

DECLARATION OF JUDGE KEITH

1. I agree with the conclusions the Court reaches, essentially for the reasons it gives. This declaration addresses one aspect of those reasons.

2. For nearly 90 years, the International Court of Justice and its predecessor, the Permanent Court of International Justice, have had the power to permit a State, not a party to the main proceeding before it, to intervene in the proceeding if the State persuades the Court that it has “an interest of a legal nature which may be affected by the decision in the case” (Article 62 of the Statute). If permission is granted, the intervening State is supplied with copies of the pleadings and may submit a written statement to the Court and its observations in the oral proceedings, with respect to the subject-matter of the intervention (Rules of Court, Article 85). Of the 15 requests that have been made in 12 cases since 1923, two have been granted, one without objection and the other in part only.

3. Until today, the Court has not attempted to provide a definition or an elaboration of the expression “an interest of a legal nature” as it appears in Article 62 of the Statute. Rather, having considered the evidence and submissions presented to it by the requesting State and the parties to the main proceeding, it has determined whether “*in concreto* and in relation to all the circumstances of a particular case” the requesting State has demonstrated what it asserts including showing that its interest may be affected (*Land, Island and Maritime Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, pp. 117-118, para. 61).

4. There are, I think, good reasons for the Court’s practice to date of keeping closely to the statutory test laid down in Article 62 and not attempting to elaborate on a single phrase within that test. I begin with the nature of the power which the Court exercises under Article 62. It is of a preliminary, procedural, interlocutory character. In terms of its legal or binding effect, it does no more than to allow (or not) the requesting State to participate in the process. It involves the Court in making a future-looking, speculative assessment about the possible impact of the decision in the main proceeding on the interest asserted by the requesting State. That assessment is whether the decision “may”, not “will” or “is likely” to affect that interest.

5. The principal features of the power of the Court to make its decision in the main proceeding differ sharply from those of the Article 62 power. The parties have much more extensive opportunities, in written and oral

proceedings, to make their case and answer the case against them. They must have given their consent in one form or other to the Court having jurisdiction over the case. The Court makes a final decision on the merits which is binding on the parties and without appeal. In the course of making that decision, the Court determines the existence or not of rights under law and whether those rights have been breached. That process of fact finding will in general be backward looking. The party asserting a fact in support of its case usually has the burden of establishing it on the balance of probabilities — a standard which is plainly more demanding than that stated in Article 62.

6. It is true that one of the differences in the elements to be found in the two functions is that between a (legal) right and an interest of a legal nature, but the two preceding paragraphs suggest that that difference has a very small role. The problematic character of that difference is to be seen in the definition which the Court gives to “an interest of a legal nature” and the consequences it draws from the difference. The Court defines today “an interest of a legal nature”, as opposed to an “established right”, as “a real and concrete claim . . . based on law” (Judgment on Application by Costa Rica, para. 26; Judgment on Application by Honduras, para. 37). If the claim is based on law and is real and concrete, is it not a claim of a right (or a liberty or a power) recognized by the law? Is the Court drawing a real distinction?

7. The Court draws two consequences from its definition: an established right has greater protection and the requirement of proof is not as demanding in the case of an interest of a legal nature. But those consequences are a result of the full range of contrasting features of the two powers set out in paragraphs 4 and 5 above. They do not arise simply and solely from any difference between an established right and an interest of a legal nature.

8. The elusive character of the difference is further demonstrated by the practice of States requesting permission to intervene. They do not appear to find assistance in any such distinction. To take the two cases being decided today, Costa Rica, at the outset of its Application, stated that its “interests of a legal nature which could be affected by a decision in this case are the *sovereign rights and jurisdiction* afforded to Costa Rica under international law and claimed pursuant to its constitution” (emphasis added). It said essentially the same at the end of the proceedings in answering a question from a judge. Similarly, as the Court records in the Honduras case, that State, to demonstrate that it has an interest of a legal nature, contends that it is entitled to claim sovereign rights and jurisdiction over a certain maritime area (Judgment, paras. 16 and 18).

9. That close linking of interests of a legal nature to rights under international law has appeared from the outset to the present day:

- In the *S.S. “Wimbledon”* case, Poland referred to “violations of the rights and material advantages guaranteed to Poland by Article 380 of The Treaty of Versailles”; it changed its request to one under Article 63 and the Court accepted it (*S.S. “Wimbledon”, Judgments, 1923, P.C.I.J., Series A, No. 1* (Question of Intervention by Poland), p. 13).

- In the *Nuclear Tests* cases, Fiji in its request having referred to the claims made by Australia and New Zealand — respectively, that the testing was not consistent with applicable rules of international law or constituted a violation of New Zealand rights under international law — contended that “[I]t will be evident from the facts set out above that Fiji is affected by French conduct at least as much as [Australia] New Zealand and that similar legal considerations affect its position.” (*I.C.J. Pleadings, Nuclear Tests (New Zealand v. France)*, Application for Permission to Intervene Submitted by the Government of Fiji, p. 91.) The Court did not rule on the substance of this request (*Nuclear Tests (New Zealand v. France), Application for Permission to Intervene, Order of 20 December 1974, I.C.J. Reports 1974*, p. 536).

- While Malta in the *Tunisia/Libya* case used the terms of Article 62 in its request it at once defined its “interest of a legal nature” as rights under the law:

“There can be no doubt that Malta’s interest in her continental shelf boundaries is of a legal character since the continental shelf rights of States are derived from law, as are also the principles and rules on the basis of which such areas are to be defined and delimited. In other words these rights are created and protected by law, and the question of the proper spatial extent of the regions over which they can be exercised by any given State is also a matter of law.” (*I.C.J. Pleadings, Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Application for Permission to Intervene by the Government of the Republic of Malta, p. 258, para. 7.)

- Italy in its request in the *Libya/Malta* case under the heading *l’intérêt d’ordre juridique* similarly referred to its rights and legal title, as it saw them, in areas of continental shelf off its coast, the relevant areas being within 400 nautical miles of the relevant coasts (*I.C.J. Pleadings, Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Vol. II, Application for Permission to Intervene, pp. 422-424, paras. 6-13).

- Nicaragua in the *El Salvador/Honduras* case stated two objects for its intervention:

“First, generally to protect the legal rights of the Republic of Nicaragua in the Gulf of Fonseca and the adjacent maritime areas by all legal means available.

Secondly, to intervene in the proceedings in order to inform the Court of the nature of the legal rights of Nicaragua which are in issue in the dispute. This form of intervention would have the conservative purpose of seeking to ensure that the determinations of the Chamber did not trench upon the legal rights and interests of the Republic of Nicaragua, and Nicaragua intends to subject itself to the binding effect of the decision to be given.” (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Application for Permission to Intervene by the Government of Nicaragua, p. 4, paras. 5-6.)

- In *Cameroon v. Nigeria*, Equatorial Guinea, again under a heading using the terms of Article 62, recalled what the Court had said in its judgment on preliminary objections in that case and continued by reference to the law:

“In fact, Equatorial Guinea has claimed an exclusive economic zone and territorial sea under its own domestic law, in terms which it believes consistent with its entitlements under international law. The maritime area thus claimed would produce a boundary in the north-east corner of the Gulf of Guinea, based upon median line principles, which would be both an exclusive economic zone boundary and — in some circumstances — a territorial sea boundary with Cameroon for a limited distance.” (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Application for Permission to Intervene by the Government of Equatorial Guinea, pp. 6-8.)

It further developed this position by reference to the detail of its national law and said this:

“in accordance with its national law, Equatorial Guinea claims the sovereign rights and jurisdiction which pertain to it under international law up to the median line between Equatorial Guinea and Nigeria on the one hand, and between Equatorial Guinea and Cameroon on the other hand. It is these legal rights and interests which Equatorial Guinea seeks to protect.” (*Ibid.*, p. 8.)

- In the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, Australia, also under a heading based on Article 62, began with two New Zealand claims:

“If, as New Zealand claims, the rights . . . are of an *erga omnes* character in the sense described above, it necessarily follows that the New Zealand claim against France puts in issue the rights of *all* States, including Australia. Assuming that France is subject to the corresponding *erga omnes* obligations invoked by New Zealand (a matter which will fall to be determined by the Court at the merits

stage of the proceedings), Australia, in common with New Zealand and all other States, has — in the words of the Court in the *Barcelona Traction* case — a ‘legal interest’ in their observance by France.

As indicated above, New Zealand argues that these obligations ‘by their very nature, are owed to the whole of the international community, and it makes no sense to conceive of them as sets of obligations owed, on a bilateral basis, to each member of that community’. If so, it must follow that a decision by the Court on the merits of the New Zealand claim would not be a decision as to bilateral rights and obligations of France and New Zealand, capable of being considered in isolation from identical bilateral rights and obligations existing between France and every other member of the international community.” (*Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, Application for Permission to Intervene under the Terms of Article 62 of the Statute submitted by the Government of Australia*, p. 9, paras. 18-19.)

Again the basis for the intervention is *rights* which Australia claims. Its reference to “legal interest” from *Barcelona Traction* may be noted — a reference relating to the capacity of a State to bring a claim rather than to the substantive character of the right or interest, a matter apparently distinct from the “interest of a legal nature” to be assessed in determining a request for intervention.

The Solomon Islands, the Federated States of Micronesia, the Marshall Islands and Samoa made requests in similar terms, invoking Article 63 as well as Article 62. On the latter, they comment that “disputes about obligations owed *erga omnes* have an inherent unity . . .” (*Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case: Application for Permission to Intervene under Article 62 — Declaration of Intervention under Article 63 Submitted by the Government of Solomon Islands*, p. 6, para. 19; *Application for Permission to Intervene under Article 62 — Declaration of Intervention under Article 63 Submitted by the Government of the Federated States of Micronesia*, p. 6, para. 19; *Application for Permission to Intervene under Article 62 — Declaration of Intervention under Article 63 Submitted by the Government of the Marshall Islands*, p. 6, para. 19; *Application for Permission to Intervene under Article 62 — Declaration of Intervention under Article 63 Submitted by the Government of Samoa*, p. 6, para. 19).

The Court did not rule on the five requests made in this case (*Request for an Examination of the Situation in Accordance with Paragraph 63*

of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, Order of 22 September 1995, *I.C.J. Reports 1995*, pp. 306-307, para. 67).

— In *Sovereignty over Pulau Ligitan and Pulau Sipadan* the Philippines stated the following objects for its request:

“(a) First, to preserve and safeguard the historical and legal rights of the Government of the Republic of the Philippines arising from its claim to dominion and sovereignty over the territory of North Borneo, to the extent that these rights are affected, or may be affected, by a determination of the Court of the question of sovereignty over Pulau Ligitan and Pulau Sipadan.

(b) Second, to intervene in the proceedings in order to inform the Honourable Court of the nature and extent of the historical and legal rights of the Republic of the Philippines which may be affected by the Court's decision.” (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Application for Permission to Intervene by the Government of the Philippines, p. 4, para. 5.)

10. I now turn to the Court's decisions on intervention under Article 62, beginning with one of the two cases in which the application was granted. In that case, Nicaragua was successful in respect of the legal régime of the waters of the Gulf of Fonseca. Honduras was not opposed to that part of its request, saying that a special legal régime was called for in terms of the community of interest of the coastal states; the Chamber of the Court, noting that El Salvador had claimed by the time of the proceedings that the waters were subject to a condominium of the three coastal states, allowed the request for intervention in that respect (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application for Permission to Intervene, Judgment, *I.C.J. Reports 1990*, pp. 120-122, paras. 69-72). It did not however allow the Application in respect of maritime delimitation within the Gulf and outside it (*ibid.*, pp. 123-128, paras. 74-84). Those refusals are the significant findings for the purpose of the present cases. Along with the other two failed delimitation intervention requests (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Application for Permission to Intervene, Judgment, *I.C.J. Reports 1981*, p. 20, para. 37; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Application for Permission to Intervene, Judgment, *I.C.J. Reports 1984*, pp. 26-28, paras. 42-43, 47), those refusals may be related to two common features of the Court's decisions in maritime delimitation cases. One was recalled by the Chamber in its decision on Nicaragua's request (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application for Permission to Intervene, Judgment, *I.C.J. Reports 1990*, p. 124, para. 77): delimitations between two States, I would add by treaty as well as by third-party decision, often take account of the coasts of one or

more States. The second feature is that the Court in drawing delimitation lines takes care to ensure that they stop short of the rights or interests of third States (e.g., *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, *I.C.J. Reports 1982*, pp. 93-94, para. 133; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, *I.C.J. Reports 1985*, pp. 25-28, paras. 21-22; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, *I.C.J. Reports 2001*, pp. 115-117, paras. 250-252; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, *I.C.J. Reports 2002*, p. 448, paras. 306-307; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, *I.C.J. Reports 2007 (II)*, pp. 756-759, paras. 312-319; *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 131, para. 219). As this practice suggests, the parties do appear to provide the Court with the necessary information about the interests of third States. That information has sometimes indeed been invoked in support of an objection to jurisdiction or admissibility based on the *Monetary Gold* principle; see the submissions of Nigeria in *Cameroon v. Nigeria (I.C.J. Pleadings, Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening))*, Preliminary Objections of the Federal Republic of Nigeria, paras. 4.1-4.11, 8.11-8.17) and of Nicaragua in *El Salvador/Honduras (I.C.J. Pleadings, Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening))*, Vol. III, pp. 737-738, paras. 9-12; *ibid.*, Vol. VI, pp. 3-27).

11. The one successful application for intervention in respect of maritime delimitation was that by Equatorial Guinea in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, *Application for Permission to Intervene, Order of 21 October 1999*, *I.C.J. Reports 1999 (II)*, p. 1029. Several features of that decision lessen its significance for today's cases: the Court in its jurisdictional judgment had suggested, when rejecting a *Monetary Gold* argument, that certain third States may wish to intervene (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 1998*, pp. 323-324, paras. 115-116); only one of them, Equatorial Guinea, in fact applied to intervene; that application was not opposed and was accepted by way of an order, not a judgment, of the Court; and the Court, in the judgment in the main proceeding, said that in fixing the maritime boundary it must ensure that it did not adopt any position which might affect the rights of Equatorial Guinea and Sao Tome and Principe (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, *I.C.J. Reports 2002*, p. 421, para. 238). The latter State had not applied to intervene and obtained exactly the same protection as the State that did

apply; and the Court refers to the “rights” and not to the “interests” of the two States (*I.C.J. Reports 2002*, p. 421, para. 238).

12. In summary, I have three difficulties with the Court’s elaboration of the distinction between “the rights in the case at hand” and “an interest of a legal nature”. Those terms or concepts are being taken out of context. The definition given to the second is problematic. And, to the extent that it exists, the distinction does not appear to be useful in practice.

(Signed) Kenneth KEITH.
