DISSENTING OPINION OF JUDGE AL-KHASAWNEH

The test of the "interest of a legal nature which may be affected" under Article 62 is a liberal one — The Court's persistently restrictive approach to Article 62 intervention — Protection of third State interests in maritime delimitation cases — Protection of third State interests under Article 59 cannot substitute for protection under Article 62 — The decision on intervention request should be made on the basis of Article 62 and not on the basis of general policy considerations or on the basis of the relative protection of Article 59 — Costa Rica's Application to intervene should have been granted — The concept of an interest of a legal nature — There is no distinction between an "interest of a legal nature" and a "right" for the purposes of intervention — The Court's attempt to define the concept of an "interest of a legal nature" is unnecessary in the present case and does not bring clarity.

1. My purpose in appending this opinion is twofold: first, to set out the reasons that led me — naturally with much regret — to dissent from the Court's finding that Costa Rica's Application to intervene in the main proceedings cannot be granted (Judgment, para. 91), and, separately from this, to comment on paragraph 26 of the Judgment in which my learned colleagues in the majority attempted, for no apparent need nor with much success, in my respectful opinion, to define and clarify the elusive concept of "an interest of a legal nature".

2. These two issues will be dealt with in Parts I and II of the present opinion, respectively.

I. Why Costa Rica's Request Should Have Been Granted

(a) *Some General Remarks*

3. The municipal law institution of intervention was introduced for the first time into international law in 1920 when the Advisory Committee of Jurists — mandated by the League of Nations with drafting the Statute of the Permanent Court of International Justice — agreed on a text on the basis of which Article 62 of the PCIJ, and of the present Court, was adopted.

4. Article 62 reads:

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

5. This language is plainly liberal. The word "affected" is not qualified by a requirement that the effect be of a serious or irreversible nature. The word "interest" is likewise not qualified by any expression that suggests that the interest be a crucial or even an important one for the requesting State, all that is needed is that the interest be of a legal nature and not of a political, economic, strategic, or other non-legal nature. Finally the word "may" is also permissive. There is no need that the interest "must" or "shall" or is "likely to be" affected by the Court's decision.

6. Notwithstanding this liberal language, the record of Article 62 over the past 90 years or so since its inception must be judged to be dismal. Out of the fifteen requests for intervention starting with the *S.S. "Wimbledon", Judgments, 1923, P.C.I.J., Series A, No. 1*, thirteen requests were dismissed, readily disclosing a persistently restrictive approach by the Court to grant requests for intervention. Two recent cases: the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* and the *Land and Maritime Boundary between Cameroon and Nigeria*, have given some hope that the institution of intervention was not dead beyond revivification. In the first case, the Court granted Nicaragua's request to intervene only in as far as the status of the Gulf of Fonseca was concerned but not with regard to maritime delimitation (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, pp. 120-121, paras. 69-72). In the second case, it was the Court that had suggested that certain other States may wish to intervene (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 324, para. 116). Equatorial Guinea requested to intervene (while Sao Tome did not), and its request was unopposed (*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. 1034, para. 12). Their paucity and special features would however set those two precedents apart and preclude the drawing of any inference that there exists another more expansive trend to grant requests for intervention or that they herald such a trend. At any rate the present Judgment would have the effect of dashing any such hope and of signalling a reversion to the earlier more restrictive jurisprudence of the admissibility of requests for intervention at least in the field of maritime delimitation.

7. If the fault does not lie with the text of Article 62, where does it lie? And why has the institution of intervention with its potential to avoid repetitive litigation and to afford a fair hearing to those States whose interest may be affected by the Court's decision, and thus to ensure a better administration of justice, been so peripheral as an institution of international law?

8. The answer may be in part because, on the facts of some cases, the would-be intervener failed to persuade the Court that its interests of a

legal nature may be affected even by the relatively low threshold of Article 62. For example, in the *El Salvador/Honduras* case the Chamber stated its reason for rejecting Nicaragua's Application to intervene in the matter of maritime delimitation as follows:

> "the essential difficulty in which the Chamber finds itself, on this matter of a possible delimitation within the waters of the Gulf, is 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" (*Judgment, I.C.J. Reports 1990*, p. 125, para. 78).

It stands to reason that when an applicant for intervention in a maritime delimitation does not indicate the areas where its interest comes into play, it cannot *ex hypothesi* demonstrate that they may be affected.

9. In other instances a request may be rejected because to grant it would be tantamount to involving the Court in pronouncing on the would-be intervener's rights, and not merely that those may be affected, as was the case with Italy's Application to intervene in the *Continental Shelf* case (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, pp. 19-22, paras. 29-33). Or, when the would-be intervener's interest is simply in ascertaining the impact of the Court's pronouncement on the applicable general principles and rules of international law (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 17, para. 30), which is not a legal interest but more of an academic interest, the request is also rejected.

10. Be all of this as it may, the almost total lack of success in invoking Article 62 can be understood only when regard is had to a parallel development in the Court's practice relating to maritime delimitation. In this field, the Court, whether responding to a request for intervention or when it considers that its delimitations may have consequences for third States, is careful not to tread on the rights and maritime entitlements of other States. Where no request to intervene by potentially affected States has been made, the Court is right in shielding the interests/rights of third States by stopping its delimitation short of those areas where third States have rights, and in indicating that by an arrow (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 100, para. 112, p. 129, para. 209, and pp. 130-131, para. 218; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 109, paras. 221-222 and pp. 115-116, paras. 249-250). Indeed the Court is required by the limits of its jurisdiction to do so. On the other hand, where there has been a request to intervene, i.e., to implement the specific procedure designed in the Statute to

safeguard the interests of a legal nature of third States, there is no justification for falling back on the argument that as a matter of principle the Court will protect the interests of third States even if the area where they come into play is only roughly indicated.

11. The conflation of the protection under Article 59 — which can, at the utmost, shield third States from the effects of *res judicata* — and the protection under Article 62 — which operates before the merits and hopes to give the potentially affected State a fair hearing so as to best ensure that its interests are protected — has been responsible above any other factor for the limited scope and impact of the institution of intervention. This is regrettable, for the protection under Article 59 cannot substitute for protection under Article 62. The protection under Article 62 is not just quantitatively different from that afforded by Article 59: it is of a different nature and operates in a different manner, giving the Court powers of an essentially procedural and preventative nature.

(b) *Costa Rica's Application*

12. Both in its timing (coming after two cases where a breath of life had been blown into the long moribund body of Article 62) and in relation to its facts (the two Parties' recognition of the existence of a Costa Rican interest of a legal nature in at least some areas claimed by the main Parties) (Judgment, para. 65), the (hopeful) expectation was that this was a perfect occasion to put Article 62 of the Statute into effect *(ut res magis valeat quam pereat)*. Instead, the Judgment declined to grant permission to Costa Rica to intervene notwithstanding, as shall be instantly demonstrated, that all the requisites of Article 62 have been met. The reasoning deployed in the Judgment was premised on three contentions, none of which stands scrutiny: *(a)* that Costa Rica had abandoned its earlier claim that the 1977 Facio-Fernández Treaty with Colombia and the assumptions underlying it constitute its interests of a legal nature which may be affected by the Court's decision in the main case; *(b)* that Costa Rica should demonstrate that its interest of a legal nature "needs a protection that is not provided by the relative effect of decisions of the Court under Article 59 of the Statute" (*ibid*., para. 87); and *(c)* that even without defining with specificity the geographical limits of the area where the interests may come into play, the Court will, as a matter of principle, protect third-party interests (*ibid*., para. 89).

13. With regard to Costa Rica's interest of a legal nature (point *(a)* above), the majority misses the point and mischaracterizes Costa Rica's arguments. Costa Rica never claimed — as far as I can ascertain — that the 1977 Treaty and its underlying assumptions are, as such, its interest of

a legal nature. That interest was clearly set out in its Application as "[a]n interest of a legal nature which may be affected by the decision of the Court" that is "Costa Rica's interest in the exercise of its sovereign rights and jurisdiction in the maritime area in the Caribbean Sea to which it is entitled under international law by virtue of its coast facing on that sea" (Judgment, para. 54). True, Costa Rica advanced arguments regarding the 1977 Treaty and its underlying assumptions to demonstrate how its interests, namely in the exercise of its rights and jurisdiction, would be affected by a decision of the Court on the basis of more than one possible scenario. For example, the enclaving of San Andrés as Nicaragua would wish, while at the same time not giving them the full weight to which they are at present entitled under the 1977 Treaty, would have ramifications for Costa Rica's entitlements in the same area. This is not the legal interest itself but rather a demonstration of how the legal interest in the exercise of sovereign rights may be affected.

14. Turning to point *(b)* above, namely that Costa Rica must show that its interest of a legal nature needs protection beyond and above that provided under Article 59, all I need to say — indeed reiterate since I have already commented on this argument — is that this argument has no foundation in law or in logic. Protection under Article 59, in the sense of shielding a non-intervening third party from the effects of *res judicata*, and protection under Article 62, designed to give a would-be intervener a chance to be heard in order to protect an interest before the merits, are entirely different provisions in their purpose and scope. In other words, the differences between them are qualitative and not quantitative.

15. It is also somewhat ironic that the Judgment argues in paragraph 26 for a less stringent test for what constitutes an interest of a legal nature, but then in effect, requires a higher standard of proof than that based on the adequacy of the protection provided under Article 59.

16. With regard to point *(c)* above, namely that the Court will, as a matter of principle, always protect third State interests, all that needs to be said is that when there is no request for intervention this policy consideration (for it is nothing other than that) is commendable. However such protection will of necessity be speculative, rough and negative since the Court does not require that the geographical limits of an area where the interest come into play be defined by it i.e., by the Court, with specificity (Judgment, para. 86). Moreover, requests for intervention do not always relate to maritime or spatial delimitation. In other areas such protection will be even more difficult to speculate on.

17. For all these reasons, I regret that the Court has rejected Costa Rica's request to intervene since all the requisites for meeting the test set out in Article 62 of the Statute have been met.

II. An Interest of a Legal Nature

18. In the present case, Costa Rica contended that the "interest of a legal nature" that it sought to protect under Article 62 was nothing other than its "interest in the exercise of its sovereign rights and jurisdiction in the maritime area in the Caribbean Sea to which it is entitled under international law by virtue of its coast facing on that sea" (Judgment, para. 54).

19. Costa Rica's use of the expression "rights and jurisdiction" and the expression "to which it is entitled" is in line with similar expressions used by the Parties and by the Court itself in previous jurisprudence dealing with maritime delimitation. For example, Italy, in its Application to intervene, in the *Libya/Malta Continental Shelf* case, defined the concept of "an interest of a legal nature" as "an interest of the Applicant State *covered . . . by international legal rules or principles*", and specified its legal interest in the case as "nothing less than respect for its *sovereign rights* over certain areas of continental shelf in issue in the present case" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, pp. 10-11, para. 15 and pp. 19-22, paras. 29-33; emphasis added). Similarly, Nicaragua in the *Land, Island and Maritime Dispute (El Salvador/Honduras)* stated as the two objects for its intervention pursuant to Article 62:

> "*[f]irst*, 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 [and] *[s]econdly*, 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" (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 108, para. 38; emphasis added).

In the *Sovereignty over Pulau Ligitan and Pulau Sipadan*, the Philippines likewise defined as the object of its intervention:

> "[f]irst, to preserve and safeguard the historical and legal *rights* . . . 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"

and

> "[s]econd, 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, Judgment, I.C.J. Reports 2001*, p. 604, para. 84; emphasis added).

20. What is of direct interest in the present case is that whilst there may be distinctions at the theoretical level between interests of a legal nature and rights, the issue simply does not arise here: Costa Rica is claiming rights, jurisdiction, as well as entitlements. This therefore was the wrong case to try to define the concept of a legal interest by distinguishing it from the concept of a right. Moreover, while proposing such a distinction, the majority did not follow it through. A lower threshold for proving the existence of a legal interest than for a right leads one to believe that this implies a greater readiness to grant permission to intervene, but here the situation is otherwise: the lower threshold still leads to refusal to grant permission. First of all, nothing turns on the distinction between rights and legal interests, thus rendering such a distinction unnecessary. Moreover, if this is going to be a model for future judgments in intervention proceedings, the Court has inevitably placed itself, unnecessarily, in a straightjacket of a lower threshold for proving that an interest of a legal nature which may be affected existed and yet refused to grant permission to intervene. Would it not have been preferable to have adhered to all the elements of the test of Article 62, rather than try to clarify only one of its elements, namely the phrase "an interest of a legal nature"?

21. The expression "an interest of a legal nature" was born out of a compromise struck in the meetings of the Advisory Committee of Jurists charged with the drafting of the Statute of the Permanent Court of International Justice in 1920. The relevant parts of the discussion bear quoting:

> "Lord Phillimore suggested the following wording:
>
> 'Should a third State consider that a dispute submitted to the Court affects its interests, it may request to be allowed to intervene; the Court shall grant permission if it thinks fit.'
>
> M. Fernandes agreed with Lord Phillimore on principle, but wished to make the right of intervention dependent upon certain conditions; for instance, it should be stated that the interests affected must be legitimate interests.
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> The President thought that the solution of the question of intervention should be drawn from common law. He proposed a wording based on this idea:
>
> 'Should a State consider that its rights may be affected by a dispute, it may request the Court to grant it permission to intervene, and the Court shall accord such permission.'

M. Adatci suggested to amend the wording proposed by Mr. Loder, by replacing the word 'right' by the word 'interest.'

. . . . . .

The President proposed to following new wording:

'Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.'" (*Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920)*, pp. 593-594.)

22. It was not long after, that the incoherence apparent in this compromise was noticed by Farag, the first commentator on the subject of intervention who described the expression as "a monster that defies definition" (W. M. Farag, *L'intervention devant la Cour permanente de Justice internationale (articles 62 et 63 du Statut de la Cour)*, Librairie générale de droit et de jurisprudence, 1927, p. 59). It is apparent that the Committee of Jurists was concerned with excluding any intervention of a political, economic or strategic nature but, inopportune as the compromise was, there is nothing in the *travaux préparatoires* to suggest that the Committee intended (nor logically could) create a third category, a hybrid which is neither a right nor an interest.

23. It is remarkable that notwithstanding the inherent contradiction of the phrase "an interest of a legal nature", it nevertheless gained acceptance and currency in legal parlance relating to intervention and was rarely commented on. A notable exception is however to be found in Judge Roberto Ago's dissenting opinion in *Continental Shelf (Libyan Arab Jamahiriya/Malta)*:

"However, I feel it is being overlooked here that the fact of a third State asserting the existence of a right of its own *(an interest of a legal nature being nothing other than a right)* in a field constituting the subject-matter of a dispute between two other States, is the very essence and *raison d'être* of the institution of intervention in its strictest and most uncontroversial sense. It was for the very purpose of protecting the potential rights of third parties that the institution was devised and enshrined in Article 62 of the Statute." (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, dissenting opinion of Judge Ago, p. 124, para. 16; emphasis added.)

24. Whilst it is true that it was only Judge Ago — as far as I could ascertain — who addressed the question of legal interests being nothing other than rights, this does not mean that there was general acceptance that they are different from each other. On the contrary, any reading of the case law, whether relating to intervention or whether dealing, more generally, with the potential effects of the Court's decisions on third States, reveals that the

words "right", "legal interests" and "entitlements" are used interchangeably (see for example, *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, pp. 128-129, paras. 208-209, and pp. 130-131, para. 218; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, pp. 596-597, paras. 49-51 and p. 598, para. 60; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 421, para. 238 and p. 432, para. 269; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, pp. 130-131, paras. 89-90 and 92).

25. This being the case with regard to the jurisprudence of the Court what remains to be explored — briefly — is whether legal reasoning admits of a hybrid category of legal interests that falls short of rights, or to be more precise, of asserted rights. The concepts of rights and interests are of course among the basic tools of lawyers and the Court had a chance, in a celebrated passage in paragraph 46 of its Judgment in the *Barcelona Traction*, to draw a distinction between the two concepts: "[n]ot a mere interest affected, but solely a right infringed" (*Barcelona Traction, Light and Power Company, Limited, (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 36, para. 46). However when the word "interest" is qualified by the adjective "legal", we are of necessity expressing the concept of "rights" through other words. Thus, if Costa Rica's interest is not to have Nicaragua as its neighbour in the maritime area under consideration that would definitely be a strategic or a political interest but not a legal interest. If Malta seeks to intervene simply on the basis that it has "an interest" in the Court's pronouncement in the case regarding the applicable general principle and rules of international law (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 17, para. 30), that interest is an academic interest and it is significant that the Court referred to this as "an interest" and not as a "legal interest". To my mind a legal interest cannot but be a right asserted.

26. Paragraph 26 of this Judgment in fact recognizes this, stating, *inter alia*: "Article 62 requires the interest relied upon by the State seeking to intervene to be of a legal nature, in the sense that this interest has to be the object of a real and concrete claim of that State, based on law".

27. If a real and concrete claim based on law is not an assertion of a right or rights, what is? I also fail to discern the causal link between this statement and the last paragraph of paragraph 26 which reads: "[a]ccordingly, an interest of a legal nature within the meaning of Article 62 does not benefit from the same protection as an established right and is not subject to the same requirements in terms of proof".

28. The contents of this sentence do not flow from the arguments advanced in the first sentence, but even as a proposition standing on its

own, it is neither self-evident nor does it say much. Thus, even if one were to accept *arguendo* that a right and an interest of a legal nature can be different, it does not follow that they will always be different. A right can be seen as a form of a legal interest, namely, when a State claims that its interest is to exercise a right in a maritime area.

29. Ultimately, the out-of-context elaboration of the expression "an interest of a legal nature" does not bring one nearer to understanding that concept nor will it be of help to counsel or to the Court. On the contrary, this attempt seems to be terminally confused.

(Signed) Awn Shawkat AL-KHASAWNEH.