Application by Malta for Permission to Intervene*, (hereinafter *Application by Malta Case*), ICJ Reports 1981, 3 et seq., (17).

¹² Cf. *Application by the Philippines Case*, see note 9, para. 52.

¹³ The question has been raised as to whether the notion of interest of a legal nature referred to in Article 62 has to be seen as equivalent to that of a legal right. In his Dissenting Opinion in the *Application by Italy Case*, Judge Ago incidentally noted that an interest of a legal nature should be considered as “nothing other than a right”, ICJ Reports 1984, 3 et seq., (124). In this sense, see also article 10 of the Resolution adopted by the Institute of International Law, see note 9: “Intervention under Article 62 [...] 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”. It has been suggested, however, that the two notions are not necessarily equivalent and that Article 62 allows a third state to intervene for the protection of something less than a right. See S. Torres Bernárdez, “L’intervention dans la procédure de la Cour internationale de Justice”, *RdC* 256 (1995), 195 et seq., (289-295); E. Dousis, “L’intérêt juridique comme condition de l’intervention devant la Cour internationale de justice”, *Revue Hellenique de Droit International* 52 (1999), 281 et seq., (288).

evaluating whether the content of the interest claimed by the third state had been specified to a degree sufficient to justify intervention.¹⁴

The state seeking to intervene also has to show the precise way in which its rights or interests “may be affected by the decision in the case”. This occurs most clearly when the legal interest of the third state is related to the subject-matter of the dispute pending before the Court. A situation of this kind arises, for instance, when the legal claims of the third state concern areas that are disputed by the parties to the proceedings, as in the case of the applications to intervene made by Italy and, more recently, by Equatorial Guinea; or when, as in the case of Nicaragua’s application, the Court is called upon by the parties to determine the legal régime of an area and that determination inevitably affects the rights of the third state. In such cases the rights or interests claimed by a third state may be affected directly by the operative part of the decision. In deciding upon the rights pertaining to the parties to the proceedings, the Court might implicitly impinge on the conflicting legal claims put forward by the third state.

When the rights or obligations of a third state are involved in a case before the Court, the principle of consensual jurisdiction might be invoked in order to protect the legal position of that state. As was stated in the *Monetary Gold Case*, this principle entails that the Court cannot dispose of rights or obligations of a state which is not before it.¹⁵ When

¹⁴ This aspect comes out clearly in the Chamber’s decision in the *Application by Nicaragua Case*. While Nicaragua contended that its legal interest in the delimitation of maritime spaces within the Gulf of Fonseca was implied in the fact that it would have been impossible to carry out any delimitation without taking into account its coasts in the Gulf, the Chamber rejected the request to intervene in that regard on the basis of the consideration that “Nicaragua did not in its Application indicate any maritime spaces in which Nicaragua might have a legal interest which could be said to be affected by a possible delimitation line between El Salvador and Honduras”, *Application by Nicaragua Case*, ICJ Reports 1990, 92 et seq., (125). On the Chamber’s decision not to accept Nicaragua’s intervention in respect to the question of the delimitation of maritime spaces, see the critical remarks by R. Riquelme Cortado, “Las claves de la limitada autorización de intervención de Nicaragua en la controversia insular y marítima entre Honduras y El Salvador (sentencia de la CIJ (Sala) de 13 de septiembre de 1990)”, *REDI* 44 (1992), 25 et seq., (41-42).

¹⁵ ICJ Reports 1954, 19 et seq., (32): “To adjudicate upon the international responsibility of Albania without her consent would run counter to a well established principle of international law embodied in the Court’s Statute,

the legal position claimed by a third state does not constitute the very subject-matter of the dispute, the Court might nonetheless be led, on the basis of that principle, to limit the scope of its decision in order not to affect rights claimed by the third state.¹⁶ Indeed, this is what the Court has done in its decision in the *Continental Shelf (Libyan Arab Jamahiriya/ Malta) Case*.¹⁷ Yet, while providing an effective protection of the interests of third states, this solution may give rise to different sets of problems. The Court's activity would be significantly hampered should it be compelled to decline to decide a dispute, at least in part, simply because it has been made aware of the possible involvement of third states' rights.¹⁸ Following this approach, a third state would be entitled to ask the Court to limit its jurisdiction in order to protect its rights without having to justify its claim. This would probably imply an

namely, that the Court can only exercise its jurisdiction over a state with its consent".

- ¹⁶ Cf. article 20 of the Resolution adopted by the Institute of International Law, see note 9: "If the rights or obligations of the parties to the proceedings can be separated from those of a third state, the court or tribunal may decide on that part of the dispute relating to these rights or obligations". On this point see B. Ajibola, "The International Court of Justice and Absent Third States", *African Yearbook of International Law* 4 (1997), 85 et seq.
- ¹⁷ ICJ Reports 1985, 13 et seq. and B. Conforti, "L'arrêt de la Cour internationale de justice dans l'affaire de la délimitation du plateau continental entre la Lybie et Malte", *RGDIP* 90 (1986), 315 et seq. See also the Court's decision in the *Continental Shelf (Tunisia/ Libyan Arab Jamahiriya) Case*, ICJ Reports 1982, 18 et seq., (91).
- ¹⁸ An additional question in this regard is whether the Court should delimit the scope of its jurisdiction only after a third state has informed the Court of its claims. For the view that the Court could decide *proprio motu*, independently of any information received from a third state whose interest may be involved in the dispute, cf. Conforti, see note 17, 342; Riquelme Cortado, see note 14, 33. It may be noted, however, that in its 1985 judgement the Court, while observing that Tunisia might also have been affected by its decision, did not take into account the possible claims of this state, contending that "the Court has not been furnished with any information as to the views of that state as to its own entitlement vis-à-vis Malta", *Continental Shelf (Libyan Arab Jamahiriya/ Malta) Case*, ICJ Reports 1985, 13 et seq., (24).

unreasonable benefit for that state and also risk an excessive curtailment of the task entrusted by the parties to the Court.¹⁹

Intervention under Article 62 is mainly regarded as a means which serves the function of a remedy to this kind of situations. What is the exact nature of this remedy, however, has not yet been clearly defined.

In the *Application by Nicaragua Case*, the Chamber stated that non-party intervention is for the purpose of protecting a third state's legal interest; such protection would not involve the seeking of a judicial pronouncement on the claims of that state but would merely consist in the possibility to inform the Court about the content of those claims.²⁰ By so doing, the intervening state would assist the Court in limiting the scope of its decision so as not to affect the rights which it claims.²¹

The distinction drawn by the Chamber between protection or preservation of the rights claimed by an intervening state and their recognition is not without ambiguity. It stops short of clarifying the question as to whether or not intervention involves the possibility for the Court to deal with the merits of the claim presented by the intervening states and to decide upon its prevalence on the countervailing claims of the

¹⁹ On this point, see the critical remarks addressed to the Court by some judges dissenting from the decision of the Court in the *Continental Shelf Case (Libyan Arab Jamahiriya/ Malta)*. Judge Mosler protested that "the competence of the Court to decide on the delimitation of the area lying between the coast of the Parties cannot depend on the pretensions of a third state brought to the Court's notice". According to Judge Schwebel, "in today's Judgements, the Court virtually grants to Italy what Italy would have achieved if its request to intervene had been granted and, once granted, if Italy had established to the Court's satisfaction 'the areas over which Italy has rights and those over which it has none'", ICJ Reports 1985, 13 et seq., (117 and 173).

²⁰ "It seems to the Chamber however that it is perfectly proper, and indeed the purpose of intervention, for an intervener to inform the Chamber of what it regards as its rights or interests, in order to ensure that no legal interest may be 'affected' without the intervener being heard", ICJ Reports 1990, 92 et seq., (130).

²¹ For the distinction between intervention aiming at the recognition of a third state's rights and intervention aiming at their protection, see G. Sperduti, "La sauvegarde des droits de l'Etat tiers dans le procès devant la Cour internationale de Justice", *RDI* 71 (1988), 86 et seq.; G. Sperduti, "Etude sur l'intervention dans le procès international", in: *Hacia un nuevo orden internacional y europeo. Estudios en homenaje al Profesor Don Manuel Díez de Velasco*, 1993, 713 et seq.; Bernhardt, see note 10, 86-90.

parties. This point appears to be decisive in order to identify the precise nature of intervention under Article 62. If it is accepted that the Court is allowed to assess the legal validity of the claim presented by the intervening state, then the distinction between intervention aiming at protection and intervention aiming at recognition would substantially vanish: the sole purpose of intervention would be that of enabling a third state to defend the merits of its claims in order to have them recognized by the Court, the only distinction lying in the fact that, in the absence of a jurisdictional link, the rights of the intervening state could only be recognized in a negative sense, namely by a decision of the Court rejecting the countervailing claims of the parties.

The Court did not fail to note this point when, in 1984, Italy attempted to intervene in the *Application by Italy Case* on the basis of the argument that it was only seeking the protection of its rights and not their recognition. The Court denied the relevance of that distinction in the context of the case arguing that, since granting intervention would have in any case entailed entering into the merits of the claim of the intervening state, the decision of the Court would inevitably have been one either recognizing or rejecting the validity of that claim.²² In order to protect the position of Italy without entering into the merits of its claim, the Court saw no other option than rejecting the request of intervention and then, on the merits, abstaining from taking a decision affecting the rights claimed by Italy.

The position taken by the Court in 1984 was no doubt unduly restrictive.²³ Even assuming, as suggested by that judgement, that the Court could not deal with the merits of the claim put forward by a

²² “A decision of the Court preserving the Italian rights, in contrast to a decision ruling upon them, could only be taken after Italy had informed the Court of its claims, but without the merits of those claims being argued before the Court by Italy and the principal Parties. [...] If in a case of this kind a third state were permitted to intervene so as to present its claims and indicate the grounds advanced as justifying them, then the subsequent judgement of the Court could not be limited to noting them, but would, expressly or implicitly, recognize their validity and extent”, *Application by Italy Case*, ICJ Reports 1984, 3 et seq., (21).

²³ For the view that the judgement in 1984 disclosed a tendency of the Court “to feel convinced that the aims which the procedure of intervention properly so called was intended to achieve, would in fact already be practically attained by the mere holding of the preliminary proceedings on the question of admission of the intervention”, see Judge Ago’s Dissenting Opinion, ICJ Reports 1984, 3 et seq., (129-130).

third state, this does not imply that the possibility of intervention should be excluded. Between abstaining and dealing with the merits the Court might follow a mid-way approach: a state could be admitted to intervene for the sole purpose of specifying the content of its claim.²⁴ Even with this limited purpose, intervention would still serve a useful function. The Court would be put in the position of determining whether the claim of the intervening state is *prima facie* unreasonable or not; this, in turn, would mitigate the risk inherent in the fact of putting in the hands of a third state, which claims an interest in the subject-matter of a dispute, the possibility of restricting the Court's jurisdiction.²⁵

It seems, however, that a different solution may be held, which represents a more radical departure from the approach followed by the Court in 1984. While the Court did not say it explicitly, the main reason why Italy's application was rejected was the absence of a jurisdictional link.²⁶ In the course of its reasoning the Court pointed indirectly to the problem of the jurisdictional link by endeavouring to show that Italy was in fact asking the Court to recognize its rights instead of simply protecting them. The central point, however, seemed to concern the problem of the Court's jurisdiction to deal with the merits of the claim presented by a third state. The idea underlying the Court's reasoning was that entering into the merits of the Italian claims, even for the sole purpose of arriving at a decision not prejudging them, would have in-

²⁴ The view that intervention would simply serve the function of giving the Court more information was held by Judge Ago. He regarded Italy's request for intervention as admissible since, in his view, the object of intervention was simply that of indicating "the extent of its claims and the legal foundations on which Italy bases them, with the sole purpose, however, of demonstrating that those claims deserve to be taken seriously, and certainly not of obtaining a definitive recognition of them by the Court", See ICJ Reports 1984, 3 et seq., (123 et seq.).

²⁵ In order to justify its decision to limit the scope of its jurisdiction, the Court referred to the question as to the reasonableness of the Italian claims by noting that "it has not been suggested by either of the Parties that they are obviously unreasonable", *Continental Shelf (Libyan Arab Jamahiriya/Malta) Case*, ICJ Reports 1985, 13 et seq., (28). On the existence of a Court's duty to assess the *prima facie* validity of the claim presented by a third state before deciding to limit the scope of its jurisdiction, cf. Conforti, see note 17, 343.

²⁶ On this point, see H. Thirlway, "The Law and Procedure of the International Court of Justice 1960-1989 (Part Eleven)", *BYIL* 70 (2000), 71 et seq., (87-88).

evitably widened the scope of the dispute submitted by the parties;²⁷ this, in turn, would not have been possible without a specific basis of jurisdiction.

This idea is questionable. Contrary to the Court's assumption, it may be argued that, when the claims of a third state relate to the subject-matter of a dispute, allowing intervention does not entail extending the dispute over matters which are not already in issue before the Court. Independently from intervention, the rights of the third state are already involved in the dispute submitted by the parties; indeed, any Court's decision upon the rights of the parties would, in any case, imply a judgement on the claims of the third state. Thus, if, in resolving the dispute between the parties, the Court might be led to assess the claim presented by a third state, this could not be construed as involving the introduction of a new dispute.²⁸

The problem as to the extension of the Court's jurisdiction should be dealt with along the same lines. The conclusion at which the Court arrived in 1984 would lead one to deny that the Court has jurisdiction to decide a dispute, at least in part, where the rights of third states are involved. Indeed, when in 1985 the Court entered into the merits of the dispute between Libya and Malta, it found that "the Court has not been endowed with jurisdiction" to delimit maritime areas which were claimed by Italy.²⁹ This approach would have the effect of placing a heavy limitation on the Court's ability to deal with disputes involving the interests of a number of states: the Court would be prevented from entertaining a case, at least in part, without the consent of all those states which may claim to have rights which could be affected, to a greater or lesser extent, by the Court's decision. Instead, when the interest of a third state is directly involved in the dispute before the Court, a more flexible approach may be suggested. It may be held that in principle the Court does have jurisdiction as regards the dispute submitted to it even if an interest of a third state might be involved in that dispute. As to the problem of ensuring the protection of third states, this should be dealt with by the Court in terms of propriety: the

²⁷ For the Court's findings that "to permit the intervention would involve the introduction of a fresh dispute", *Application by Italy Case*, ICJ Reports 1984, 3 et seq., (22).

²⁸ See, in this sense, the considerations of Judge Jennings, ICJ Reports 1984, 3 et seq., (155).

²⁹ *Continental Shelf (Libyan Arab Jamahiriya/ Malta) Case*, ICJ Reports 1985, 13 et seq., (26).

Court should evaluate, in the light of the possible impact of its decision on the interests of third states, whether or not it should refrain from exercising its jurisdiction over the dispute or part of it.

So far, in the context of contentious proceedings, the Court has refrained from taking a clear position as to the situations in which it can assert a discretion to exercise jurisdiction.³⁰ Yet, considerations of propriety did not appear to be extraneous to the Court's reasoning in certain cases, in particular when dealing with the problem of disputes involving interests of third states.³¹ In the recent decision on the preliminary objections in the *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria*, for instance, the Court, in dealing with the objections raised by Nigeria that the question of maritime delimitation necessarily involved the rights of third states, observed that, in order to determine "to what extent it would meet possible claims of other states, and how its judgement would affect the rights and interests of these states, the Court would of necessity have to deal with the merits of Cameroon's request"; it added that "the Court cannot rule out the possibility that the impact of the judgement required by Cameroon could be such that the Court would be prevented from rendering it in the absence of these states".³² Notwithstanding the careful language of

³⁰ On the question as to the relevance of considerations of judicial propriety in the context of contentious cases, see, in particular, the Separate Opinion of Judge Fitzmaurice appended to the Court's decision in the *Case Concerning the Northern Cameroons*, ICJ Reports 1963, 15 et seq., (100 et seq.).

³¹ This aspect comes out clearly from the position taken by some judges in their Separate or Dissenting Opinions. See, for instance, Judge Schwebel's approach to the problem of disputes involving third states' interests, as manifested in his Dissenting Opinion attached to the judgement on preliminary objections in the *Nauru* case: "The question is one of balancing the propriety of the Court's exercising to the full the jurisdiction which it has been given against the impropriety of determining the legal interests of a third state not party to the proceedings", ICJ Reports 1992, 240 et seq., (335). For an assessment of the question concerning the Court's discretion to decline jurisdiction when third states' interests are involved in a dispute, see H. Thirlway, "The Law and Procedure of the International Court of Justice 1960-1989 (Part Nine)", *BYIL* 68 (1998), 1 et seq., (34 et seq.).

³² ICJ Reports 1998, 275 et seq., (324). Significantly, the Court referred also to its earlier *dictum* in the *East Timor* case, to the effect that the Court "is not necessarily prevented from adjudicating when the judgement it is asked to give might affect the legal interest of a state which is not a party to the case".

the Court, the issue as to the possibility not to render a judgement appears to be treated here as one of propriety rather than one of absence of jurisdiction. This conclusion, at least, seems to be supported by the fact that the decision on whether or not to render a judgement is made dependent on an evaluation on the part of the Court as to the extent of the impact of a possible judgement on the rights of third states.

Once it is recognized that, in case of a dispute involving the rights of third states, the Court has jurisdiction but may choose not to exercise it, then the possibility for the Court to enter into the merits of a claim presented by an intervening state can certainly be admitted. Because of the willing participation in the proceedings by the interested state, no question of propriety may be raised. Provided that that state has agreed to defend its claim before the Court, it does seem proper that the Court would exercise the jurisdiction which has been conferred to it by the parties; in resolving the dispute between the parties, the Court can also determine the validity and the extent of the rights claimed by the third state.³³ It has to be noted that the conclusions at which the Chamber arrived in its judgements on the merits in the *Application by Nicaragua Case*, appear to be wholly consistent with this approach. The Chamber did not refrain from dealing with the merits of the claims presented by Nicaragua. In fact, the dispute has been dealt with as one between three states, even if Nicaragua was not formally a party to the dispute. In this regard, it is striking that the Chamber, while finding that Nicaragua was

³³ In this regard, an interesting parallel may be drawn with the case in which the Court has been requested to give an Advisory Opinion on a question which directly relates to an actual dispute between states, and these states agree to argue the merits of the dispute before the Court. While the Court has asserted that, in principle, judicial propriety prevents it from entertaining a request for an opinion related to a legal dispute actually pending between states, in at least one case it has given relevance, in considering the problem as to the propriety to render an opinion, to the fact that the interested state “has appeared before the Court, participated in both the written and oral proceedings and, while raising specific objections against the competence of the Court, has addressed itself to the merits of the question”. See the Advisory Opinion in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* case, ICJ Reports 1971, 16 et seq., (23). For the view that “the willing participation to the proceedings by the state or states concerned would negate any threat to judicial propriety caused by the fact that the request for an advisory opinion relates to an actual dispute”, see S. Yee, “*Forum Prorogatum* and the Advisory Proceedings of the International Court”, *AJIL* 95 (2001), 380 et seq., (385).

not bound by the judgement, made reference to the rights and duties of that state in the operative part of the decision.³⁴

If it is accepted that the sole purpose of intervention is to obtain the recognition of the rights of the intervening state by the Court, then the only distinction which can be drawn is between intervention as a party and intervention as a non-party. In the *Application by Nicaragua Case* the Chamber has rejected that the purpose of intervention can be to tack on a new case against either or both of the parties.³⁵ Yet, the possibility to intervene as a party, in the presence of a jurisdictional link, should be admitted at least when a state has an interest in the subject-matter of a dispute before the Court.³⁶ Since in this kind of situation a

³⁴ The problem of identifying the proper purpose of intervention is now put squarely to the Court in the pending case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon/ Nigeria: Equatorial Guinea Intervening)*. In its Application for permission to intervene, Equatorial Guinea explained that the purpose of its intervention was to inform the Court of its rights “so that these may remain unaffected as the Court proceeds to address the question of the maritime boundary between Cameroon and Nigeria”, ICJ Reports 1999, 1030 et seq., (1031). In particular, Equatorial Guinea specified that, “if the Court were to determine a Cameroon-Nigeria maritime boundary that extended into Equatorial Guinea waters, as defined by the median line, Equatorial Guinea’s rights and interests would be prejudiced”. On the other hand, Cameroon contested the rights claimed by Equatorial Guinea but did not object to the intervention, considering that “the intervention of Equatorial Guinea should allow the Court to decide on a delimitation of the boundary which will be stable and final in relation to the states involved”. Thus, on the basis of what it has been said, it seems that the Court, instead of limiting the scope of its decision up to the point where the third state has no claims, should proceed to evaluate the respective argument submitted by the parties and by the intervening state, and then, after having seen which claim prevails over the others, to decide upon the precise extent of the rights of the parties.

³⁵ ICJ Reports 1990, 92 et seq., (133-134).

³⁶ Although not without ambiguity, the Chamber seemed to leave open the possibility for a state to intervene as a party since it recognized that, “provided that there is the necessary consent by the parties to the case, the intervener is not prevented by reason of that status from itself becoming a party to the case”, see case mentioned above, ICJ Reports 1990, 92 et seq., (134). Thus, it seems that, in the Chamber’s view, the presence of a jurisdictional link is not sufficient for a state to be admitted to intervene as a party; an *ad hoc* consent of the parties would in any case be necessary. On this point, see the remarks by J.M. Ruda, “Intervention before the Interna-

state can, in any case, intervene as a non-party, it seems unreasonable that, in the same situation, a state would be debarred from intervening as a party. Independently of a jurisdictional link, intervention would in any case aim at the recognition of the rights of the intervening state; the main difference between these two forms of intervention would consist in the fact that, in the presence of a jurisdictional link, the Court would be empowered to decide with binding force upon the rights of all the states involved in the proceedings. Indeed, a solution which would allow the Court to take a binding decision also on the intervening state should be favoured. For this reason, even in the absence of a prior jurisdictional link, the Court should recognize the possibility to extend its jurisdiction on the intervening state simply on the basis of some form of *ad hoc* consent between the intervening state and the parties.

The identification of the precise nature of intervention under Article 62 has a bearing, in particular, on the question of the procedural rights which should attach to the status of an intervener. Contrary to what sometimes has been suggested, a non-party intervener cannot be assimilated to an *amicus curiae*. It is true that the subsequent decision of the Court will not be binding upon it; but too much weight should not be given to this point, since such a decision will nonetheless affect the possibility for that state to maintain its claim in its relation to the other states.³⁷ From this point of view, it does not seem that the intervening

tional Court of Justice”, in: V. Lowe/ M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice. Essays in honour of Sir Robert Jennings*, 1996, 487 et seq.; Thirlway, see note 26, 71 et seq. (89).

³⁷ The position stated by Equatorial Guinea in its application for permission to intervene (available at <http://www.icj-cij.org>) is very significant in this regard. Equatorial Guinea refers to the possible effect of a Court's decision in the following terms: “While Article 59 of the Court's Statute provides that ‘the decision of the Court has no binding force except between the parties and in respect of that particular case...’, the Court can readily appreciate that the reality of international life is such that it may be difficult to implement this legal principle in practice. Equatorial Guinea is a relatively small, poor country faced by two large and relatively powerful neighbouring African states. If the Court were to determine a Cameroon-Nigeria maritime boundary that would cross over the median line with Equatorial Guinea, this would impair Equatorial Guinea's ability to negotiate a boundary with these two states based on the median line as well as its interest in any adjudication of its maritime boundary with either Cameroon or Nigeria. [...]. The Court will readily appreciate that, as a practical matter, any judgement extending the boundary between Cameroon and Nigeria across the median line with Equatorial Guinea will be relied upon

state, which is not a party, is in a more advantageous position than the parties to the case. In fact, the interests of an intervening state are put at stake in the proceedings to the same extent as that of the parties. Yet, under the Rules of Court, the intervener is certainly endowed with more limited procedural rights.³⁸ Apart from the fact that a non-party intervening state has no right to appoint a judge *ad hoc*, the means given to an intervener, under article 85 of the Rules of Court, in order to defend its claims are not satisfactory compared to that available to the parties. This could be explained by considering that, when, in 1978, the current Rules were adopted, there was still uncertainty about the precise function of intervention under Article 62. Once this question has been clarified in the practice of the Court, the Rules should be amended in order to enlarge the scope of the procedural rights which are attached to the status of an intervener; in particular, an intervener should be allowed to present its arguments before the Court on an equal footing with the parties.³⁹

2. Intervention Prompted by an Interest in the Reasoning of the Court

The situation in which a state has an interest related to the subject-matter of a dispute, brought before the Court, has for long been con-

by concessionaires who would likely ignore Equatorial Guinea's protests and proceed to explore and exploit resources to the legal and economic detriment of Equatorial Guinea."

- ³⁸ On the procedural rights of a non-party intervenor, cf. Bernhardt, see note 10, 91-93. In this regard, it may be interesting to note that an even more unfavourable position appears to be that of a state intervening under article 31 of the Statute of the International Tribunal for the Law of the Sea, which is framed similarly to Article 62. In that case, the intervening state does not become a party and is not entitled to choose a judge *ad hoc*, but is bound by the Tribunal's decision. On this point, see R. Wolfrum, "Intervention in the Proceedings before the International Court of Justice and the International Tribunal for the Law of the Sea", in: V. Götz/ P. Selmer/ R. Wolfrum (eds), *Liber amicorum Günther Jaenicke – Zum 85. Geburtstag*, 1998, 427 et seq., (440-441).
- ³⁹ For the view that, "where the legal rights of the third party are an integral aspect of the litigation, or a part of it, the role of that party should be greater", and in particular "its involvement should be regulated, as far as possible, by the ordinary procedural rules for the contentious cases", cf. Greig, see note 2, 287 et seq., (329).

sidered as the only one which could justify intervention under Article 62.⁴⁰ This view was prompted not so much by the wording of the text as by the Court's decision in the *Application by Malta Case*. The Court rejected Malta's application because it considered that the interest invoked by Malta was not such as to justify intervention. It noted, *inter alia*, that "the interest of a legal nature invoked by Malta does not relate to any legal interest of its own directly in issue as between Tunisia and Libya in the present proceedings [...]; it concerns rather the potential implications of reasons which the Court may give in its decision in the present case".⁴¹

In its recent decision on the application by the Philippines for permission to intervene, however, the Court upheld a broader reading of the notion of legal interest.⁴² While rejecting the Philippines' application, the Court recognized that an interest, which relates to the reasoning that the Court could make in deciding upon a dispute, may be sufficient in order to justify intervention. This conclusion was reached on the basis of a broad interpretation of Article 62. The decision on Malta's application was explained as follows: the Court considered that Malta's application was rejected not because of the nature of the interest claimed by that state, but on the grounds that the object of the intervention sought by Malta was not a proper one under Article 62.⁴³

When the legal interest of the third state relates to the reasoning of the Court, its request to intervene seems to be motivated by something other than the fear that the Court, by deciding upon the rights or titles of the parties, would by implication be led to decide also upon the conflicting rights claimed by that state. The third state will then be prompted to intervene by a more general apprehension that its legal in-

⁴⁰ See, for instance, J. Collier/ V. Lowe, *The Settlement of Disputes in International Law*, 1999, 166; Chinkin, see note 7, 152; Davi, see note 8, 218. In his Dissenting Opinion appended to the Court's judgement in the *Application by Italy Case*, Judge Jennings noted that "it is evident from the wording of Article 62 that an intervention under that article is admirably suited to intervention limited to the subject-matter and the issues raised in the main action", *Application by Italy Case*, ICJ Reports 1984, 3 et seq., (149).

⁴¹ ICJ Reports 1981, 3 et seq., (12).

⁴² See *Application by The Philippines Case*, Judgement of 23 October 2001, available at the Court's website (<http://www.icj-cij.org>).

⁴³ The explanation does not appear convincing. See, on this point, the remarks by S. Forlati, "Interesse di natura giuridica' ed effetti per gli Stati terzi delle sentenze della Corte internazionale di giustizia", *RDI* 85 (2002) forthcoming.

terest may be affected by certain interpretations of rules or certain assumptions of fact which the Court may make as a basis of its decision. The risk is that these interpretations or assumptions may subsequently be made also in the determination of the rights which the intervening state claims. By intervening, the third state will seek to prevent the formation of a precedent which could be contrary to its claims.

Thus, in its application to intervene the Philippines did not claim any interest in the actual subject-matter of the dispute between Malaysia and Indonesia, namely the sovereignty over Sipadan and Ligitan islands. The Philippines feared that by deciding the dispute between Malaysia and Indonesia the Court might be led to interpret certain treaties in a way which would have affected its claim to sovereignty in North Borneo. In other words, the Philippines' interest did not lie in the fact that its claim could be directly affected by the Court's decision concerning the respective rights of the parties; its interest had to do only with the interpretation that could be given to treaties which constituted the basis of its claim.⁴⁴

The fact that a third state may be admitted to intervene because of its interest in the interpretations or assumptions which the Court may make in the course of its reasoning in a case entails an enlargement of the types of intervention covered by Article 62. In a situation of this kind the intervention of the interested third state would serve almost the same purpose as that of intervention under Article 63.⁴⁵ A difference would remain insofar as a state seeking to intervene under Article 62 has to show that it has an interest which could be affected by the Court's reasoning. In particular, as the Court observed in its decision in the *Application by The Philippines Case*, the state must show its own claim and the legal instruments on which it is said to rest, and "must explain with adequate specificity how particular reasoning or interpre-

⁴⁴ See, in this respect, the statement by the counsel of the Philippines, Reisman: "The interest of a legal nature which the Philippines believes is implicated is the interpretation of treaties which may have to be interpreted by the Court", ICJ, Public sitting held on 25 June 2001, Verbatim Record, CR 2001/1, 12 (available at <http://www.icj-cij.org>).

⁴⁵ This was noted by the counsel of Malaysia, Lauterpacht: "There is a real danger that if the Court were to accept the Philippines' thesis, the scope of Article 62 would have been construed so widely that it could embrace even matters that fall within Article 63, and recourse to the latter Article would become unnecessary", ICJ, Public sitting held on 29 June 2001, Verbatim Record, CR 2001/4, 16.

tation of identified treaties by the Court might affect its claim".⁴⁶ The burden of showing the existence of a legal interest may be a heavy one, particularly when, as in the case of the Philippines, the third state has been denied access to the documents in the case.⁴⁷ However, once admitted, intervention will not concern the question of the actual existence and extent of the rights claimed by the intervening state. It will merely allow the third state to submit its views to the Court on specific points of law or other issues. Under this aspect there seems to be no difference with the type of intervention covered by Article 63. However, the state intervening under Article 63 will be bound by the Court's interpretation while the same does not apply in the case of intervention under Article 62.

3. Limits to Intervention under Article 62

The central point of the Court's decision concerning the *Application by The Philippines Case* relates to the identification of the legal interest which must be shown under Article 62. By accepting that a state which has an interest in the reasoning of the Court may be admitted to intervene, the Court has widened the possibility of access to the proceedings by third states.⁴⁸ Whether it represents a proper move to enlarge the

⁴⁶ *Application by the Philippines Case*, Judgement of 23 October 2001, para. 60.

⁴⁷ Under article 85 of the Rules of the Court, a third state has no right to be supplied with copies of the pleadings and documents annexed until its intervention is admitted. The Philippines strongly protested against the fact that access to the pleadings was denied to it by the Court, arguing that not allowing a state seeking to intervene to have notice of the briefs of the parties would be equivalent under certain circumstances to a denial of justice. A suggestion to amend the Rules has been presented by a study group established by the British Institute of International and Comparative Law, to the effect that a state which can establish *prima facie* that it has an interest in the case should be allowed to have access to the memorials and annexed documents in the case. See "The International Court of Justice. Efficiency of Procedures and Working Methods. Report of the Study Group Established by the British Institute of International and Comparative Law as a Contribution to the UN Decade of International Law", *ICLQ Supplement* 45 (1996), 1 et seq., (30). Cf. also article 13 of the resolution adopted by the Institute of International Law, see note 9.

⁴⁸ During the oral proceedings in the *Application by the Philippines Case*, counsel for Malaysia, Crawford, warned the Court that, if states were per-

scope of intervention under Article 62 so as to cover also this type of situation, remains to be seen. Before dealing with this point, however, the question of the effects of the Court's judgements on third states has to be considered.

The Court's position with regard to the scope of intervention seems to rest on the assumption that a third state, which has an interest in the issues of law or fact to be resolved by the Court in the course of its reasoning in a case, may be affected by the Court's decision to the same extent as a state whose interest is involved in the actual dispute to be settled by the Court. Contrary to this assumption, however, the impact of a Court's decision on third states appears to be different depending on whether a state has an interest in the very dispute to be adjudicated by the Court or in one of the questions which the Court has to deal with in order to decide a case.

When the interest of a third state is affected by the operative part of a decision, the fact that the rights and obligations created by the operative part constitute, as between the parties, the final settlement of the dispute submitted to the Court, is not without relevance to the third state. While that state would be formally free to initiate new proceedings, the possibility of the Court deciding differently on the same issue should not be taken for granted.⁴⁹ It would involve accepting the idea that the Court could take contradictory judgements on the same issue. This, however, runs counter to the very notion of *res judicata*, which entails that a dispute should be regarded as definitively settled once the Court has decided upon it. Does the problem of *res judicata* arise also when a third state is affected by the reasoning of the Court? While the Court's position with regard to the scope of intervention may be seen as an indication in the sense that the effect of *res judicata* extends also to the reasons on which a decision was based,⁵⁰ the impact on third states of the Court's reasoning in a case has nothing to do with the problem of

mitted to intervene because of their interest in the reasoning of the Court, "then we would have to enlarge this court room, because in virtually every boundary dispute there will be other states who fear that they may be affected [...]. There will be queues of states seeking to intervene", See ICJ Public sitting held on 29 June 2001, Verbatim Record, CR 2001/4, 17.

⁴⁹ The risks inherent in the fact of using Article 59 as "a vehicle for importing an inappropriate bilateralism or relativism into the judgements of the Court" have been denounced, in particular, by Judge Jennings in his Dissenting Opinion in the *Application by Italy Case*, ICJ Reports 1984, 3 et seq., (157 et seq.).

⁵⁰ For this remark, cf. Forlati, see note 43.

res judicata.⁵¹ This impact is determined by the Court's tendency to adopt the same solutions in later disputes in which similar issues of law or fact arise. While it is certainly in the Court's interest to maintain consistency in its holdings, it is clear that the Court is free to reconsider its previous findings and to depart from them.⁵²

The different impact of a Court's decision on a third state is an aspect which has to be taken into account when considering the problem of third states' participation in the proceedings. It is in this light that the question concerning the opportunity to enlarge the scope of intervention under Article 62 should be assessed.

In the *Application by The Philippines Case* the Court has substantially recognized that the position of a state, which has an interest in the Court's reasoning in a case, may not be adequately safeguarded by Article 59 of the Statute and that a proper protection can only be assured by giving the third state an opportunity to present its views to the Court. This is a very significant development in the Court's position. It may be noted that, within the Court, Judge Oda has repeatedly held the view that intervention under Article 62, if interpreted in the light of Article 63, could be considered as embracing also the situation in which a state seeks to intervene in order to present its views on aspects of law which the Court may be led to decide in the course of its reasoning in a case.⁵³ In particular, he observed that, if under Article 63 a third state is enabled to protect its interests in the interpretation of a convention to which it is a party, there is no convincing reason why the same state

⁵¹ The question as to the objective limits of the notion of *res judicata* has been considered mainly in order to determine the part of the judgement which is binding on the parties. For the view that the binding effects attach only to the operative part of the judgement and not to the reasons, see, in particular, G. Gaja, "Considerazioni sugli effetti delle sentenze di merito della Corte internazionale di giustizia", in: *Il processo internazionale. Studi in onore di Gaetano Morelli, Comunicazioni e studi* 14 (1975), 312 et seq.

⁵² On the Court's power to depart from its previous decisions, cf. Shahabuddeen, see note 5, 128 et seq.

⁵³ See the Dissenting Opinion in the *Application by Malta Case*, ICJ Reports 1981, 3 et seq., (30-31); the Dissenting Opinion in the *Application by Italy Case*, ICJ Reports 1984, 3 et seq., (110 et seq.); the Separate Opinion in the *Application by Nicaragua Case*, ICJ Reports 1990, 92 et seq., (138 et seq.); the Dissenting Opinion in the *Application by The Philippines Case* (available at the International Court of Justice's website: <http://www.icj-cij.org>). See also Oda, see note 7, 9 et seq. (85-87). A similar view was held by Jessup, see note 7, 903 et seq.

should not be permitted to intervene in order to protect its interest in the interpretation of general principles and rules of international law. In the *Application by The Philippines Case*, the Court seems to have moved, to a certain extent, in the direction that Judge Oda pointed to.

While one may agree with the Court about the opportunity to enlarge the possibility of access to the Court by third states, extending the scope of intervention under Article 62 does not appear to be an adequate solution. Since, as we have seen, third states may have a different degree of interest in a Court's decision, it does not seem proper that the same form of intervention should cover considerably different situations. It seems reasonable to consider that the conditions for intervention and the degree of involvement of third states in the proceedings may vary in relation to the different degree of interests in the Court's decision.

The lack of a clear distinction to this effect may explain the position taken by the Court in the *Application by The Philippines Case* with regard to the point concerning the nature of the interest which a third state has to show in order to be admitted to intervene. As it has been seen, in the Court's view a state which has an interest in the reasoning of the Court has to show that its interest is not simply general in nature but is linked to a specific claim. While the Court has not clarified whether there should be a certain degree of connection between the claim of the third state and that of the parties, this condition, however, appears to be implied in the Court's reasoning.⁵⁴ The need of a connection has also been stressed by Judge Oda in his Dissenting Opinion.⁵⁵

⁵⁴ On the contrary, the state seeking to intervene does not have to show that a dispute between either of the parties had already arisen prior to its application. The existence of a previous dispute does not seem to represent a condition for intervention. In the *Application by Nicaragua Case*, the Chamber did not consider "that there is any requirement for the definition of a dispute in prior negotiations before an application can be made for permission to intervene", ICJ Reports 1990, 92 et seq., (113). Cf. Chinkin, see note 7, 212-213; Davi, see note 8, 171 et seq.

⁵⁵ According to Judge Oda, "the Court may in some cases uphold objections by the parties to the principal cases showing [...] that the alleged interest is far removed from the subject-matter of the case. For example, where a state is situated far from the scene and has no historical or administrative connection with the parties, it can be shown in advance that that state has no interest in any territorial or boundary issues which will be affected". See para. 11 of Judge Oda's Dissenting Opinion.

When the third state's interest relates to the subject-matter of the dispute, the fact that the state seeking to intervene has to specify the content of its legal interest with reference to a given claim can be easily explained: as has been seen, in this kind of situation intervention is for the purpose of submitting a claim in order to have it recognized by the Court. Yet, when a third state has an interest in the reasoning of the Court, it is questionable whether a state has to show a specific claim connected with the dispute before the Court. In this case, intervention does not serve the purpose of obtaining the recognition of a specific claim by the Court. Indeed, the Court could not deal with the merits of the third state's claim insofar as this claim will concern a dispute which is different from the one submitted to the Court by the parties. Since the state seeking to intervene will simply aim at presenting its views on abstract points of law which may arise in a case, it seems reasonable that the existence of an interest of the third state should be determined only in relation to the possible impact on that state of the Court's pronouncements. In the same manner, a state which wishes to intervene under Article 63 does not have to show a specific claim linked to the dispute before the Court; the interest in the Court's interpretation of a convention to which a state is a party is presumed.

This restriction on the possibility of intervention may be motivated by the need to limit the number of states which have access to the Court in certain proceedings.⁵⁶ Without this restriction, the Court would be compelled to permit intervention by every state willing to argue points of law which may arise in a dispute. Indeed, the Court would find itself in a difficult situation if every state having an interest in a rule of general international law to be applied in a case were entitled to intervene. While this may be true, yet it does not appear reasonable that views about general points of law in issue before the Court might be presented only by those states which can claim a specific interest in the dispute. This the more so since there are cases in which it is clear from the outset that the actual point in issue before the Court is represented not so much by the solution of a specific dispute as by the Court's pronouncement about the questions of law involved.

⁵⁶ Significantly, the fact that "any danger of expansive application of Article 62 will certainly be restricted by the Court's exercising its discretionary power", more particularly by determining whether a state seeking to intervene has an interest which may be affected by the Court's decision, has been stressed by Judge Oda, see note 7, 9 et seq., (87).

The *Fisheries Case (United Kingdom v. Norway)* offers a good example in this regard.⁵⁷ If one followed the approach taken by the Court, then probably only states fishing in the maritime area claimed by Norway would have been entitled to present their views to the Court on the question as to the lawfulness, under general international law, of the method of straight baselines. Yet, any restriction in this sense would have been inappropriate since it was clear that the Court's pronouncement on that point would have had a much broader impact. Indeed, during the proceedings, the Court was informed that, in parallel with the dispute submitted to it concerning the right of Norway to measure the breadth of its territorial sea from straight baselines, there was another dispute centred on Iceland's decision to introduce the same method of straight baselines as Norway. The Netherlands, Iceland and Belgium sent the Court a note to that effect.⁵⁸ During the proceedings, the United Kingdom and Norway stressed several times the bearing of the case on third states' claims to a territorial sea from straight baselines.⁵⁹ In the course of the hearings the United Kingdom suggested that the Court should limit itself to decide only on the general principles of international law to be applied. Its intention was probably to obtain from the Court a judgement which the United Kingdom could then invoke in its relation with other states claiming rights similar to that of Norway.⁶⁰ Thus, it becomes evident how third states' interest

⁵⁷ ICJ Reports 1951, 116 et seq.

⁵⁸ ICJ Pleadings, *Fisheries Case*, Vol. IV, 606, 607, and 680.

⁵⁹ See the statement by the counsel for the Government of the United Kingdom: "It is common ground that this case is not only a very important one to the United Kingdom and to Norway, but that the decision of the Court will be of the very greatest importance to the world generally as a precedent, since the Court's decision in this case must contain important pronouncements concerning the rules of international law relating to coastal waters", ICJ Pleadings, *Fisheries Case*, Vol. IV, 23.

⁶⁰ This proposal was objected to by the Agent of the Norwegian Government: "Le Gouvernement du Royaume-Uni a moins le désir, semble-t-il, de voir trancher le litige juridique concret qui divise les Parties, que de faire établir par la Cour un précédent pour la communauté des nations concernant le principes formulés par l'honorable Partie adverse". Interestingly, he then referred to the fact that the Court was invited to lay down general principles of international law governing the territorial sea, without any opportunity having been given to third states to present their views to the Court: "En effet, après n'avoir entendu que le deux membres de la communauté internationale qui sont Parties à cette affaire, la Cour est invitée par le Gouvernement du Royaume-Uni à établir pour une partie du droit inter-

may remain involved in the Court's pronouncement as to the rules to be applied when deciding an apparently bilateral dispute.⁶¹ The example of the *Fisheries Case* is still more significant since it is well known that the Court's finding as to the lawfulness of the method of the straight baseline has rapidly been accepted by states and has become a rule of general international law; this notwithstanding the fact that the Court had emphasized the elements peculiar to the case and had explained its decision not to consider as contrary to international law the method of adopting straight baselines adopted by Norway with reference mainly to the acquiescence of the United Kingdom.⁶²

The problem concerning the identification of the legal interest which may justify intervention illustrates the difficulties which the Court may face by applying the same form of intervention in relation to different situations. So, if the purpose is to widen the possibility of access to the Court in situations where third states can not claim an interest in the subject-matter of the dispute, it would be better not to stretch too far intervention under Article 62. A preferable option seems to allow for alternative forms of participation of third states to the proceedings. Such solution would also allow to differentiate the degree of involvement in the proceedings by third states in relation to the kind of interest in the Court's decision.⁶³ In fact, there is no reason why a state

nationale, où il règle tant d'incertitude et de divergences de vues, des règles juridiques normatives pour toute la communauté de droit international. Elle devrait, partant, déclarer implicitement comme sans force et comme contraires au droit, toutes les autres conceptions qui se sont manifestées au sein des différents Etats par une série de lois et de décrets, et par la pratique judiciaire et administrative. [...] cette tâche, la Cour est invitée à l'entreprendre sans avoir entendu les autres membres de la communauté internationale", ICJ Pleadings, *Fisheries Case*, Vol. IV, 171.

⁶¹ See, with particular reference to the *Fisheries Case*, the views expressed by Scobbie, see note 5, 299 et seq., (315-317).

⁶² The Court, while refusing the United Kingdom's proposal to deliver a judgement concerning only the definition of the principles or rules to be applied, recognized that "these are elements which might furnish reasons in support of the Judgements". However, it added: "Even understood in this way, these elements may be taken into account only in so far as they would appear to be relevant for deciding the sole question in dispute, namely, the validity or otherwise under international law of the lines of delimitation laid down by the 1935 Decree", ICJ Reports 1951, 116 (126).

⁶³ For the view that "there is much to be said for the idea of having degrees of involvement by the intervening state depending upon the degree of nexus

which wishes to present its views to the Court on a particular question of law or fact should be given the procedural rights of an intervener. A more limited form of participation to the proceedings, such as an *amicus curiae* brief, would be more adequate.

III. Beyond Intervention: *Amici Curiae* before the International Court?

1. Power of the Court to Accept *Amicus Curiae* Briefs

Compared to intervention, the *amicus curiae* procedure constitutes a more flexible and less time-consuming form of participation of third states to the proceedings.⁶⁴ The choice whether or not to accept *amicus curiae* briefs would be discretionary.⁶⁵ The Court could decide it in the

between that state and a particular issue in the dispute between the litigant states”, cf. Greig, see note 2, 287 et seq., (363).

⁶⁴ The question as to whether it would be desirable to provide for an *amicus curiae* procedure before the ICJ has been examined by several authors. See J.T. Miller, “Intervention in Proceedings Before the International Court of Justice”, in: L. Gross (ed.), *The Future of the International Court of Justice*, Vol. II, 1976, 550 et seq.; W. Fritzemeyer, *Die Intervention vor dem Internationalen Gerichtshof*, 1984, 177 et seq.; L. Fisler Damrosch, “Multilateral Disputes”, in: L. Fisler Damrosch (ed.), *The International Court of Justice at a Crossroad*, 1987, 376 et seq., (388). The question concerning participation as *amicus curiae* of entities other than states, such as nongovernmental organizations or individuals, will be here left aside. But see H. Ascensio, “L’*amicus curiae* devant les juridictions internationales”, *RGDIP* 105 (2001), 897 et seq.; P. Palchetti, “*Amici curiae* davanti alla Corte internazionale di giustizia?”, *RDI* 83 (2000), 965 et seq., (986 et seq.); D. Shelton, “The Participation of Nongovernmental Organizations in International Judicial Proceedings”, *AJIL* 88 (1994), 611 et seq.; Chinkin, see note 7, 232 et seq. On participation as *amicus curiae* in domestic law, see E. Angell, “The *Amicus Curiae*: American Development of English Institutions”, *ICLQ* 16 (1967), 1017 et seq.; G.A. Caldeira/ J.R. Wright, “*Amici Curiae* before the Supreme Court: Who Participates, When, and How Much?”, *Journal of Politics* 53 (1990), 782 et seq.

⁶⁵ On the contrary, it seems that the Court does not have a discretionary power not to permit intervention if the conditions under Article 62 are fulfilled. In the *Application by Malta Case*, the Court observed that “it does not consider paragraph 2 [of Article 62] to confer upon it any general discretion to accept or reject a request for permission to intervene for reasons

light of the particular circumstances of the case; it could also identify the specific issues of law or facts which third states are allowed to address in their briefs. The *amici curiae* would not become parties to the case nor be bound by the Court's decision. They would not necessarily be entitled to have access to the pleadings and other documents of the case. Their participation to the proceedings would be limited simply to the submission of briefs presenting their views on specific questions.

It may be objected that there is no need for such a procedure since, if a third state wishes to inform the Court of its point of view on questions in issue in a case, it could achieve that result simply by sending a note to the Court.⁶⁶ Indeed, as we have seen, several states sent communications to the Court in e.g. the *Fisheries Case* for the purpose of stating their position about the Icelandic regulations concerning the delimitation of the fishery zone. Similar communications have been presented in other cases.⁶⁷ Yet, it can be doubted whether these communications effectively serve the function of bringing to the Court's notice the views of third states. There is no clear indication that the Court takes into account the viewpoints presented by means of communications. Only in one case has the Court given the impression of having perused the information submitted by a third state. In the *Corfu Channel Case*, the Court noted that it did not refuse to receive documents that Albania had obtained from Yugoslavia, since it "was anxious for

simply of policy", ICJ Reports 1981, 3 et seq., (12). In this sense, cf. Bernhardt, see note 10, 60 et seq. (90).

⁶⁶ For a view in this sense, see G. Cellamare, *Le forme di intervento nel processo dinanzi alla Corte internazionale di giustizia*, 1991, 83 et seq.

⁶⁷ In the *Asylum Case (Colombia/ Peru)*, Costa Rica and Ecuador sent communications to the Court with the aim to inform the Court of their views in respect of the principle of the right of asylum. In its answer, the Registrar referred to the possibility for these states to intervene under Article 63 of the Statute. See ICJ Pleadings, *Asylum Case*, Vol. II, 167-168 and 241-242. In the *Case Concerning Trial of Pakistani Prisoners of War (Pakistan/ India)*, Afghanistan presented a note for the purpose of "correcting the minutes" with regard to a statement made by Pakistan on a point of law. The Registrar answered, *inter alia*, that the contentions advanced did not appear "to comply with the requirements of those instruments regarding the right of intervention of third states before it", see ICJ Pleadings, *Pakistani Prisoners of War*, 167-169 and 174-175. On this latter case, see S. Rosenne, *The Law and Practice of the International Court, 1920-1996*, Vol. III, 1997, 1374.

full light to be thrown on the facts alleged".⁶⁸ It added, however, that "Yugoslavia's absence from the proceedings meant that these documents could only be admitted as evidence subject to reserves, and the Court finds it unnecessary to express an opinion upon their probative value". In other cases the only reply to such communications consisted in a letter by the Registrar which informed the interested state of the possibility to apply for intervention.

As to the power of the Court to introduce an *amicus curiae* procedure, while the Statute does not provide expressly for this form of participation of third states to the proceedings, there is nothing in the Statute which could be construed as preventing the Court from accepting and taking into account the views submitted to it by third states acting as *amici curiae*. An indication to the contrary could not be drawn from Article 34 para. 2 of the Statute.⁶⁹ It is true that this provision envisages a kind of participation as *amicus curiae* which is expressly limited only to international organizations. However, this could not be taken as meaning that the possibility for third states to participate as *amici curiae* would be excluded under the Statute.⁷⁰ Article 34 deals in general with the problem of the qualification to be parties to proceedings before the Court. Para. 2 of that article was added in order to specify the role of international organizations in contentious proceedings.⁷¹ The only inference which can be drawn from that provision is that international

⁶⁸ ICJ Reports 1949, 4 et seq., (17). For the view that, in this case, "la Cour avait ouvert la possibilité aux Etats tiers d'intervenir indirectement, en tant qu'*amicus curiae*, dans un différend entre les parties sur lequel la Cour doit se prononcer", see M. Bartoš, "L'intervention yougoslave dans l'Affaire du détroit de Corfou", in: *Il processo internazionale. Studi in onore di Gaetano Morelli, Comunicazioni e studi* 14 (1975), 41 et seq., (50). A contrary view was held by S. Rosenne, in *Yearbook/ Institute of International Law*, 68 (1998), Vol. I, 216 et seq. This author observed that Yugoslavia's participation "was neither intervention, in the protective sense, nor strictly an *amicus curiae* function, since it dealt with facts, not the law". The exceptional nature of this case has been stressed by Chinkin, see note 7, 227.

⁶⁹ Article 34 para. 2 of the Statute provides that the Court "may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative".

⁷⁰ A different view was held by Cellamare, see note 66, 97 et seq.; Davì, see note 8, 179 et seq. See also Miller, see note 64, 550 et seq., (560).

⁷¹ On this point, cf. Rosenne, see note 68, 638 et seq.

organizations are only entitled to submit information to the Court but cannot become parties to judicial proceedings.

Moreover, it could not be held that accepting *amicus curiae* briefs from third states would affect fundamental principles underlying the Court's jurisdiction, namely the principle of consent and that of reciprocity and equality of states.⁷² As *amici curiae* are not parties to the proceedings, the same arguments set out by the Chamber in the *Application by Nicaragua Case* with reference to the non-party intervenor could be invoked in relation to participation of third states as *amici curiae*. In particular, the Chamber noted that the competence of the Court to permit intervention "is not, like its competence to hear and determine the dispute referred to it, derived from the consent of the parties to the case, but by the consent given by them, in becoming parties to the Court's Statute, to the Court's exercise of its powers conferred by the Statute";⁷³ it then referred to the fact that a state which is admitted to intervene as a non-party does not have to show a jurisdictional link. Thus, it can be held that the participation of *amici curiae* does not affect the principle of consensual jurisdiction or that of equality of states provided that they do not become parties to the proceedings and that the Court is given the power to authorize their participation.

The existence of such a power of the Court can be inferred from the autonomy which the Court enjoys under the Statute in seeking and obtaining evidence of both law and fact. While the main burden of evidence lies no doubt on the parties to the proceedings, the Court is empowered to acquire all relevant information independently of the actual assistance of the parties.⁷⁴ This is expressly stated in Article 62 of the Rules of the Court, according to which "the Court may at any time call upon the parties to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue, or may itself seek other information for this

⁷² On the "fundamental principles underlying the Court's jurisdiction", see the statement of the Court in the *Application by Italy Case*, ICJ Reports 1984, 3 et seq., (22).

⁷³ ICJ Reports 1990, 92 et seq., (133).

⁷⁴ On the power of the Court to collect evidence, see M. Lachs, "Evidence in the Procedure of the International Court of Justice: Role of the Court", in: E.G. Bello/ B.A. Ajibola (eds), *Essays in Honour of Judge Taslim Olawale Elias*, 1993, 205 et seq.; M. Kazazi, *Burden of Proof and Related Issues*, 1996; E. Valencia-Ospina, "Evidence before the International Court of Justice", *International Law Forum* 1 (1999), 202 et seq.

purpose”.⁷⁵ The Court itself has repeatedly asserted a right to investigate facts at issue *proprio motu*.⁷⁶ It has also clarified that, in deciding questions of law, its task is not limited to consider the arguments of the parties but it has to take into account all the possible evidence available to it.⁷⁷ Thus, in order to elucidate as far as possible all the aspects of fact and law at issue in a case the Court is empowered to act independently of the will of the parties to assist it. It may be said that this Court’s ability to collect evidence is one of the aspects that distinguishes the Court from an arbitral tribunal.⁷⁸

⁷⁵ A more general legal basis is provided by Article 50 the Statute, according to which “The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion”.

⁷⁶ In its decision in *Military and Paramilitary Activities in and against Nicaragua*, the Court observed that, “as to the facts of the case, in principle the Court is not bound to confine its consideration to the material formally submitted to it by the parties”, ICJ Reports 1986, 14 et seq., (25).

⁷⁷ In the *Lotus* case, the PCIJ held the view that “in the fulfilment of its task of itself ascertaining what the international law is, it has not confined itself to a consideration of the arguments put forward, but has included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law contemplated in the special agreement”. See PCIJ Publications, Series A, No. 10, 3 et seq., (31). In the *Fisheries Jurisdiction (United Kingdom/ Iceland)* case, the Court observed that “the Court [...] as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its initiative all rules of international law which may be relevant to the settlement of dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court”, ICJ Reports 1974, 3 et seq., (9).

⁷⁸ See, with regard to the power conferred to the Court by Article 62 of the Rules, the following observation of M. Lachs, “The Revised Procedure of the International Court of Justice”, in: F. Kalshoven/ P.J. Kuyper/ J.G. Lammers (eds), *Essays on the Development of the International Legal Order in Memory of Haro F. Van Panhuys*, 1980, 21 et seq., (38): “It is perhaps in this provision that one finds the best illustration of the long path that has been traversed since 1907, when the corresponding rule enacted for arbitral tribunals under the Permanent Court of Arbitration read: ‘Le Tribunal peut, en outre, requérir des agents des parties la production de tous actes et

The autonomy of the Court in establishing evidence as to facts and law is not without relevance for the question concerning the power to accept *amicus curiae* briefs. *Amici curiae* could provide the Court with information which may prove to be useful for resolving questions at issue in a case. The Court may avail itself of the *amicus curiae* procedure as an additional means for collecting evidence. In this sense, it seems tenable that the power to acquire evidence *proprio motu* includes also the possibility of accepting and evaluating views submitted by third states as *amici curiae*.⁷⁹ This implies that an *amicus curiae* procedure may be introduced in contentious proceedings before the Court without the need of a formal amendment of the Statute. The Court could decide to accept *amicus curiae* briefs in a case on the basis of its powers in collecting evidence. Yet, if the Court were to accept this procedure, an amendment to the Rules would be required in order to lay down the procedure to be followed by third states when requesting leave to submit a brief.

2. *Amicus Curiae* Briefs before Other International Tribunals

Other international courts or tribunals have accepted to receive views submitted by third parties acting as *amici curiae*. It is significant to note that in most cases an *amicus curiae* procedure was not expressly provided for by the statutes or rules but has been introduced by the tribunals on the basis of their power on the collection of information.⁸⁰

In this regard, one can mention the case of the European Court of Human Rights. There was no provision under neither the European Convention nor the 1959 Rules of the Court which dealt explicitly with the question of third parties participation to the proceedings. In *Winterwerp v. The Netherlands*, the United Kingdom Government asked

demandeur toutes explications nécessaires. En cas de refus, le Tribunal en prend acte' (Hague Convention I of 18 October 1907, Article 69)".

⁷⁹ The same opinion was held by Miller, see note 64, 563; Fritzemeyer, see note 64, 177 et seq.; Shelton, see note 64, 642; Bernhardt, see note 10, 113.

⁸⁰ In his tentative suggestions for a draft resolution on "Judicial and arbitral settlement of international disputes involving more than two states", Judge Bernhardt mentioned this power of international courts and tribunals to introduce an *amicus curiae* procedure; in particular, article 12 of the draft provided that "courts and tribunals have the possibility to adopt and apply relevant rules autonomously in their capacity as master of their procedure", cf. Bernhardt, see note 10, 165.

the Court to be given leave to submit a statement on the interpretation of certain provisions of the Convention.⁸¹ As a legal basis to its request, the United Kingdom referred to article 38 para. 1 of the 1959 Rules, according to which the Court was able *proprio motu* to decide “to hear as a witness or expert or in any other capacity any person whose evidence or statements seem likely to assist it in the carrying out of its task”. The Court rejected the United Kingdom’s request; however, it authorized the Commission to submit the written statement of that state as part of its own submissions.⁸² In *Young, James and Webster*, the Court acceded to the request made by the Trade Union Congress under article 38 para. 1 to be given leave to submit observations on certain questions of fact in issue in the case.⁸³ By so doing, the Court allowed in fact a third subject, on the basis of the power conferred to it by article 38 of the 1959 Rules, to participate in the proceedings in order to present its views.⁸⁴ The Court subsequently decided to modify its Rules in order to insert a new rule providing expressly for a kind of *amicus curiae* procedure.⁸⁵

⁸¹ ECHR, Series B, Vol. 31, 115 et seq. On this, see F. Matscher, “Überlegungen über die Einführung der ‘Interpretationsintervention’ im Verfahren vor dem Europäischen Gerichtshof für Menschenrechte”, in: H. Miehsler/ E. Mock/ B. Simma/ I. Tammelo, *Ius Humanitatis. Festschrift zum 90. Geburtstag von Alfred Verdross*, 1981, 533 et seq.; P. Mahoney, “Developments in the Procedure of the European Court of Human Rights: The Revised Rules of the Court”, *Yearbook of European Law* 3 (1983), 127 et seq., (141 et seq.).

⁸² ECHR, Series B, Vol. 31, 67.

⁸³ ECHR, Series A, Vol. 44, 7 et seq.

⁸⁴ The reaction of one of the applicant’s lawyers is significant: “My submission is this: the Rule of the Court as to the admission of specialist evidence is now being used before you as a device to provide a right to intervene. This, Mr. President, as you very well know, is something which cannot happen and may not happen under your Rules and under Article 48 of the Convention”. See ECHR, Series B, Vol. 39, 281.

⁸⁵ See article 37 para. 2 of the 1982 Rules: “The President may, in the interest of the proper administration of justice, invite or grant leave to any contracting State which is not a party to the proceedings to submit written comments within a time limit and on issues which he shall specify. He may also extend such an invitation or grant such leave to any person concerned, other than the applicant.” Cf. now article 36 para. 2 of the European Convention, as modified by the Eleventh Protocol. See F. Matscher, “Quarante ans d’activités de la Cour européenne des droits de l’homme”, *RdC* 270 (1997), 237 et seq., (270). On the practice of the European Court concerning *amicus curiae* participation, see A. Lester, “Amici curiae: Third-Party

The experience of the Inter-American Court of Human Rights as to the *amicus curiae* participation comes very close to that of the European Court. The Inter-American Court decided to give leave to submission of *amicus curiae* briefs although neither the American Convention nor the 1980 Rules of Procedure of the Court mentioned this kind of procedure. The Court did not specify on which legal basis its decision to permit third parties' participation to the proceedings rested. Yet, such a power of the Court has been generally considered as flowing from article 34 para. 1 of the 1980 Rules, which contained a provision whose tenor was very similar to that of article 38 of 1959 Rules of the European Court.⁸⁶ The 1996 Rules of Procedure of the Inter-American Court now expressly provide, at least in regard to the advisory proceedings, for a form of participation by third parties as *amicus curiae*.⁸⁷

A panel and on appeal the Appellate Body of the World Trade Organization dealt for the first time with the question concerning *amicus curiae* participation in *United States – Import Prohibitions of Certain Shrimp and Shrimp Products*. Also in this context, the question has been examined and resolved in the light of the provision of the DSU (Understanding on Rules and Procedures Governing the Settlement of Disputes) which refers to the panel's "right to seek information".⁸⁸ In the above mentioned case, the panel refused to accept *amicus curiae* briefs arguing that, on the basis of article 13 of the DSU, panels have only the

Intervention before the European Court of Human Rights", in: *Protecting Human Rights: The European Dimension. Studies in Honour of Gérard J. Wiarda*, 1988, 341 et seq.

⁸⁶ Article 34 of the 1989 Rules provided that "the Court may, at the request of a party, or the delegates of the Commission, or *proprio motu*, decide to hear as a witness, expert, or in any other capacity, any person whose testimony or statements seem likely to assist it in carrying out its function". For the view that this provision permitted the receipt of *amicus curiae* briefs, see T. Buergenthal, "The Advisory Practice of the Inter-American Human Rights Court", *AJIL* 79 (1985), 1 et seq., (15); S. Davidson, *The Inter-American Court of Human Rights*, 59; C. Moyer, "The Role of *Amicus Curiae* in the Inter-American Court of Human Rights", in: *La Corte Interamericana de Derechos Humanos*, 1986, 119 et seq.

⁸⁷ Article 62 para. 3 of the Rules, which came into force on 1 January 1997, provides that "the President may invite or authorize any interested party to submit a written opinion on the issues covered by the request".

⁸⁸ Article 13 para. 1 provides, *inter alia*, that "Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate".

power to seek information on their own initiative and not that to accept unsolicited information by third parties. The Appellate Body arrived at a different conclusion which relied on a broader interpretation of article 13. In the Appellate Body's view, the authority to seek information does not exclude the possibility to receive unrequested information, the panel having the discretionary authority either to accept or to reject information submitted to it.⁸⁹ The Appellate Body has also specified, in subsequent decisions, that it has the legal authority under the DSU to accept *amicus curiae* briefs, without, however, giving clear indication as to the provision of the DSU from which this authority stems.⁹⁰

While the Appellate Body has received *amicus curiae* briefs in a number of cases, it has to be noted that this practice has prompted the reaction of many WTO Member States. Criticism was voiced that by introducing an *amicus curiae* procedure the Appellate Body acted well beyond the competence allotted to it under the DSU. The attitude of WTO Member States, however, seems mainly to be motivated by the apprehension that their ability to maintain control over the proceedings could be compromised by the decision to open up the doors to this procedure.⁹¹ The initial answer of the Appellate Body in response to such criticism has consisted in a very cautious approach in considering the admissibility of *amicus curiae* briefs.⁹² Whether the reaction by WTO Member States will have further consequences remains to be seen.

⁸⁹ See Appellate Body Report of 12 October 1998, WT/DS58/AB/R, para. 104 et seq. (available at <http://www.wto.org>). On this report, see A. H. Qureshi, "Extraterritorial Shrimps, NGOs and the WTO Appellate Body", *ICLQ* 48 (1999), 199 et seq.

⁹⁰ On the question as to the authority of the Appellate Body to receive *amicus curiae* briefs, see P.C. Mavroidis, "Amicus Curiae Briefs before the WTO: Much Ado about Nothing", *Harvard Jean Monnet Working Paper 02/01*, 1 et seq.; S. Ohlhoff/ H. Schloemann, "Transcending the Nation-State? Private Parties and the Enforcement of International Trade Law", *Max Planck UNYB* 5 (2001), 675 et seq.

⁹¹ On the different views held by Member States during an extraordinary meeting of the WTO General Council, which took place on 22 November 2000, see Mavroidis, see above, 1 et seq., (9 et seq.).

⁹² In particular, in *European Communities – Measures Affecting Asbestos and Asbestos Containing Products* the Appellate Body rejected, without giving any detailed reason, all the numerous *amicus curiae* briefs received. See Appellate Body Report of 12 March 2001, WT/DS135/AB/R, para. 53 et seq. Cf. Ohlhoff/ Schloemann, see note 90, 675 et seq., (693 et seq.).

3. The Need for Balancing Respect for Party Autonomy and Participation of *Amici Curiae*

The hostility of WTO Member States to the Appellate Body's initiative concerning *amici curiae* is a fact which has to be taken into account when considering the opportunity to introduce such a procedure before the ICJ. Indeed, various arguments have been presented in support of the view that the Court should resist the idea of introducing an *amicus curiae* procedure in the context of contentious proceedings. It has been said that the existing provisions on the collection of evidence are already adequate.⁹³ It may also be argued that the fact of receiving from third states their views on questions of law, far from facilitating the work of the Court, might render it more difficult; while it may be in the Court's interest, in the circumstances, to confine the scope of its pronouncements on law to the particular dispute submitted to it in order not to give the impression of enunciating general principles or rules which apply with regard to all states, it would be more difficult for the Court to minimize its role in the development of the law after third states having been involved in the proceedings. The main reason why the idea of introducing an *amicus curiae* procedure is not generally welcomed appears to lie in the fear that opening the doors to third participants would have an impact upon the states' willingness to resort to the Court to resolve their dispute. Indeed, starting from the assumption that the Court's primary function is to settle particular and mainly bilateral disputes between states, the opposition to the *amicus curiae* procedure is motivated above all by reference to the need not to undermine party autonomy. It has been held that allowing third states to interfere in a case brought to the Court would render the settlement of the disputes more difficult.⁹⁴ The contentious jurisdiction of the Court would risk becoming assimilated to a kind of forum where parties and third

⁹³ See, in this sense, the position held by Rosenne and Caflisch during the work of the Commission of the Institute of International Law which had the task to prepare a draft resolution on "Judicial and arbitral settlement of international disputes involving more than two states". *Yearbook/ Institute of International Law*, Vol. 68 (1998), Vol. I, 59 et seq., (172, 177).

⁹⁴ Caflisch, see above, observed that "the fact that state-to-state disputes are settled on the basis of the principle of sovereign equality may make it improper to resort to a municipal-law technique advocating the interference of third countries with the affairs of the state parties to a dispute".

states would have the same role in submitting views to the Court.⁹⁵ The attention of the Court would be averted from the specific dispute submitted to it; as a consequence, states would be discouraged from bringing cases to the Court.

Party autonomy represents no doubt an important value which deserves protection in order to maintain the confidence of states in the Court. This, however, does not imply that the Court should not be concerned about broader interests eventually at stake in a dispute. Unlike arbitral tribunals, the Court is not merely a tool in the hand of the parties whose sole purpose is to settle the dispute between them.⁹⁶ If there is a difference between the Court and an arbitral tribunal, this lies also in the fact that the Court should take into account not only the interest of the parties but also the possible interests of third parties and, more generally, the interest in the proper administration of justice. Thus, a proper balance should be struck between countervailing interests: interest of the parties, on the one hand, interest of third states and interest of the Court, on the other. The issue is certainly not new to the Court. Indeed, almost all the procedural rules governing the activity of the Court raise the problem of balancing countervailing interests. The question as to the access to the pleadings by third states offers a good example; it is apparent that while the parties may have an interest in the confidentiality of the documents of a case, the transparency of the proceedings may be in the third states' interest.⁹⁷ Yet the need to balance

⁹⁵ See in this respect the view held by Torres Bernárdez, see note 93, 59 et seq., (139): "It should be prevented that through the *lege ferenda* propositions on *amicus curiae* or other procedural means the ICJ and other international courts or tribunals dealing with inter-states disputes become, ultimately, a kind of assembly forum!"

⁹⁶ On the need to distinguish the role of the ICJ from that of arbitral tribunals, see, in particular, P.M. Dupuy, "The judicial policy of the International Court of Justice", in: F. Salerno (ed.), *Il ruolo del giudice internazionale nell'evoluzione del diritto internazionale e comunitario*, 1995, 61 et seq.; G. Abi-Saab, "De l'évolution de la Cour internationale: Réflexions sur quelques tendances récentes", *RGDIP* 96 (1992), 273 et seq.; G. Abi-Saab, "Fragmentation or Unification: Some Concluding Remarks", *N. Y. U. J. Int'l L. & Pol.* 31 (1999), 919 et seq.

⁹⁷ On this question, see T. Treves, "Trasparenza e confidenzialità degli atti di parte davanti alla Corte internazionale di giustizia e al Tribunale Internazionale del Diritto del Mare", in: *Divenire sociale e adeguamento del diritto. Studi in onore di Francesco Capotorti*, Vol. I, 1999, 535 et seq. On the practice of the Court, see also Rosenne, see note 68, 1287 et seq.

countervailing interests arises also with reference to apparently more neutral problems. One can mention, for instance, the problem concerning the length of time the proceedings take: while it may be hoped that the Court would take clear control over the proceedings in order to expedite cases, it is clear that parties may wish to have a say over matters such as the length or number of written pleadings.⁹⁸

Thus, it seems questionable to hold that an *amicus curiae* procedure does not fit with the basic assumptions of the procedure before the Court on the grounds that it would risk undermining party autonomy. This opinion reflects a narrow view of the function of the Court, which tends to emphasize the role of the parties while minimizing third states' interests; it is a view, moreover, which seems to undervalue the fact that it could be in the Court's interest to be in the position of deciding a case after having been fully informed of the broader interests at stake. Instead of totally excluding the possibility of introducing such procedure, a better option would be to find a solution which allows a proper balance of all the interests involved. The Court could distinguish situations in which, in the light of the nature of the dispute or other circumstances, the participation of *amici curiae* might appear more or less suitable. In order to address the possible concern of the parties, the Court should probably adopt a cautious attitude about the cases in which *amici curiae* could be admitted to present their views. This, however, should not prevent the Court to appreciate the useful role which an *amicus curiae* participation could play under certain circumstances. Indeed, there are cases in which this form of participation would allow the procedure before the Court to adapt to situations which are not adequately addressed under the present procedural rules.

⁹⁸ The problem concerning the excessive length of time required by the Court to dispose of cases has been addressed in particular in the report presented by the study group established by the British Institute of International and Comparative Law, see note 47, 1 et seq. As to the need of balancing the interest of the parties and the interest of the Court with regard to this problem, see C. Peck/ R.S. Lee (eds), *Increasing the Effectiveness of the International Court of Justice*, 1997, 101 et seq., and in particular the remarks of Pellet and Abi-Saab.

4. *Amici Curiae* and *Erga Omnes* Obligations

The introduction of an *amicus curiae* procedure would provide an adequate solution, in particular, to the problem concerning third states' participation when obligations *erga omnes* are at stake in a dispute before the Court.

In its decision in the *Barcelona Traction* case, the Court observed that "when one such obligation in particular is in question, in a specific case, [...] all states have a legal interest in its observance".⁹⁹ As is well known, different views have been held as to the possibility for not directly injured states to institute proceedings before the Court with regard to violations of *erga omnes* obligations.¹⁰⁰ Yet, assuming that a state has been able to bring a case against the alleged wrongdoer, it may be asked whether the other states, being equally affected by such violation and sharing in principle the same interest as the applicant state, should be granted the possibility to participate in the proceedings. It seems that, unless a state is also injured in its own right by the conduct of the party, the purpose of intervention in this kind of situation would likely be that of allowing states to assert before the Court the collective nature of the obligation breached.¹⁰¹ A Court's decision recognizing the *erga omnes* character of an obligation may constitute in fact a means of

⁹⁹ ICJ Reports 1970, 3 et seq., (32).

¹⁰⁰ On this point, see Bernhardt, see note 10, 60 et seq., (114 et seq.); C. Annacker, "The Legal Régime of *Erga Omnes* Obligations in International Law", *Austrian J. Publ. Int. Law* 46 (1994), 131 et seq., (162 et seq.); S. Forlati, "Azioni dinanzi alla Corte internazionale di giustizia rispetto a violazioni di obblighi *erga omnes*", *RDI* 84 (2001), 69 et seq.; C.A. Günther, *Die Klagebefugnis der Staaten in internationalen Streitbeilegungsverfahren*, 1999, 69 et seq.

¹⁰¹ It is significant in this regard the case of the applications for permission to intervene submitted by the Marshall Islands and other states in the dispute concerning the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgements of 20 December 1974 in the Nuclear Tests (New Zealand/ France) Case*. These states claimed to have a direct legal interest in the prevention of any unlawful introduction into the maritime environment of radio-active material; but they also claimed an interest in the prevention of a violation by France of an obligation owed *erga omnes*. As to the purpose of the intervention, it was said to be to inform the Court of their interest that might be affected by the Court's decision, "as well as to affirm the collective character of the obligations involved". The text of the application is available at the Court's website.

protecting the interest of the international community. States may therefore wish to present their views on the existence and content of rules imposing obligations which aim at protecting community interests, so as to have these rules upheld by the Court.¹⁰²

While, as noted by the Court, “all states can be held to have a legal interest” in case of violations of *erga omnes* obligations, it is not clear whether this “legal interest” is such as to justify an intervention under Article 62.¹⁰³ As it has been seen, this form of intervention has been construed by the Court as a means by which a third state is enabled to protect an individual right of its own, which is opposed to that of the parties. A more generalized interest, one which is shared by all or a number of states such as the interest in the Court’s pronouncement on a question of law, has not been regarded as sufficient to justify intervention.¹⁰⁴ It is true that any state not directly injured by a breach of an *erga omnes* obligation is entitled to put forward a specific claim to the cessation of the breach and in some circumstances, even to the repara-

¹⁰² The view that, with regard to a breach of *erga omnes* obligations, the interest of all states other than the injured state would be likely to consist mainly in the possibility to obtain from the Court a declaratory judgement which aims at determining the existence and the content of the obligation at issue and at deciding whether the breach occurred, seems to be held also by the ILC. See the commentary on article 48, Articles on the Responsibility of States for Internationally Wrongful Acts, in Reports of the ILC, Doc. A/56/10 and Corr. The Commission noted, in particular, that “the focus of an action by a state under article 48 – such state not being injured in its own rights and therefore not claiming compensation on its own account – is likely to be on the very question whether a state is in breach and on cessation if the breach is a continuing one”.

¹⁰³ On the distinction between intervention by a third state to protect its own interest and intervention to protect the interest of the international community, see the remark by Zemanek during the meeting of the Institute of International Law in Berlin, *Yearbook/ Institute of International Law*, 68 (1998), Vol. II, 185 et seq., (223).

¹⁰⁴ Concerning the application by Malta, the Court noted that the interest invoked by Malta “does not relate to any legal interest of its own directly in issue as between Tunisia and Libya”. The Court recognized that Malta had a certain interest in the Court’s pronouncements that was of a more specific and direct nature compared to that of other states outside the Mediterranean region. It added, however, that, “even so, Malta’s interest is of the same kind as the interest of other states within the region”, ICJ Reports 1981, 3 et seq., (19). On the possible implications of the position taken by the Court in this case, see Günther, see note 8, 255 et seq., (267).

tion;¹⁰⁵ but the Court cannot be called upon to adjudicate on these claims by way of intervention, at least not in the absence of a jurisdictional link.¹⁰⁶ It may be held that an interest in upholding rules which aim at protecting fundamental values of the international community is more qualified for intervention than a general interest in the development of international law. However, the fact remains that also the former interest, being shared by all states, could be considered by the Court as too general in nature.¹⁰⁷

The large notion of legal interest upheld by the Court in the *Application by The Philippines Case* might have opened the doors to the possibility for third states to intervene under Article 62 in order to protect the interests of the international community.¹⁰⁸ However, even admitting this possibility, an *amicus curiae* procedure appears to be more suitable than intervention for cases in which an *erga omnes* obligation is at issue. Since third states' participation in this kind of situation would aim simply at affirming the collective character of the obligation in-

¹⁰⁵ See article 48 of the Articles on the Responsibility of States for Internationally Wrongful Acts adopted on second reading by the ILC in 2001.

¹⁰⁶ In its decision in the *East Timor* case, the Court noted that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things". According to Annacker, see note 100, 131 et seq., (163), while any state may institute proceedings before the Court with regard to the breach of *erga omnes* obligations, this would not imply that any state could be allowed to intervene under Article 62; this is because "Article 62 does not relate to the implementation of a right, but to the conservation of a legal position".

¹⁰⁷ For the view that "at present it does not appear that the Court will regard intervention to uphold what can be termed 'public rights' as appropriate", see Chinkin, see note 7, 288. Bernhardt, see note 10, 60 et seq., (120), while stating that intervention under Article 63 would at first glance seem to be more suitable to cases concerning violations of *erga omnes* obligations, held that a state could also be allowed to intervene under Article 62, since "the purpose of intervention, namely the protection of peremptory norms of international law, could probably not be regarded as improper". The possibility for a state to intervene under Article 62 in such cases is recognized also by Forlati, see note 100, 67 et seq., (106 et seq.).

¹⁰⁸ Since in the case of a breach of an *erga omnes* obligation any state has a right to obtain the cessation of that breach, it may be thought that, if the Court would be called upon to decide on such breach, any state could claim an interest in the reasoning of the Court such as to justify intervention.

volved, *amicus curiae* briefs would constitute an adequate and sufficient means for allowing third states to present their views to the Court.¹⁰⁹

IV. Concluding Remarks

In the recent past, criticism was rightly addressed to the ICJ for its unduly restrictive attitude towards third states' intervention. Since the Chamber's decision in the *Application by Nicaragua Case*, a change in the Court's approach seems to have taken place. In principle, this new trend has to be welcomed. The Court's decisions in the *Application by Malta* and *Application by Italy* cases had limited to a very narrow scope the possibility of intervention. A wider conception of intervention, one which could allow a better balance between party autonomy and third states interests, appeared to be warranted. To an increasing extent, disputes submitted to the Court, while generally presented as bilateral, involve interests other than that of the parties. The Court cannot disregard these broader interests simply because of the fear of undermining the autonomy of the parties.¹¹⁰ Allowing for wider participation by third states could also have the effect of increasing the authority of its decision.¹¹¹

Yet, the recent developments in the Court have evidenced a new dimension of the problem concerning third states' access to the Court. Intervention under Article 63 being limited in scope, the Court may be tempted to allow for a wider participation by third states by extending the possibility of intervention under Article 62. Indeed, this course of

¹⁰⁹ See in this sense Chinkin, see note 7, 286, and the remark of Abi-Saab, in *Yearbook/ Institute of International Law* 68 (1998), Vol. I, 59 et seq., (160).

¹¹⁰ This point was stressed by Judge Ago in his Dissenting Opinion in the case concerning the *Application by Italy Case*. He criticized the Court for having preferred "a prudential confinement within the sheltered precincts of a purely bilateral, and relativist, notion of its task" and added: "I doubt whether this really meets the present-day needs of an international community which is becoming ever more inter-dependent; I also doubt whether it reflects the wishes and hopes which presided at the Court's inception, and later at its confirmation, in the Charter, as the principal judicial organ of the United Nations", ICJ Reports 1984, 3 et seq., (130).

¹¹¹ For the view allowing more and diverse voices to be heard by the Court "would be likely to enhance its appeal and credibility", see C. Chinkin, in: C. Peck/ R.S. Lee (eds), *Increasing the Effectiveness of the International Court of Justice*, 1997, 43 et seq., (47).

conduct has been followed by the Court in the *Application by the Philippines Case*. The Court should resist this temptation. A better course seems to consist in distinguishing different forms of participation on the basis of the different interests claimed by third states.

Intervention under Article 62 should be limited to situations where the legal interest claimed by a third state is directly involved in the dispute before the Court. Indeed, since in this kind of situation, as shown by the Court's decision in the *Application by Nicaragua Case*, intervention serves substantially the purpose of allowing a third state to defend the merits of its claim so as to have it recognized by the Court, the need for amending the Rules should be considered in order to strengthen the procedural rights of the intervening state.

When a state seeks to participate for protecting a less direct interest, a more limited form of participation would be adequate. For that purpose, the Court should consider the possibility of introducing an *amicus curiae* procedure. Since the Statute does not envisage expressly such procedure, the Court would be likely to resist any attempt by third states to present an *amicus curiae* brief in a particular case. The Court might wish to avoid giving the impression of acting outside the power conferred to it by the Statute; and in any case there might be the fear that such a move would deter states from submitting cases to the Court. However, such fear should not be overemphasized. States might be more ready to accept an *amicus curiae* procedure than an extension of the scope of intervention under Article 62, since an *amicus curiae* brief appears less intrusive than intervention as a means of presenting third states' views. Moreover, the Court could provide for limiting the situations in which *amici curiae* could be permitted to present their briefs. Thus the risk of undermining party autonomy could be minimized. On the other hand, the introduction of this form of participation would certainly contribute to the adaptation of the procedure before the Court to cases in which a dispute involves questions which touch upon the interest of a number of third states or of the international community as a whole.