

SPEECH BY H.E. JUDGE HISASHI OWADA, PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE, TO THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

28 October 2011

Mr. Chairman,

Distinguished Delegates of the Sixth Committee,

Ladies and gentlemen,

I am pleased to address your Committee today for the third time since my assumption of office as President of the International Court of Justice (“ICJ”). The Court greatly appreciates this opportunity which enables it, through an exchange of views, to strengthen its ties to the legal committee of the General Assembly.

I congratulate H.E. Mr. Hernán Salinas Burgos on his election as Chairman of the Sixth Committee for the Sixty-sixth Session of the General Assembly.

Rather than reiterating what I stated in the General Assembly concerning the work of the Court over the past year, I would like to take this opportunity to speak about some specific aspects of the Court’s work. As you are aware, the International Court of Justice is empowered to adjudicate two kinds of cases: contentious cases and advisory opinions. Over the course of the Court’s 65 year history, a total of 151 cases — including both contentious and advisory — have been entered in the Court’s General List. What many observers do not consider, however, is that the judgments on the merits in contentious cases, and opinions rendered under its advisory jurisdiction, represent only one part of the Court’s work. Aside from these more well-known culminating stages of a case, the Court may take one or several other kinds of decisions. Such proceedings, known as incidental proceedings and elaborated in Articles 73 to 89 of the Rules of Court, include interim protection, preliminary objections, counter-claims, intervention, special reference and discontinuance. It is on this problem of incidental proceedings that I wish to focus today. In light of the relatively large number of such proceedings which the Court has dealt with in recent years, I would like to discuss various aspects of the Court’s incidental jurisdiction, especially their relationship to the merits phase of a case. I will focus on the four most substantively complex

incidental proceedings: provisional measures, preliminary objections, counter-claims and intervention.

I. PROVISIONAL MEASURES

The first type of incidental proceeding I will discuss is provisional measures, which allow the Court, at a preliminary stage of the proceedings, to order either or both parties to preserve the status quo until it has rendered a final decision. Under Article 41, paragraph 1, of the Court's Statute, "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party." As has been elaborated in the Court's case law, a party requesting that the Court indicate provisional measures must establish: first, that the Court has prima facie jurisdiction in the case; second, a link between the right the protection of which is being sought and the measures requested; and third, an urgent risk of irreparable harm.

When one considers the relationship of incidental proceedings to the merits, it is possible to discern a relationship between each of these criteria and the merits stage of the proceedings. The first criterion, existence of prima facie jurisdiction, clearly relates to the Court's consideration of the merits; indeed, the existence of a basis of jurisdiction and the admissibility of the Application are the very elements necessary in order for the Court to consider the merits in a subsequent phase, so it is logical that such jurisdiction and admissibility must be established, prima facie, for the Court to indicate provisional measures as to the same subject-matter. The second criterion, the link between the right to be protected and the measures requested, relates to the merits because the rights to be protected are in principle those the recognition of which is being asked at the merits stage. This means, it goes without saying, that the rights claimed by the party requesting measures are at least plausible/arguable to warrant such a request. Third, the requirement that the State requesting the indication of provisional measures establish an urgent risk of irreparable harm relates to the merits since it is at the merits phase when the Court will ultimately adjudicate all the claims of the Parties, and any prior consideration of those claims for the purposes of the indication of provisional measures of protection must be justified by an urgent risk that harm could be done to

one of the rights claimed by of those parties which would no longer be reparable at the merits stage.

These three criteria are the conditions to ensure that proceedings on provisional measures are sufficiently connected to the merits and that the Court, by its decisions on provisional measures, does not prejudice the merits. The premise of these three conditions, though an obvious point, which is implicit in the Court's consideration of whether or not to grant provisional measures, is the issue of existence *vel non* of the rights to be protected. In its request for provisional measures in the *Passage through the Great Belt* case, for example, Finland had asked the Court to prohibit Denmark, pending a decision on the merits, from continuing with the construction of a bridge over the East Channel of the Great Belt that it alleged would have violated Finland's right of free passage¹. Denmark had responded that for provisional measures to be granted it was essential that Finland be able to substantiate the claimed right to a point where a reasonable prospect of success in the main case existed. The Court did not directly address this issue in its Order². Judge Shahabuddeen, in his separate opinion, stated that "a State requesting interim measures, such as Finland, is required to establish the possible existence of the rights sought to be protected"³. He stressed that there is a real difference between deciding that a right definitely exists and finding that "the requesting State has shown any possibility of its existence"⁴.

The plausibility of the rights claimed at the provisional measures stage took on added importance with the Court's affirmation, in its 2001 Judgment in the case concerning *LaGrand (Germany v. United States)*, that provisional measures under Article 41 of the Statute were binding⁵.

The Court, in its 2009 Order on provisional measures in the case concerning *Obligation to Extradite or Prosecute (Belgium v. Senegal)*, confirmed this point by stating that its power "to

¹See Case Concerning *Passage through the Great Belt (Finland v. Denmark)*, *Provisional Measures, Order of 29 July 1991*, *I.C.J. Reports 1991*, pp. 13-14, paras. 6-7.

²The Court noted that the existence of a right of free passage was undisputed but that the parties' disagreement concerned the *extent* of that right — including whether it applied to drill ships and oil rigs — which meant that the right could be protected by provisional measures (although it ultimately rejected the request for provisional measures on other grounds). See *ibid.*, p. 17, para 22.

³See *ibid.*, separate opinion of Judge Shahabuddeen, p. 36.

⁴*Ibid.*, p. 30.

⁵*Judgment, I.C.J. Reports 2001*, pp. 501-506, paras. 98-109.

indicate provisional measures should be exercised only if the Court is satisfied that the rights asserted by a party are at least plausible”⁶. It was repeated in its Order on provisional measures in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* that “the Court needs only to decide whether the rights claimed by the Applicant on the merits, and for which it is seeking protection, are plausible”⁷.

This question also arose in the recent provisional measures proceedings in the *Request for Interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)*. The Court concluded that, insofar as the rights claimed by Cambodia were based on the Court’s Judgment of 15 June 1962 in the case concerning the *Temple of Preah Vihear*, as interpreted by Cambodia, those rights were plausible⁸.

It bears reiterating that while the Court’s determination of the plausible/possible existence of rights at the provisional measures stage has an obvious relationship to the merits, it is not at all determinative of the merits. It does not prejudice the merits, just as the Court’s finding at the provisional measures stage that it has prima facie jurisdiction to consider the merits does not prejudice a full-fledged consideration of jurisdiction at the subsequent stage of the proceedings. However, to my mind, what is essential is not this obvious point but the question of what exactly is meant by this expression “plausible” or the question of what is the standard required for establishing this plausibility. Various expressions have been used in the jurisprudence of the Court — possibility/plausibility/arguability/prima facie case, etc. What I wish to emphasize is that in my personal view this so-called “plausibility” is not a new requirement added by the Court to the three conditions established in the jurisprudence on the interim measures of protection.

II. PRELIMINARY OBJECTIONS

The second type of incidental proceeding I would like to discuss is preliminary objections. Under Article 79 of the Rules, the Respondent may, within three months after the Memorial is

⁶*Obligation to Extradite or Prosecute (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009, p. 151, para. 57.*

⁷*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, para. 57.*

⁸*Request for Interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), Provisional Measures, Order of 18 July 2011, para. 40.*

filed, submit a written objection to the jurisdiction of the Court or to the admissibility of the Application⁹. Once the Respondent has submitted such a preliminary objection, the proceedings on the merits of the case are suspended. When a preliminary objection is raised, the Court stops any consideration of the merits until it has first determined whether it may proceed to entertain the case.

After the Court has heard both parties' views on the preliminary objection, it issues a Judgment in which it upholds the objection, rejects it, or declares that the objection does not possess an "exclusively preliminary character"¹⁰. This is a new formula introduced in the revised Rules of Court in 1978 and has its implications.

In the time of the Permanent Court, preliminary objections which were considered to bear on the merits of the case would be officially "joined" by the Court to the merits of the case, as was the situation, for example in the *Prince von Pless Administration* case. The practice of the International Court of Justice in this regard has evolved over time. Initially, the Court operated much as the Permanent Court in this regard, joining preliminary objections to the merits. Under the 1946 Rules, the Court had a discretionary prerogative to join the preliminary objections to the merits whenever the interests of the good administration of justice required it. Four preliminary objections were joined to the merits under the 1946 Rules: two in the *Right of Passage over Indian Territory* case, and two more in the *Barcelona Traction* case. In the *Right of Passage* case, the Court decided to join two objections to the merits after reaching the conclusion that it was not possible to pronounce upon them without prejudging the merits. In the *Barcelona Traction* case, the Court joined two preliminary objections to the merits, even though one of them might have been examined at the preliminary stage since its elements were not related to the merits. What is legally significant with this formula is that the Court could join preliminary objections to the merits for any reason consistent with the good administration of justice — it was not required to look into the substance of the objection in order to do so.

This procedure was seen as somewhat inadequate, resulting in delaying proceedings and the potential for a double discussion of the same issues during both the preliminary stage of the

⁹The same article also contemplates the procedure, rarely used in practice, for another party to raise preliminary objections "within the time-limit fixed for the delivery of that party's first pleading".

¹⁰Article 79, paragraph 9, of the Rules of Court.

proceedings and during the discussion on the merits stage. The Court thus suggested two alternatives, namely “to revise the Rules so as to exclude the possibility of a joinder to the merits” in the future, which would have required that every objection be addressed at the preliminary stage, or “to seek a solution which would be more flexible”¹¹. This issue was the subject of a long deliberation by several Member States of the United Nations particularly during the discussions lasting from 1963 to 1970 in this Sixth Committee, and in a series of Special Committees. The Court then set up a Committee for the Review of the Methods and Procedures of the Court, which came up with suggestions in the form of the 1972 amendments to the Statute. Those amendments offered a new way forward, not totally excluding the power of the Court to examine a preliminary objection during the merits phase, but limiting the exercise of that power. In particular, the discretion that the Court previously exercised concerning the joining of preliminary objections to the merits was replaced by a new formula presently contained in Article 79, paragraph 9, of the Rules of the Court¹², according to which a preliminary objection can be reserved for the merits stage only when that objection “does not possess an exclusively preliminary character”.

The Court has identified preliminary objections which it considered were not of an “exclusively preliminary character” several times since 1972. In the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court determined that an objection advanced by the United States was so intimately related to the substance and merits of the dispute that it did not possess an intrinsically preliminary character, and consequently, that that objection did not constitute an obstacle for the Court to entertain the proceedings initiated by Nicaragua¹³. Similarly, in the case concerning *Land and Maritime Boundary between Cameroon and Nigeria*, the Court declared that a preliminary objection raised by Nigeria had to be decided in connection with the merits when it decided that the objection lacked an exclusively preliminary character. That objection concerned the question whether the Court was prevented from carrying out the maritime

¹¹*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, I.C.J. Reports 1986, p. 30, para. 40.

¹²Before the amendments and revision that entered into force on February 2001, this provision was established in paragraph 7 of Article 79 of the 1978 Rules. As a consequence of this revision, this paragraph was renumbered paragraph 9.

¹³*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 425, para. 76.

delimitation requested because the rights and interests of third States were at issue¹⁴. In the *Lockerbie* cases, the Court found that an objection raised by the United Kingdom and the United States, to the effect that intervening resolutions of the United Nations Security Council had rendered the Libyan claims without object, did not have an exclusively preliminary character and thus fell to be addressed at the merits stage¹⁵.

The decision of the Court reserving judgment on an objection until the merits phase because it does not have an exclusively preliminary character has produced in many cases similar outcomes to the Court's decision under the old Rules to join a preliminary objection to the merits. However, it has one difference: that the reformulation of Article 79, paragraph 9, has narrowed the Court's discretion in this regard. As the Court observed in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*¹⁶, to decide a case on a purely preliminary question after requiring the parties to expend the time and money necessary to plead the merits fully could invite criticism for waste. Instead, Article 79 in its present form attempts to balance the desire not to prejudge the outcome with concerns for judicial economy.

III. COUNTER-CLAIMS

The third type of incidental proceeding is the counter-claim, which must be raised in the respondent's Counter-Memorial on the merits¹⁷. A counter-claim is an "autonomous legal act, the object of which is to submit a new claim to the Court"¹⁸. At the same time, a counter-claim is "linked to the principal claim, insofar as, formulated as a 'counter' claim, it reacts to it"¹⁹.

As provided in Article 80, paragraph 1, of the Rules, "[t]he Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the

¹⁴*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 325, para. 118.*

¹⁵*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 28, para. 50; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 133, para. 49.*

¹⁶*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 410, para. 39.*

¹⁷Article 80, paragraph 2, of the Rules of Court.

¹⁸*Jurisdictional Immunities of the State (Germany v. Italy), Counter-claim, Order of 6 July 2010, p. 6, para. 13.*

¹⁹*Ibid.*

subject-matter of the claim of the other party”. Counter-claims are intended “to achieve a procedural economy whilst enabling the Court to have an overview of the respective claims of the parties and to decide them more consistently”; at the same time, such a means should not be used by the Respondent “to impose on the Applicant any claim it chooses, at the risk of infringing the Applicant’s rights and of compromising the proper administration of justice”²⁰. It is for these reasons that Article 80 of the Rules of the Court refines the evidence of jurisdiction and connection to the main claim to be met. The counter-claim must come within the Court’s jurisdiction on its own standing; it may not be heard simply on the basis of the Court’s jurisdiction over the main claim²¹. That being said, parties have at times simply agreed to extend the Court’s jurisdiction to a counter-claim through the application of *forum prorogatum*.

In determining whether a counter-claim is directly connected with the subject-matter of the main claim, the Court exercises its sole discretion, taking account of the particular aspects of each case. In the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, the Court explained that, as a general rule, a degree of connection between the claims must be assessed both in fact and in law²². Thus, in that case the Court found Yugoslavia’s counter-claims to be admissible as such because the facts on which the counter-claims rested had allegedly occurred on the same territory and during the same time period as the facts underpinning the main claim and Yugoslavia had stated its intention to rely on certain identical facts both in opposing Bosnia and Herzegovina’s claim and in supporting its own claims, and because both Parties’ claims pursued the same legal aim, namely the establishment of legal responsibility for violations of the Genocide Convention²³. In the *Oil Platforms* case, the Court found the United States’ counter-claim to be admissible as such under similar reasoning, emphasizing that the Parties’ claims and counter-claims rested on facts of the same nature, since the United States had indicated that it intended “to rely on the same facts and circumstances in order both to refute the allegations of Iran and to obtain judgment against that

²⁰*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997, p. 257, paras. 30-31.*

²¹See Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005* (4th ed.), p. 1234.

²²*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997, p. 258, para. 33.*

²³*Ibid.*, paras. 34-35.

State”²⁴. The Court also observed that both the claim and counter-claim concerned violations of the same treaty²⁵.

In analysing whether a factual connection exists between a counter-claim and the main claim, the Court inquires whether the facts underpinning both claims are part of the same so-called “factual complex”²⁶. That concept, while capturing the essence of the analysis, should not be interpreted to suggest that the analysis is formulaic: as I stated before, whether a counter-claim is directly connected with the subject-matter of the main claim depends on the particular aspects of each individual case. The Court’s jurisprudence shows the concept of a “factual complex”. As one commentator has observed, such a complex comprises many factors: the title of the jurisdiction itself; the time span of events to which the counter-claim relates as compared with the time span of events of the original claim; the territorial aspect; the instruments invoked in the counter-claim in comparison with those invoked in the original claim; and the objective of restoring legality in the relations of the litigant States²⁷.

In the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, the Court found Italy’s counter-claim, which was submitted on 23 December 2009, to be inadmissible as such. In its Order of 6 July 2010, the Court found that it lacked jurisdiction over the counter-claim²⁸. The Court concluded that the dispute which Italy sought to bring before the Court — whether Germany had violated an obligation to provide Italian World War II victims with effective reparation — related to facts and situations existing before the entry into force between the Parties in 1961, of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957. That Convention, however, which served as the alleged basis of the Court’s jurisdiction over the counter-claim, as well as the basis of the claim by Germany, expressly

²⁴*Oil Platforms (Islamic Republic of Iran v. United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998, p. 205, para. 38.*

²⁵*Ibid.*

²⁶*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997, p. 258, para. 34; Oil Platforms (Islamic Republic of Iran v. United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998, p. 205, para. 38.*

²⁷Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005* (4th ed.), p. 1235.

²⁸*Jurisdictional Immunities of the State (Germany v. Italy), Counter-Claim, Order of 6 July 2010, p. 11, para. 32.*

provided that its provisions did *not* apply to disputes relating to facts or situations prior to the Convention's entry into force.

I am not going to dwell on the issue of how the Court might analyse the counter-claim's connection with the subject-matter of the main claim. It is however useful to point out that, in this case, unlike in the *Application of the Genocide Convention* and the *Oil Platforms* cases, both the factual and legal aspects of the counter-claim differed from the factual and legal aspects of the main claim. This difference led the Court to examine carefully the jurisdictional bases of the main claim and the counter-claim in light of the legal nature of the claim. With the counter-claim in the *Germany v. Italy* case, Germany in its Application alleged that Italy, in allowing civil claims to be brought in its courts against Germany for violations of international humanitarian law committed by the Nazi régime, had violated Germany's jurisdictional immunity under international law, while Italy in its counter-claim submitted that Germany had violated an international obligation to provide effective reparation to Italian victims of crimes committed by the Nazi régime.

IV. INTERVENTION

The fourth type of incidental proceeding is intervention by a State in an existing case between other States. Intervention allows the intervening State to present to the Court its observations relating to a particular aspect of the case²⁹. Under the Statute two types of intervention are envisaged. First, under Article 62 of the Statute, “[s]hould 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”. Second, under Article 63 of the Statute, when a case concerns the construction of a convention, the Registrar notifies all States parties to that convention, who then have a right to intervene in the proceedings. In view of the fact that the Court has recently considered three different requests for permission to intervene under Article 62, I will be focusing my comments on this form of intervention.

Unlike intervention under Article 63 of the Statute, intervention under Article 62 of the Statute is not as of right. Instead, a State which considers that it has an interest of a legal nature in a case may only request to be permitted to intervene in that case. It is for the Court to decide

²⁹See Articles 85 and 86 of the Rules of Court.

whether or not to grant this request. To that end, the Court will have to examine whether the State applying to intervene has an interest of a legal nature sufficiently connected to the subject-matter of a case to justify the inclusion of that State in the case as an intervening State.

The requirement of establishing “an interest of a legal nature which may be affected by the decision in the case” is a difficult one for States to satisfy in practice. Permission to intervene has been granted only in three cases in the whole history of the Court. First, Nicaragua was permitted to intervene on one question before the Court in the case concerning *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*. Second, Equatorial Guinea was authorized by the Court to intervene in the case concerning *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*. Finally, the Court recently granted Greece’s Application for permission to intervene in the proceedings now before the Court in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*. With respect to all other applications for intervention, the Court has concluded that the State requesting permission to intervene had not established that it had “an interest of a legal nature which may be affected by the decision in the case”. The basic difficulty came from the fact that “the decision of the Court has no binding force except between the Parties and in respect of that particular case” (Article 59 of the Statute). By virtue of this provision, the decision of the Court remains *res inter alios acta* to the States wishing to intervene. While it was related to “an interest of a legal nature” and not rights of a third party, it is difficult to establish that the decisions of the Court “may affect such interest of a legal nature”. Moreover, in many of the cases of maritime delimitation, in which States have sought to intervene, the Court has always taken pains to make a consistent position that it will avoid delimiting “any area where third party interests could become involved”³⁰. The Court has always taken care to ensure that it is not going to affect the interest of a third Party. This practice of the Court will have the effect of making it more difficult for the party wishing to intervene the interests of a legal nature. It is for this reason that with the exception of the case of Equatorial Guinea, which the Court authorized to intervene, the two other successful cases of intervention related to situations other than that of maritime delimitation. That is to say, the intervention by Nicaragua which was

³⁰*Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009*, p. 100, para. 112.

permitted only in relation with the argument concerning condominium and the intervention by Greece in the *Germany v. Italy* case in relation with the Greek Judgements involved.

The fact that the Court has seldom granted requests to intervene under Article 62 reflects the precision with which it handles disputes brought before it. The possibility to intervene under Article 62 of the Statute and Article 81 of the Rules of Court is not an open invitation to expand an existing dispute between two States into one including numerous States. Rather, the possibility of a third State participating as an intervener is only made available when, as already indicated, that latter State can establish that it has an interest of a legal nature which may be affected by the subject-matter of that case. The strictness of this criterion can be illustrated by reference to Nicaragua's requested intervention in the *El Salvador/Honduras* case, since the Chamber of the Court in that case granted Nicaragua's request as to part of the case but denied the request with respect to another aspect of the case. First, with respect to the question before the Court concerning the legal régime applicable in the Gulf of Fonseca, El Salvador was claiming before the Court that a condominium existed. Nicaragua in its application for permission to intervene observed that it plainly had rights in the Gulf of Fonseca, the existence of which was undisputed, and contended that the condominium, if declared applicable, would necessarily affect these rights, this being inherent in the very definition of a condominium. On the other hand, the Chamber concluded that Nicaragua had no interest of a legal nature in the maritime delimitation to be carried out in the case.

Basically for these reasons, the Court rejected recently the expansive view presented in the Application of Honduras to intervene in the case *Nicaragua v. Colombia*³¹. Honduras had argued that a State has a right to intervene under Article 62 when that State considers that it has an interest of a legal nature. The Court rejected this argument, stating that "[i]t is not sufficient for that State to consider that it has an interest of a legal nature which may be affected by the Court's decision"³². It emphasized that "Article 62, paragraph 2, clearly recognizes the Court's prerogative to decide on

³¹*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment of 4 May 2011, para. 35.

³²*Ibid.*

a request for permission to intervene, on the basis of the elements which are submitted to it”³³, which it is the function of the Court to examine.

Even when a State is permitted to intervene under Article 62 of the Statute, that State does not automatically become a party to the case as such. Intervention is a procedure that is incidental to an existing case. It is not a way for a State to bring a new dispute before the Court. As the Court stated, intervention “is not intended to enable a third State to tack on a new case, to become a new party, and so have its own claims adjudicated by the Court”³⁴. The Court emphasized that “the incidental jurisdiction conferred by Article 62 of the Statute is circumscribed by the general principle of consensual jurisdiction over particular disputes”³⁵ and concluded: “[i]t is therefore clear that a State which is allowed to intervene in a case, does not, by reason only of being an intervener, become also a party to the case”³⁶. The Court however added that “[i]t is true, conversely, that, provided that there be 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”³⁷.

On the other hand, if a State were permitted to intervene as a party, it would in essence be admitted into the merits phase of the case on an equal footing as the existing parties. It is thus another area where the boundary between incidental proceedings and merits is most obvious. However, until recently, the Court had never received an Application from a State for permission to intervene as a party. This situation changed when, in the case concerning *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Honduras applied to intervene as a party and, only alternatively, as a non-party. Although the Court in that case rejected Honduras’s application for permission to intervene both as a party and as a non-party³⁸, the Court affirmed that the distinction between intervention as a party and intervention as a non-party is of significant legal effect. The Court observed that:

³³*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment of 4 May 2011, para. 35.

³⁴*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, pp. 133-134, para. 97.

³⁵*Ibid.*, p. 134, para. 99.

³⁶*Ibid.*

³⁷*Ibid.*, pp. 134-145, para. 99.

³⁸*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment of 4 May 2011, para. 75.

“If it is permitted by the Court to become a party to the proceedings, the intervening State may ask for rights of its own to be recognized by the Court in its future decision, which would be binding for that State in respect of those aspects for which intervention was granted, pursuant to Article 59 of the Statute. *A contrario*, as the Chamber of the Court formed to deal with the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* has pointed out, a State permitted to intervene in the proceedings as a non-party ‘does not acquire the rights, or become subject to the obligations, which attach to the status of a party, under the Statute and Rules of Court, or the general principles of procedural law’.”³⁹

If a State is permitted to intervene as a party, the intervention is transformed into something very different from the case of a State wishing to intervene as a non-party under Article 62 of the Statute. It can be said that if a State were to intervene as a party, that State participates in the merits phase of the proceedings as a party to the case, and it is subsequently bound by Article 59 of the Court’s Statute. To this day, no State has been permitted to intervene as a party. What we have been witnessing is non-party intervention. In a typical non-party intervention under Article 62, the intervening State’s connection to the merits could be considered quite tangential: it is not bound by the Judgment under Article 59. It is participating in the proceedings, but it cannot be considered to have the same stake in those proceedings as does a party to the case. Nevertheless, intervention under Article 62 has a central role to play. If it can establish that it has a specific “interest of a legal nature which may be affected by the case”, the State intervening as non-party is able to make that interest fully known to the Court through intervention proceedings under Article 62.

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Mr. Chairman,

Distinguished Delegates,

As I have said at the outset, incidental proceedings may not be the central point of the Court’s work, but they raise interesting aspects of the activities of the Court. With an understanding of these proceedings one is able more fully to appreciate the Court’s work. The Court’s jurisprudence in each area of these incidental proceedings is continuing to evolve, as more case law is being accumulated in these comparatively new areas relating to the procedural law of the Court.

³⁹*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment of 4 May 2011, para. 29.

Thank you for this opportunity to address you today on this important aspect of the Court's work. I wish you a productive session of the Sixth Committee, and it is my hope and sincere belief that our two institutions will continue to benefit from each other's work on international legal issues.
