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The Objects and Effects of Non-Party Intervention before the International Court of Justice

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1. Introduction: the passport and the journey

More than thirty years have elapsed since the International Court of Justice (ICJ or Court) Chamber's landmark decision authorising Nicaragua's intervention as a non-party in the *Land, Island and Maritime Frontier Dispute (El Salvador* v. *Honduras)*.[2] By accepting non-party intervention, the Court overcame the inconveniences deriving from the traditional construction of Article 62 of the Statute, considering intervention *as a party*.

Article 62 entitles any state having 'an interest of a legal nature which may be affected by the decision in the case' to 'submit a request to the Court to be permitted to intervene, in which case '[i]t shall be for the Court to decide upon this request'. Until the 1980s, this provision had mainly been interpreted as a transposition into international proceedings of the legal institution of intervention as known in the national systems of civil procedure. The main consequence of such approach was that intervention would necessarily consist of the submission by the third state of a claim of its own, the intervening state would acquire the status of a party, and the judgment would be *res judicata* for it.[3] However,

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[2] *Land, Island and Maritime Frontier Dispute (El Salvador* v. *Honduras)*, Application by Nicaragua for permission to intervene, Judgment of 13 September 1990, [1990] ICJ Rep 92.

[3] Cf. G. Morelli, *La sentenza internazionale* (1931), 217; Id., 'Fonction et objet de l'intervention dans le procès international', in *Essays in International Law in Honour of Judge Manfred Lachs* (1984) 403; W. Friede, 'Die Intervention im Verfahren vor dem Ständigen Internationalen Gerichtshof', [1933] ZaöRV 1, at 49; M. Scerni, 'La procédure de la Cour permanente de justice

considering the consensual principle underlying international jurisdiction, according to the prevailing interpretation such a form of intervention would require the existence of a specific jurisdictional link between the intervening state and the party or parties against which the claims of the former were addressed. But, given the rarity of situations in which a third state was able to satisfy such requirement, no application for intervention had been upheld until that time.[4]

It is precisely to overcome these drawbacks that legal literature, individual judges in the *Continental Shelf* cases,[5] and ultimately the Court itself, starting from the Chamber's 1990 judgment, developed a new pattern of participation of third States in the proceedings under Article 62: non-party intervention. In this form of intervention, the intervening state does not put forward a claim of its own nor become a party to the proceedings. It merely seeks to inform the Court of its legal interest that might be affected by the decision of the case, in order to protect it.[6]

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internationale', 65 RCADI 561 (1938), at 652; E. Hambro, 'The Jurisdiction of the International Court of Justice, 76 RCADI 121 (1950), at 149; V.S. Mani, International Adjudication: Procedural Aspects (1980), 248 ff.; A. Davì, *L'intervento davanti alla Corte internazionale di giustizia* (1984); W. Fritzemeyer, *Die Intervention vor dem Internationalen Gerichtshof* (1984), 109 ff.; G. Cellamare, *Le forme di intervento nel processo dinanzi alla Corte internazionale di giustizia* (1991), 56 ff.

[4] Cf. *Continental Shelf (Tunisia* v. *Lybia)*, Application by Malta for permission to intervene, Judgment of 14 April 1981, [1981] ICJ Rep 3; *Continental Shelf (Lybia* v. *Malta)*, Application by Italy for permission to intervene, Judgment of 21 March 1984, [1984] ICJ Rep 3.

[5] Cf. *Continental Shelf (Tunisia* v. *Lybia)* case, *supra* note 4, at 23 (Judge Oda, Separate Opinion); *Continental Shelf (Lybia* v. *Malta)*, ibid., at 35, 84, 115 and 148 (Judge Mbaye's Separate Opinion and Sir Robert Jennings', Judge Ago's and Judge Oda's Dissenting Opinions, respectively).

[6] Cf. *Land, Island and Maritime Frontier Dispute* case, *supra* note 2, at 135 ff., para. 102 ff. On this judgment cf. K. Oellers-Frahm, 'Überlegungen anläβlich der Zulassung der Intervention Nicaraguas im Streit zwischen El Salvador und Honduras', [1990] ZaöRV 795; M. Kohen, 'La requête à fin d'intervention du Nicaragua dans l'affaire du différend frontalier, terrestre, insulaire et maritime (Salvador/Honduras). L'ordonnance de la Cour du 28 février 1990 et l'arrêt de Chambre du 13 septembre 1990, [1990] AFDI 341; M. Evans, 'Case concerning the Land, Island and Maritime Frontier Dispute *(El Salvador/Honduras)* – The Nicaraguan Intervention', [1992] ICLQ 896; A.J.J. de Hoogh, 'Intervention under Article 62 of the Statute and the quest for incidental jurisdiction without the consent of the principal parties', [1993] LJIL 739.

Consequently, a non-party intervener does not need a specific jurisdictional link with the parties and is not bound by the future judgment.[7]

The subsequent case law has confirmed the legitimacy of non-party intervention, which now forms part of the 'law in action' within the Statute of the Court.[8]

Yet, the precise features of this procedure remain unclear. Article 81(2)(b) of the Rules of Court requires that an application for permission to intervene pursuant to Article 62 of the Statute set out 'the precise object of the intervention'. However, the precise 'object' of non-party intervention is still unexplored. The above description tells us what non-party intervention does *not* entail (i.e., submitting a state's own claims and becoming a party to the dispute), but it does not tell us what this form of intervention *does* entail.

Moreover, the procedural position of the non-party intervener and the effects on the intervener of the judgment issued in the main dispute are also unclear. The position taken by the Court - that a non-party intervener under Article 62 is not bound by the future judgment - does not adequately reflect the influence that such an intervener is entitled to exert on the future decision by its participation in the proceedings.

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[7] Cf. *Land, Island and Maritime Frontier Dispute* case, *supra* note 2, at 135 ff., para. 102 ff.; *Land, Island and Maritime Frontier Dispute (El Salvador* v. *Honduras; Nicaragua intervening)*, Judgment of 11 September 1992, [1992] ICJ Rep 610, para. 424.

[8] Cf. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*, Application by Equatorial Guinea for permission to intervene, Order of 21 October 1999, [1999] ICJ Rep 1029; *Jurisdictional Immunities of the State (Germany* v. *Italy)*, Application by Greece for permission to intervene, Order of 4 July 2011, [2011] ICJ Rep 494. This conclusion was not questioned in other cases in which the Court dismissed the application, due to the failure by the third state to demonstrate the existence of a legal interest capable of being affected by the decision: *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia* v. *Malaysia)*, Application by the Philippines for permission to intervene, Judgment of 23 October 2001, [2001] ICJ Rep 575; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Applications by Costa Rica and Honduras for permission to intervene, Judgments of 4 May 2011, [2011] ICJ Rep 348 and 411, respectively.

As Ian Brownlie QC, Nicaragua's counsel, noted in 1991,

> both the decisions of the Court and the legal literature are almost exclusively devoted to the conditions on which intervention may be permitted. As a result, it is the *passport* which has attracted most attention, rather than the *journey* itself.[9]

Since then, little progress has been made in filling this gap and understanding this 'journey'.

The present study explores these issues in depth. It demonstrates that non-party intervention can have various potential objects, depending on how the intervener intends to influence the future judgment between the original parties (Section 2). It questions the traditional construction denying any binding effect of the decision on a non-party intervener (Section 3) and argues that a judgment issued following intervention is binding as between the intervener and the original parties insofar as it decides issues related to the specific object of intervention (Section 4).

2. Objects of non-party intervention under Article 62

One of the requirements set by Article 81(2)(b) of the Rules of Court for an application to intervene is the indication of 'the precise object of the intervention'. This requirement was introduced in 1978, in the aftermath of the *Nuclear Tests* cases,[10] where Fiji's applications to intervene proved to be excessively vague.[11]

[9] Cf. *Land, Island and Maritime Frontier Dispute (El Salvador* v. *Honduras; Nicaragua intervening)*, CR 1991/43, p. 40 (emphasis added).
[10] *Nuclear Tests (Australia* v. *France)*, Application by Fiji Islands for permission to intervene, 16 May 1973, www.icj-cij.org/public/files/case-related/58/9441.pdf; *Nuclear Tests (New Zealand* v.

As noted by Miron and Chinkin,

> in English, the term 'object' has a double meaning, either material, 'a thing that is not living', or subjective, 'a reason for doing something, or the result you wish to achieve by doing it'. In the context of intervention, these two understandings are used alternatively, even if the purpose-oriented meaning appears predominant.[12]

To date, applications for permission to intervene as a non-party under Article 62 have steadily identified the object of non-party intervention as *informing* the Court of the intervener's legal rights and interests and *protecting* them by all available means.[13] Similarly, the Court's decisions on these applications have consistently identified 'information' and 'protection' as the object of non-party intervention.[14]

France), Application by Fiji Islands for permission to intervene, 18 May 1973, www.icj-cij.org/public/files/case-related/59/9455.pdf.

[11] Cf. S. Torres Bernárdez, 'L'intervention dans la procédure de la Cour internationale de Justice', 256 RCADI 193 (1995), at 269.

[12] A. Miron, C. Chinkin, 'Article 62', in A. Zimmermann, C. Tomuschat, K. Oellers-Frahm, C. Tams (eds.), *The Statute of the International Court of Justice. A Commentary* (2019), 1686 ff., at 1716 (citations omitted).

[13] Cf. *Land, Island and Maritime Frontier Dispute (El Salvador* v. *Honduras)*, Application by Nicaragua for permission to intervene, 17 November 1989, www.icj-cij.org/en/case/75/intervention, 4, para. 4 ff.; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*, Application by Equatorial Guinea for permission to intervene, 27 June 1999, www.icj-cij.org/en/case/94/intervention; 12; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia* v. *Malaysia)*, Application by the Philippines for permission to intervene, 13 March 2001, www.icj-cij.org/en/case/102/intervention, 4; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Application by Costa Rica, 25 February 2010, www.icj-cij.org/en/case/124/intervention, 10 f., para. 23 f.; ibid., Application by Honduras for permission to intervene, 10 June 2010, www.icj-cij.org/en/case/124/intervention, 14 f., para. 33; *Jurisdictional Immunities of the State (Germany* v. *Italy)*, Application by Greece for permission to intervene, 13 January 2011, www.icj-cij.org/en/case/143/intervention, 10.

[14] Cf. *Land, Island and Maritime Frontier* case, *supra* notes 2, at 131; *Land and Maritime Boundary* case, *supra* note 8, at 1034; *Sovereignty over Pulau Ligitan and Pulau Sipadan* case, *supra* note 8, at 604 ff.; *Territorial and Maritime Dispute* case, *supra* note 8, at 359 f. and 435 f.; *Jurisdictional Immunities* case, *supra* note 8, at 502.

'Information' and 'protection', however, represent the general objectives of any form of intervention.[15] These notions are too vague to define the specific object of a particular form of intervention, such as intervention 'as a non-party', and to distinguish it from other forms of intervention.

To define the object of non-party intervention, one should instead consider the specific way in which the intervening state intends to influence the future judgment. It is probably this element that Sir Robert Jennings had in mind in his dissenting opinion appended to the 1984 judgment on Italy's intervention in *Continental Shelf (Libya* v. *Malta)*, when he noted:

> For the Court has to consider, besides the existence of interests of the kind referred to in Article 62, what the intervening State proposes to ask the Court to do about them. *If, for example, it were allowed to intervene, in what ways might it be asking the Court to modify the decision it has to make in the main case?* Or are there other ways in which the Court might be asked to assist the intervening State? Obviously, therefore, this kind of information is relevant to the Court's consideration whether or not the intervention should be permitted.[16]

Whereas a non-party intervener does not submit any formal claim,[17] it does solicit the Court, by steering the future judgment towards a result favourable to it. This is

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[15] Cf. Morelli, 'Fonction et objet de l'intervention dans le procès international', *supra* note 3, at 406 ff.

[16] Cf. *Continental Shelf (Lybia* v. *Malta)* case, *supra* note 4, at 152 (Sir Robert Jennings, Dissenting Opinion, emphasis added).

[17] In *Land, Island and Maritime Frontier Dispute (El Salvador* v. *Honduras, Nicaragua intervening)*, though, Nicaragua's agent, Mr. Arguello Gomez, presented a summary of the position of Nicaragua, which it expressly characterised as 'formal conclusions': cf. CR/1991/49, 46 f.: 'We have prepared a sort of summary of the position of Nicaragua in this procedure of intervention which we are exploring; there is nothing very clearly written about it, so we have taken the decision, in accordance with Article 62 of the Statute and Article 85 of the Rules of

precisely the object of non-party intervention that needs to be examined more closely.

In this respect, non-party intervention, as with any form of intervention, should first be distinguished from participation in proceedings as *amicus curiae*, since an *amicus curiae* typically acts as a disinterested third-party in view of the protection of a general interest.[18] The Court had this distinction in mind when, in support of its decision not to authorise Malta's intervention in *Continental Shelf (Tunisia* v. *Lybia*), it noted: 'Malta would moreover do so, not objectively as a kind of *amicus curiae*, but as a closely interested participant in the proceedings intent upon seeing those issues resolved in the manner most favourable to Malta.'[19] Even more explicitly, in the proceedings relating to Italy's intervention in *Continental Shelf (Libya* v. *Malta)*, Italian counsel Michel Virally argued: 'L'Italie pourra-t-elle presenter des conclusions? Evidemment. L'Italie n'intervient que parce qu'elle a quelque chose à demander à la Cour, sinon pourquoi le ferai t-elle? Elle n'agit pas comme un simple *amicus curiae*.'[20] Although, at that time, the legitimacy of non-party intervention had not yet been acknowledged, this statement is relevant

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Court, to present the following, what we have called "formal conclusions", on behalf of the Republic of Nicaragua'.

[18] It is accepted, though, that the 'interest of a legal nature' justifying intervention under Art. 62 may encompass any state's right to invoke the responsibility of another state for the breach of an *erga omnes* obligation: cf. S. Forlati, 'Azioni dinanzi alla Corte internazionale di giustizia rispetto a violazioni di obblighi *erga omnes*' [2001] RDI 69; G. Gaja, 'The Protection Of General Interests in the International Community. General Course on Public International Law (2011)', 364 RCADI 9 (2013), at 118 ff. On *amicus curiae* and its relationship with intervention before the Court, cf. H. Ascensio, 'L'*amicus curiae* devant les jurisdictions internationales, [2001] RGDIP 897; P. Palchetti, 'Opening the International Court of Justice to Third States: Intervention and Beyond', [2002] UNYB 139; C. Santulli, *Droit du contentieux international* (2005), 299; G. Gaja, 'A New Way for Submitting Observations on the Construction of Multilateral Treaties to the International Court of Justice', in *Festschrift Bruno Simma* (2011), 665. The Court's system contemplates certain forms of participation of international organizations as *amici curiae* in contentious (Arts. 34(2), 34(3), 50 and 66 of the Statute; Art. 43(2) of the Rules) and advisory proceedings (Art. 66 of the Statute). Instead, for states the possibility to act as *amici curiae* is currently contemplated only for advisory proceedings (Art. 66 of the Statute).

[19] Cf. *Continental Shelf (Tunisia* v. *Libya*) case, *supra* note 4, at 32, para. 18.

[20] *Continental Shelf (Libya* v. *Malta)*, *ICJ Pleadings*, Vol. II (1984), 650.

because the intervention for which Italy had requested authorization presented all the characteristics of this new form of intervention.

While the precise object of non-party intervention has not yet been identified, we are familiar with the objects of two other forms of intervention: (i) intervention as a party (reflecting the similar institution in domestic civil procedural law); and (ii) 'interpretative' intervention under Article 63 of the Statute. These two patterns provide useful elements for understanding non-party intervention.

In *intervention as a party*, which requires 'the existence of a basis of jurisdiction as between the States concerned', the intervener 'may submit claims of its own to the Court for decision', provided that these claims are 'linked to the subject of the main dispute'.[21] Following intervention as a party, the Court must decide not only on the claims of the original parties, but also on the new claims of the intervener. This form of intervention therefore results in formally expanding the scope of the decision (*thema decidendum*).

'Interpretative' intervention is governed by Article 63 of the Statute, pursuant to which:

> 1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.
>
> 2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

[21] Cf. *Territorial and Maritime Dispute* (Application by Honduras) case, *supra* note 8, at 432, para. 28 and 47.

According to the Court,

> intervention under Article 63 of the Statute is limited to submitting observations on the construction of the convention in question and does not allow the intervenor, which does not become a party to the proceedings, to deal with any other aspect of the case before the Court.[22]

Hence, in an intervention under Article 63 – which is a form of non-party intervention – the intervener influences the future judgment by arguing for a certain interpretation of a multilateral convention that is applicable to the dispute between the original parties. Such an intervener does not file any claim of its own. It simply strives to persuade the Court to resolve an issue relating to the interpretation of the convention in a certain way. This form of intervention does not expand the scope of the decision. As a matter of fact, even in the absence of any intervention, the Court would have to resolve the interpretative issue raised in the main dispute.

Having in mind these two models (intervention as a party and interpretative intervention under Article 63), I turn to identify the precise object of non-party intervention under Article 62, by analysing state practice and the Court's case law. The cases considered are those in which intervention was authorised or requested. I will not only consider the object of intervention, but also the legal interest invoked in each case as a justification for the intervention. The object of

[22] *Whaling in the Antarctic (Australia* v. *Japan)*, Declaration of intervention by New Zealand, Order of 6 February 2013, [2013] ICJ Rep 9, para. 18. See A. Miron, C. Chinkin, 'Article 63', in Zimmermann, Tomuschat, Oellers-Frahm, Tams, *supra* note 12, 1741 ff.; Z. Crespi Reghizzi, 'L'unità della figura di intervento nello Statuto della Corte internazionale di giustizia', in *Liber amicorum Angelo Davì* (2019), 1801 ff.

intervention and the legal interest are inextricably linked, as the former is functional to the protection of the latter.[23]

Based on the practice and case law examined, the objects of non-party intervention can be classified into three patterns, which are not mutually exclusive:

1. Non-party intervention aimed at preventing the delivery of the judgment or reducing the scope of its operative part based on the *Monetary Gold* principle;

2. Non-party intervention aimed at influencing the substance of the future decision with respect to the solution of certain issues capable of affecting a legal interest of a third state; and

3. Non-party intervention aimed at supporting the position of one of the parties, when the third state has a qualified interest in a specific outcome of the main dispute.

2.1 Non-party intervention aimed at preventing the delivery of the judgment or reducing the scope of its operative part based on the **Monetary Gold** *principle*

In the first of the three patterns of non-party intervention, a third state intervenes to solicit the application by the Court of the *Monetary Gold* principle.

Pursuant to this principle, the absence of a third state from the proceedings may induce the Court not to exercise its jurisdiction or to exercise it to a limited

[23] Cf. *Continental Shelf (Lybia* v. *Malta)* case, *supra* note 4, at 18 f., para. 28; *Territorial and Maritime Dispute* (Application by Honduras), *supra* note 8, at 435, para. 44.

extent.[24] This principle constitutes a corollary of the principles of consent to jurisdiction and the subjective limits of *res judicata*. It is aimed at protecting both the judicial function of the Court and absent third states.[25]

For such principle to apply, it is not enough that the legal interests of a third state may be affected by the future judgment (in which case this state could seek permission to intervene under Article 62): the dispute submitted to the Court by the original parties must involve the third state's legal interests to a very significant degree, so that that these interests would form 'the very subject matter of the decision'.[26] Whereas the *Monetary Gold* principle has been invoked in many cases, so far the Court has applied it – and abstained from exercising jurisdiction –in only two cases, which involved the alleged liability of a third state.[27]

The *Monetary Gold* principle applies also in disputes concerning land and maritime delimitation, albeit with greater flexibility.[28] In these cases, to avoid adjudicating on the rights of absent third states, the Court does not need to abstain from exercising jurisdiction: narrowing the scope of the operative part of its

[24] Cf. *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom, and United States of America)*, Judgment of 15 June 1954, Preliminary question, [1954] ICJ Rep 19.
[25] Cf. C. Rousseau, 'Le règlement arbitral et judiciaire et les Etats tiers', in *Mélanges H. Rolin* (1964) 300, at 307 ; B. Conforti, 'L'arrêt de la Cour internationale de justice dans l'affaire de la délimitation du plateau continental entre la Libye et Malte', [1986] RGDIP 313, at 337; E. Lagrange, 'Le tiers à l'instance devant les juridictions internationales à vocation universelle (CIJ et TIDM)', in H. Ruiz-Fabri, M. Sorel (eds.), *Le tiers à l'instance devant les juridictions internationales* (2005), 9, at 28.
[26] Cf. *Monetary Gold* case, *supra* note 24, at 32.
[27] Besides the *Monetary Gold* case (*supra* note 24), cf. *East Timor (Portugal* v. *Australia)*, Judgment of 30 June 1995, [1995] ICJ Rep 90. For further references cf. A. Zimmermann, 'Die Zuständigkeit des internationalen Gerichtshofes zur Entscheidung über Ansprüche gegen am Verfahren nicht beteiligte Staaten', [1995] ZaöRV 1051 ff.; Z. Crespi Reghizzi, *L'intervento 'come non parte' nel processo davanti alla Corte internazionale di giustizia* (2017), 86 ff.
[28] Cf. E. Jouannet, 'L'impossible protection des droits du tiers par la Cour internationale de justice dans les affaires de délimitation maritime', in *La mer et son droit: mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec* (2003), 315.

decision is sufficient. In practice, this reduction takes place either through the so-called 'arrow method',[29] or by excluding the sectors claimed by the third state from the operative part of the judgment.[30]

The Court shall apply the *Monetary Gold* principle of its own motion, irrespective of third parties' intervention. However, for the sake of caution, an absent third state that considers that its interest forms the 'very subject matter' of the main proceedings may wish to intervene as a non-party to explain to the Court the reasons which would require the latter to abstain from exercising jurisdiction or narrow the scope of its decision.

This scenario often occurs in delimitation cases, where the Court has acknowledged that 'the protection afforded by Article 59 of the Statute may not always be sufficient'.[31] Incidentally, on two occasions, the Court took the opposite view and invoked the protection offered by Article 59 to the third state as a justification for excluding its intervention.[32] This position, which was harshly criticized, does not seem justified as it would ultimately lead to a denial of any

[29] This method consists of the Court's avoiding determining the endpoint of the border line and ruling instead that, from a certain point, this line continues along a certain direction until it reaches the area where the rights of third states may be affected. On maps attached to judgments, such result is graphed by a line ending with an arrow: cf. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain*), Judgment of 16 March 2001, [2001] ICJ Rep 116; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)*, Judgment of 10 October 2002, [2002] ICJ Rep 449; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, Judgment of 8 October 2007, [2007] ICJ Rep 763; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)*, Judgment of 3 February 2009, [2009] ICJ Rep 131.

[30] Cf. *Continental Shelf (Lybia* v. *Malta)*, Judgment of 3 June 1985, [1985] ICJ Rep 25 ff., para 21 ff., and 56, para 79.

[31] *Land and Maritime Boundary* case, *supra* note 29, at 421, para. 238.

[32] *Continental Shelf (Libya* v. *Malta)* case, *supra* note 4, at 26, para. 42: 'The rights claimed by Italy would be safeguarded by Article 59 of the Statute'; *Territorial and Maritime Dispute* (Application by Costa Rica) case, *supra* note 8, at 372, par. 87: 'to succeed with its request, Costa Rica must show that its interest of a legal nature in the maritime area bordering the area in dispute between Nicaragua and Colombia needs a protection that is not provided by the relative effect of decisions of the Court under Article 59 of the Statute'.

possibility of intervention. Articles 59 and 62 act on different levels.[33] Whereas Article 59 protects an absent third state from the *formal* binding effects of a judgment issued between different parties, it does not address the *factual* prejudice that such a judgment may cause to a third party, due to the authority of the Court's decisions, the Court's tendency not to deviate from its own precedents in the absence of compelling reasons, and the influence that its judgments may have on the subsequent conduct of the states involved.[34] Article 62 aims at protecting the third state from this factual prejudice.

By intervening, a third state that has certain claims on the areas forming the subject matter of the original parties' submissions in the main case asks the Court to exclude these areas from its decision. Unlike intervention as a party – which asks the Court to determine the maritime boundary between the intervener's areas and those of the original parties[35] – this non-party intervention asks the Court merely to narrow the scope of the decision so as not to affect the intervener.

Among the applications to intervene submitted to date, the following examples can be mentioned.

A first example, which dates to a period during which the legitimacy of non-party intervention had not yet been recognised, is offered by Italy's intervention in

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[33] Cf. *Continental Shelf (Libya* v. *Malta)* case, *supra* note 4, at 87, para. 81 (Vice-president Sette-Camara, Dissenting Opinion); ibid., at 157, para. 27 (Sir Robert Jennings, Dissenting Opinion); *Territorial and Maritime Dispute* (Application by Costa Rica) case, *supra* note 8, at 378, para. 14 (Judge Al Khasawneh, Dissenting Opinion); ibid., at 411 ff., para. 24 ff. (Judges Cançado Trindade and Yusuf, Dissenting Opinion).

[34] Cf. H. Lauterpacht, *The Development of International Law by the International Court* (1958), at 14; L. Condorelli, 'L'autorité de la décision des juridictions internationales permanentes', in *La juridiction internationale permanente: colloque de Lyon, Société française pour le droit international* (1987), 277; M. Shahabuddeen, *Precedent in the World Court* (1996) ; N. Miller, 'An International Jurisprudence? The Operation of 'Precedent' Across International Tribunals', [2002] LJIL 483; Crespi Reghizzi, *supra* note 27, 47 ff.

[35] This was the object of Honduras's intervention as a party in the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*: cf. note 64 and accompanying text, *infra*.

Continental Shelf (Libya v. *Malta)*.[36] Italy emphasized that it was making no claim against the two original parties and was simply asking the Court, in deciding on the dispute between the original parties, to consider the legal interests it had in some of the disputed areas,

> et de donner en conséquence aux deux Parties toutes indications utiles pour qu'elles n'incluent pas, dans l'accord de délimitation qu'elles concluront en application de l'arrêt de la Cour, des zones qui, en raison de l'existence de droits de l'Italie, devraient faire l'objet soit d'une délimitation entre l'Italie et la Libye, soit d'une délimitation entre l'Italie et Malte, soit, le cas échéant, d'un accord entre les trois pays.[37]

The Court dismissed Italy's application.[38] Its negative decision, which essentially rests on a re-characterisation of the object of Italy's intervention,[39] reflects the uncertainties that marked the period leading up to the recognition of non-party intervention in *Land, Island and Maritime Frontier Dispute*.[40] When examined in

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[36] As noted above, Italy's application to intervene was substantially framed as a non-party intervention.

[37] *Continental Shelf (Libya* v. *Malta)*, in *ICJ Pleadings*, Vol. II (1984), p. 511 (Monaco).

[38] *Continental Shelf (Tunisia* v. *Lybia)* case, *supra* note 4.

[39] Cf. E. Decaux, 'L'arrêt de la Cour internationale de justice sur la requête de l'Italie afin d'intervention dans l'Affaire du plateau continental entre la Libye et Malte - arrêt du 21 mars 1984', [1984] AFDI 282, at 291. The Court did not accept Italy's position that the object of its intervention would be that of safeguarding its rights, as opposed to asking the Court to recognize them: 'While formally Italy requests the Court to safeguard its rights, it appears to the Court that the unavoidable practical effect of its request is that the Court will be called upon to recognize those rights, and hence, for the purpose of being able to do so, to make a finding, at least in part, on disputes between Italy and one or both of the Parties'. The Court hence noted that, if it had admitted Italy to intervene, 'the Court would be called upon, in order to give effect to the intervention, to determine a dispute, or some part of a dispute, between Italy and one or both of the principal Parties', which the Court considered impossible, at least in the absence of a jurisdictional link between Italy and the original parties. Cf. *Continental Shelf (Tunisia* v. *Lybia)* case, *supra* note 4, at 19 ff., para. 29 ff.

[40] *Land, Island and Maritime Frontier Dispute* case, *supra* note 2.

the light of the subsequent case law, however, Italy's intervention provides a good illustration of the first pattern of non-party intervention.[41]

A second example is Equatorial Guinea's intervention in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*. This state asked the Court 'to abstain from establishing the Cameroon-Nigeria maritime boundary within the area claimed by Equatorial Guinea, all of which is more proximate to Equatorial Guinea than to either of the Parties in the case before the Court'.[42] The Court authorised Equatorial Guinea's intervention.[43]

A third example is Costa Rica's intervention in *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*. This state pointed out an overlap between the area in which it had a legal interest and the area in dispute between the parties to this case.[44] The Court did not authorise Costa Rica's intervention based on the finding that Costa Rica did not have a legal interest capable of being affected by a decision of the case, but its decision was criticised, especially due to the inconsistency with the Court's earlier decision on Equatorial Guinea's intervention in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*.[45]

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[41] *Land and Maritime Boundary between Cameroon and Nigeria* case, *supra* note 8.
[42] Written Statement of Equatorial Guinea, 4 April 2001, www.icj-cij.org/en/case/94/written-proceedings, at 17, para. 41, 25, para. 60.
[43] *Land and Maritime Boundary between Cameroon and Nigeria, Application to Intervene*, Order of 21 Octoher 1999, I.C.J. Reports 1999, p. 1029.
[44] Cf. *Territorial and Maritime Dispute* (Application by Costa Rica) case, *supra* note 8, at 368, para. 68 f.
[45] Cf. *Territorial and Maritime Dispute* (Application by Costa Rica) case, *supra* note 8, at 378, para. 14 (Judge Al Khasawneh, Dissenting Opinion); ibid., at 411 ff., para. 24 ff. (Judges Cançado Trindade and Yusuf, Dissenting Opinion); ibid., 388 ff., para. 14 ff. (Judge Abraham, Dissenting Opinion); ibid., 416, para. 10 (Judge Donoghue, Dissenting Opinion); ibid., 417, para 2 s. (Judge *ad hoc* Gaja, Declaration). Cf. also S. Forlati, 'Intervento nel processo ai sensi dell'art. 62 dello Statuto: quale coerenza nella giurisprudenza della Corte internazionale di giustizia?', [2011] RDI 1197.

A last example is Nicaragua's arguments in *Land, Island and Maritime Frontier Dispute (El Salvador* v. *Honduras)*, with respect to Honduras's claim to a maritime corridor through the Gulf of Fonseca up to the Pacific Ocean.[46] Honduras's claim was closely linked to its contention that the waters of the Gulf were subject to a regime of 'community of interests' between the riparian states (i.e. Honduras, El Salvador and Nicaragua), the sole aspect in respect of which Nicaragua's intervention had been authorised by the Court.[47] Following its admission as a non-party intervener, Nicaragua recalled the Court's earlier decision in *Continental Shelf (Libya* v. *Malta)* that narrowed the scope of its decision in order not to affect Italy's claims and urged the Court to exercise 'a similar policy of *judicial restraint*… in respect of the wholly unreasonable claim of Honduras to an entitlement which is conspicuously incompatible with the legal entitlements of Nicaragua in the region of the Gulf, and which is also incompatible with the territorial *status quo* established by the Agreement between Nicaragua and Honduras in 1900'.[48]

While the above instances concerned delimitation disputes, there are no instances of non-party intervention aimed at invoking the *Monetary Gold* principle in cases of international responsibility. This could be due to the exceptional character of

[46] Honduras's claim was instrumental in asserting its rights on the waters outside the Gulf. Unlike El Salvador and Nicaragua, which overlooked both the Gulf and the Pacific Ocean, Honduras overlooks only the Gulf: *Land, Island and Maritime Frontier Dispute (El Salvador* v. *Honduras; Nicaragua intervening)*, CR 1991/43, 52 f. (Brownlie).

[47] *Land, Island and Maritime Frontier Dispute* case, *supra* note 2, at 137. In this judgment, the Court did not authorise Nicaragua's intervention with respect to the delimitation of the waters of the Gulf of Fonseca, the legal situation of the maritime spaces outside the Gulf, and the legal situation of the islands in the Gulf.

[48] Cf. *Land, Island and Maritime Frontier Dispute (El Salvador* v. *Honduras; Nicaragua intervening)*, CR 1991/43, 64 (Brownlie) (emphasis added). See also the conclusions of Nicaragua's agent Mr. Carlos Arguello Gomez, CR 1991/49, 47: 'Without prejudice to the above, there are substantial considerations of *judicial propriety* on the basis of which Honduran maritime claims, which form part of the submissions relating to a community of interests, should be treated as inadmissible' (emphasis added).

these cases, and perhaps also due to the third states' concern that intervention would involve them in the discussion of the merits, which could ultimately cure their original absence from the proceedings.[49] However, also in these cases it seems perfectly admissible for a third state to intervene as a non-party to persuade the Court to refrain from exercising jurisdiction based on the 'necessary party' rule. For instance, in *Monetary Gold*, Albania could have intervened pursuant to Article 62 to argue the propriety of not deciding the case, given its absence as a 'necessary party'. In taking such an initiative, however, a third state should clarify that the object of its intervention is limited to explaining the reasons that require the application of the *Monetary Gold* principle. Should the third state address the merits of the dispute, its intervention would fall within the second pattern.[50]

2.2. Non-party intervention aimed at influencing the substance of the future decision with respect to the solution of certain preliminary issues capable of affecting a legal interest of a third state

The second group of cases concerns situations in which the legal interest of the third state could be affected by the evaluation, by the Court, of a certain *preliminary issue*, which is relevant to both the main dispute and a potential dispute regarding the legal interest of the third state itself (so-called 'interest by implication').[51]

[49] On this possibility the case law provides conflicting indications, and the opinions of legal authors are divided. For further analysis, cf. Crespi Reghizzi, *supra* note 27, at 365 ff.
[50] Cf. Section 2.2, *infra*.
[51] For this terminology, cf. B.I. Bonafè, 'Interests of a legal nature justifying intervention before the ICJ', [2012] LJIL 739, 750 ff.

Whereas, based on Article 59 of the Statute, the solution of the preliminary issue contained in the judgment would not be formally binding on the third state, nevertheless, given the authority of the Court's decisions, the same judgment could cause factual prejudice to the third State.[52]

The third state may wish to intervene as a non-party under Article 62 to present its views on this preliminary issue and steer the Court's solution of this issue towards a result favourable to the third state. This pattern of non-party intervention resembles intervention under Article 63, where the third state intervenes to support a certain interpretation of a multilateral convention that is applicable to the main dispute.[53]

A first example of this form of non-party intervention is the *Land, Island and Maritime Frontier Dispute (El Salvador* v. *Honduras)* case, where Nicaragua devoted a significant part of its arguments to disputing El Salvador's and Honduras's contentions, according to which the waters of the Gulf of Fonseca would be subject to a regime of 'condominium' or, respectively, 'community of interests' of riparian states.[54]

A second example is *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia* v. *Malaysia)*, where the Philippines did not have any claim on the islands disputed between Indonesia and Malaysia, Pulau Ligitan and Pulau Sipadan. Instead, the Philippines' legal interest was connected to a claim to North Borneo against Malaysia (which exercised sovereign powers over the territory).

[52] Cf. note 34 and accompanying text, *supra*.
[53] Cf. Section 2, *supra*.
[54] Cf. *Land, Island and Maritime Frontier Dispute (El Salvador* v. *Honduras; Nicaragua intervening)*, Written statement of Nicaragua, 14 December 1990, www.icj-cij.org/en/case/75/written-proceedings, 11 ff.; CR 1991/43, 10 ss. (Arguello Gomez); CR 1991/49, 12 ff. (Brownlie) and 47 (Arguello Gomez).

The Philippines argued that their claim to North Borneo could have been affected by the Court's interpretation of certain treaties when deciding the main case.[55] The Court dismissed the Philippines' application for permission to intervene, holding that it had failed to demonstrate the existence of a legal interest capable of being affected by the future decision. However, the Court accepted, in principle, that

> the interest of a legal nature to be shown by a State seeking to intervene under Article 62 is not limited to the *dispositif* alone of a judgment. It may also relate to the reasons which constitute the necessary steps to the *dispositif*.[56]

This acknowledgment suggests that where such legal interest exists, the object of intervention consists of persuading the Court to solve a preliminary issue underlying both the main dispute and the third state's claim in a manner favourable to the latter.[57]

A third example is *Jurisdictional Immunities of the State (Germany* v. *Italy)*, where Greece explained that by its intervention it intended to address

> l'approche hellénique concernant la problématique de l'immunité juridictionnelle de l'Etat, et son développement ces dernières années, quand la Cour adresserait la question de l'immunité juridictionnelle et de la

[55] Cf. Application for permission to intervene by the Philippines, *supra* note 13, at 4, para. 4: 'The interest of the Republic of the Philippines is solely and exclusively addressed to the treaties, agreements and other evidence furnished by Parties and appreciated by the Court which have a direct or indirect bearing on the matter of the legal status of North Borneo'.
[56] Cf. *Sovereignty over Pulau Ligitan and Pulau Sipadan* case, *supra* note 8, at 596, para. 47.
[57] S. Forlati, '"Interesse di natura giuridica" ed effetti per gli Stati terzi delle sentenze della Corte internazionale di giustizia', [2002] RDI 99.

> responsabilité internationale, comme présentée par les Parties dans la présente affaire.[58]

Greece's subsequent written and oral pleadings confirmed that this was the real object of its intervention. Its pleadings extensively addressed the content of the customary rule on state immunity, by supporting a 'progressive' determination of the content of this rule that would reconcile the latter with the need to ensure effective reparation following serious violations of rules of *ius cogens*.[59] Clearly, the object of Greece's intervention in this case was to persuade the Court to solve certain preliminary issues relating to the merits in a certain way. This is also confirmed by Germany's reactions, which to a large extent were devoted to rebutting Greece's arguments on this aspect.[60]

As in intervention under Article 63 and all the patterns of non-party intervention, the intervener does not put forward any claim of its own, thus leaving the original scope of the decision unaffected. The Court should solve the relevant preliminary issue in any event, irrespective of intervention.

This point was emphasised by the Philippines in their application in *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia* v. *Malaysia)*:

> By this Application, the Government of the Republic of the Philippines would like to state that *it does not intend to change the subject-matter*,

[58] Cf. *Jurisdictional Immunities of the State (Germany* v. *Italy)*, Observations of Greece in reply to the Written Observations of Germany and Italy, 4 May 2011, www.icj-cij.org/en/case/143/written-proceedings, para. 7.
[59] Cf. *Jurisdictional Immunities of the State (Germany* v. *Italy, Greece intervening)*, Written Statement of the Hellenic Republic, 3 August 2011, www.icj-cij.org/en/case/143/written-proceedings, 20 s., para. 63; CR 2011/19, 43, para. 128 (Perrakis).
[60] Cf. *Jurisdictional Immunities of the State (Germany* v. *Italy, Greece intervening)*, Written Observations of Germany on the Written Statement of Greece, www.icj-cij.org/en/case/143/written-proceedings, paras 2 ff.

> *the nature or the scope of the current proceedings between Indonesia and Malaysia*. Nor does the Philippine Government seek to ask the Court to adjudicate additional or extraneous legal issues.[61]

In the same vein, in *Jurisdictional Immunities of the State (Germany* v. *Italy)*, Greece observed:

> *The scope of the controversy before the Court*, as framed by the Application instituting proceedings, *remains the very same as it were before*. Greece holds the view that it shall remain the same irrespective of the outcome of the present Application for permission to intervene.[62]

2.3. Non-party intervention aimed at supporting the position of one of the parties, when the third state has a qualified interest to a specific outcome of the main dispute.

In the third pattern of non-party intervention, the third state has a legal interest that could be affected by the way in which the Court decides the main dispute between the original parties and intervenes to support one of them.

The intervener does not invoke the *Monetary Gold* principle (as in the first pattern) nor seek to influence the Court's solution of a preliminary issue (as in the second one). Instead, it argues in favour of the claims of one of the main parties. As in the first and second patterns of non-party intervention, the intervener does

[61] *Sovereignty over Pulau Ligitan and Pulau Sipadan, (Indonesia* v. *Malaysia),* Application for permission to intervene by the Philippines, *supra* note 13, at 2, para. 2 (emphasis added).
[62] *Jurisdictional Immunities of the State (Germany* v. *Italy),* Application for permission to intervene by the Hellenic Republic, *supra* note 13, at 10 (emphasis added).

not put forward any claim of its own, thereby leaving the scope of the decision unaffected.

This pattern of non-party intervention has an analogy with 'dependent' intervention as contemplated in domestic systems of procedural law, where the intervener does not put forward any claim of its own, but simply supports the claims of one of the parties in the main dispute, having a personal interest in doing so.[63]

This object characterized part of Costa Rica's and Honduras's requests for intervention in *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*. For the sake of completeness, it should be recalled that Honduras, which could rely on a jurisdictional link with the original parties, sought permission to intervene as a party – 'to determine the course of the maritime boundary between the three States' – and, only in the alternative, as a non-party – 'to protect Honduras's rights and interests of a legal nature and to inform the Court of their character, lest they be affected by the maritime delimitation between Nicaragua and Colombia which the Court is being requested to make in these proceedings'.[64] The analysis below focuses only on Honduras's request to intervene as a non-party.

Costa Rica and Honduras both claimed to have an interest in the maritime delimitation between Nicaragua and Colombia not only because such delimitation was likely to impinge on areas claimed by them,[65] but also because, depending on whether the Court would ascribe the areas to either of the two parties (Nicaragua

[63] Cf. E.J. Cohn, 'Parties', in *International Encyclopedia of Comparative Law*, Vol. XVI, Ch. 5 (1974), 56.
[64] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Application by Honduras for permission to intervene, 10 June 2010, www.icj-cij.org/en/case/124/intervention, 10, para. 21 ff.
[65] Cf. Section 2.1, *supra*.

or Colombia), the respective claims of Costa Rica and Honduras would compete only with those of that state. The fact of competing with Nicaragua's or Colombia's claims entailed certain relevant consequences for them.

As regards Costa Rica, while this state was not bound by any delimitation treaty with Nicaragua, it had signed a border treaty with Colombia in 1977. Although this treaty was not yet in force due to its lack of ratification, it had since then been given effect by the parties.[66] Had the future judgment attributed the areas that the 1977 treaty allocated to Colombia instead to Nicaragua (albeit only in the latter's bilateral relationship with Colombia), in practice it would have prevented that treaty from producing any effect.[67]

As regards Honduras, this state claimed to have certain rights in an area formed by a rectangle placed north of the 15th parallel and east of the 82nd meridian.[68] Colombia had acknowledged these rights in a delimitation treaty of 1986, which indeed set the border along the 15th parallel. Between Honduras and Nicaragua, however, Honduras's claims had been denied by the Court in a judgment in 2007, which had ascribed the above-mentioned rectangle to Nicaragua.[69] Had the future judgment between Nicaragua and Colombia determined that the areas attributed by the 2007 judgment to Nicaragua in fact belonged to Colombia, then Honduras could have kept asserting its claims on these areas against Colombia based on the

[66] Cf. the map reproduced in the *Territorial and Maritime Dispute* (Application by Costa Rica) case, *supra* note 8, at 366.
[67] Cf. *Territorial and Maritime Dispute* (Application by Costa Rica) case, *supra* note 8, at 388 (Judge Abraham, Dissenting opinion); P. Jacob, 'L'intervention devant la Cour internationale de Justice à la lumière des décisions rendues en 2011: lente asphyxie ou résurrection', [2011] AFDI 213, at 221.
[68] Cf. *Territorial and Maritime Dispute* (Application by Honduras) case, *supra* note 8, at 441. Within this area, Honduras claimed to have certain sovereign rights such as oil concessions, naval patrols, and fishing activities: ibid., 437, para. 50.
[69] Cf. *Territorial and Maritime Dispute between Nicaragua and Honduras* case, *supra* note 29, at 659.

1986 treaty. Conversely, had the Court attributed these areas to Nicaragua, then Honduras could not have contested Nicaragua's rights over these areas, and the 1986 treaty with Colombia would have been deprived of its effect.[70] In its application to intervene, Honduras therefore asserted

> that given the "conflicting bilateral obligations", stemming from the 1986 Treaty with Colombia and the 2007 Judgment vis-à-vis Nicaragua respectively, Honduras has an interest of a legal nature in determining if and how the 2007 Judgment has affected the status and application of the 1986 Treaty.

The Court did not authorise Costa Rica's and Honduras's interventions because it considered that these states had not sufficiently demonstrated that they had a legal interest that could have been affected by its judgment. It cannot be excluded, however, that under different circumstances the Court might authorize an intervention having such an object.

3. Binding effect of the judgment on a non-party intervener under Article 62.

Having identified the three potential objects of non-party intervention, this section explores whether the judgment issued in the main dispute has any binding effect on the intervener.[71] As shall be demonstrated, the identification of these objects plays a key role in this analysis.

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[70] Cf. *Territorial and Maritime Dispute* (Application by Honduras) case, *supra* note 8 (Judges Abraham and Donoghue, Dissenting opinions), [2011] ICJ Rep 456, para. 35 ff., and 487 ff., para. 45 ff., respectively; Jacob, note 67 *supra*, at 221.

[71] It is undisputed that, when a third state is permitted to intervene as a party to the proceedings, the Court's decision 'would be binding for that State in respect of those aspects for which

Whereas, for 'interpretative intervention', Article 63(2) expressly provides that the construction of the multilateral convention given by the judgment 'will be equally binding' upon the intervener, Article 62 of the Statute is silent on this issue.[72]

In *Land, Island and Maritime Frontier Dispute*, the Chamber stated that its judgment would not be binding as between the intervener and the original parties: 'This Judgment is not *res judicata* for Nicaragua'. In support of this conclusion, the Chamber noted that

> a State permitted to intervene under Article 62 of the Statute, but which does not acquire the status of party to the case, is not bound by the Judgment given in the proceedings in which it has intervened

and

> in these circumstances, the right to be heard, which the intervener does acquire, does not carry with it the obligation of being bound by the decision.[73]

This negative conclusion was based on the proposition that, for the judgment to become binding between the third state and the original parties, their consent is required. In denying any relevance to Nicaragua's unilateral declaration that it considered itself bound by the decision to be given, the Chamber observed:

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intervention was granted, pursuant to Article 59 of the Statute': cf. *Territorial and Maritime Dispute* (Application by Honduras) case, *supra* note 8, at 432, para. 29.

[72] Article 62 also differs from Art. 31(3) of the ITLOS Statute, which provides that: 'If a request to intervene is granted, the decision of the Tribunal in respect of the dispute shall be binding upon the intervening State Party in so far as it relates to matters in respect of which that State Party intervened'.

[73] Cf. *Land, Island and Maritime Frontier Dispute (El Salvador* v. *Honduras; Nicaragua intervening)* case, *supra* note 7, at 609 f., para. 423 f.

> In the Chamber's Judgment of 13 September 1990, emphasis was laid on the need, if an intervener is to become a party, for the consent of the existing parties to the case, either consent *ad hoc* or in the form of a pre-existing link of jurisdiction. This is essential because the force of *res judicata* does not operate in one direction only: if an intervener becomes a party, and is thus bound by the judgment, it becomes entitled equally to assert the binding force of the judgment against the other parties. A non-party to a case before the Court, whether or not admitted to intervene, cannot by its own unilateral act place itself in the position of a party, and claim to be entitled to rely on the judgment against the original parties. [74]

This solution was criticised by Vice-President Oda and Judge *ad hoc* Torres Bernárdez in their declaration and separate opinion, respectively.[75] In its subsequent case law, the Court did not return to this question. This issue is debated in the literature, and many authors do not share the Chamber's restrictive interpretation.[76] The present author agrees with this critique for the following reasons.

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[74] Cf. *Land, Island and Maritime Frontier Dispute (El Salvador* v. *Honduras; Nicaragua intervening)* case, *supra* note 7, ibid.

[75] Cf. *Land, Island and Maritime Frontier Dispute (El Salvador* v. *Honduras; Nicaragua intervening)* case, *supra* note 7, at 619 f. (Vice-President Oda, Declaration); ibid., at 730 f., para. 208 (Judge *ad hoc* Torres Bernárdez, Separate Opinion).

[76] Cf. S. Oda, 'Intervention in the International Court of Justice. Articles 62 and 63 of the Statute', in *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit, Menschenrechte. Festschrift für Hermann Mosler* (1983) 629, at 644; C. Chinkin, 'Third-Party Intervention before the International Court of Justice', [1986] AJIL 495, at 526; Torres Bernárdez (*supra* note 11) 436; D.W. Greig, 'Third Party Rights and Intervention before the International Court*'* [1991-1992] Virginia JIL 285, at 326 ff.; L. Caflisch, 'Cent ans de règlement pacifique des différends interétatiques', 288 RCADI 245, at 405 f. (2001); Santulli (note 18 *supra*) 302 f.; R. Kolb, *The International Court of Justice* (2013), 720 and 728; S. Forlati, *The International Court of Justice. An Arbitral Tribunal or a Judicial Body?* (2014), 200. For the opposite conclusion, cf. J.M. Ruda, 'Intervention before the International Court of Justice', in *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings* (1996), 487, at 501; C.E. Amerasinghe, *Jurisdiction of International Tribunals* (2003), 327 f.; Palchetti (*supra* note 18) 154 f.; M. Al-

At first glance, the thesis that, in non-party intervention, the judgment would not be binding on the third state, seems straightforward: if it is possible to intervene as a party or as a non-party under Article 62, it might follow that intervention as a party would have binding effects and intervention as a non-party would not. Yet, this conclusion overlooks the difference between the two forms of intervention. In intervention as a party – incidentally, a situation that has never occurred to date – the intervener is permitted to file claims of its own against the original parties:[77] accordingly, the binding effects of the judgment are *res judicata* effects and extend to the Court's decision on the original parties' and intervener's claims, as for any other judgment. By contrast, in non-party intervention, the intervener may not file any such claim of its own but is only permitted to present arguments on certain aspects of the Court's decision relating to its legal interest.[78] While it is submitted that the judgment issued following non-party intervention has certain binding effects on the non-party intervener, these effects are not *res judicata* effects and have a more limited scope, as will be demonstrated below.

The Chamber's interpretation of Article 62 denying any binding effect of the judgment on the non-party intervener rests on the consensual principle through the following syllogism:

1. The judicial settlement of a dispute requires the consent of the parties to such dispute;

Qahtani, 'The Status of Would-Be Intervening States before the International Court of Justice and the Application of *Res Judicata*', [2003] LPICT 269, at 284; G. Cellamare, 'Corte internazionale di giustizia', in *Enciclopedia del diritto, Annali*, Vol. V (2012) 421, at 455; In doubtful terms, cf. S. Rosenne, *Intervention in the International Court of Justice* (1993), 155; M. Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015* (2016), 1556 f.; J.J. Quintana, *Litigation at the International Court of Justice. Practice and Procedure* (2015), 903 ff.

[77] See, for instance, Honduras's request to intervene as a party in the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*: cf. note 64 and accompanying text, *supra*.

[78] Cf. Section 2, *supra*.

2. In the case of non-party intervention, the intervener and the original parties have not agreed to submitting a fresh dispute to the Court;

3. Such lack of consent prevents the judgment issued in the main case from having any binding effect between the intervener and the original parties.

However, this reasoning omits an intermediate step. The intervener's and parties' lack of consent to jurisdiction results only *indirectly* in preventing the Court from issuing a binding judgment. Before reaching that outcome, such lack of consent prevents the third state from intervening as a party and *submitting a fresh dispute* to the Court. But the consensual principle does not exclude that, where a third state has been authorised to take part in the proceedings to a limited extent (i.e. as a non-party), the judgment issued in that case may have *certain binding effects* between the intervener and the original parties.

The question is whether, in the light of the above objects of non-party intervention, the judgment can produce such binding effects. Whereas a non-party intervener, unlike an intervener as a party, does not submit any claim of its own, it nevertheless participates actively in the proceedings, either by invoking the application of the *Monetary Gold* principle,[79] by seeking to influence the Court's approach to certain preliminary issues related to its own legal interest,[80] or by supporting the position of one of the parties in the main dispute.[81] Because of its participation in the proceedings following the Court's authorisation pursuant to Article 62(2), a non-party intervener cannot remain totally immune from the judgment as if it had not intervened. As noted by Greig,

[79] Cf. Section 2.1, *supra*.
[80] Cf. Section 2.2, *supra*.
[81] Cf. Section 2.3, *supra*.

> It has regularly been stated that, the third state has a choice between seeking to intervene in a case, if it thinks that its interests might be affected, or of relying upon the protection provided by article 59 of the Statute. It would seem to be implicit in this formulation of the position that, by becoming an intervener, the intervener ceases, or may cease, to have the protection of that article.[82]

A non-party intervener under Article 62 is therefore bound by the judgment in so far as this judgment, whether expressly or by implication, decides issues related to the object of intervention.[83]

This conclusion is based on a principle of procedural fairness: the participation in proceedings by a third party through the presentation of arguments before an impartial judge implies its submission to the binding effect of any judgment issued in these proceedings on the aspects discussed, as a 'price' for such participation.

In the Court's system, this principle is reflected in Article 63 on 'interpretative intervention'. Although an intervener does not become a party to the case,[84] Article 63(2) provides that the interpretation of the convention given by the judgment reciprocally binds the third state and the original parties. Such a binding

[82] Greig, *supra* note 76, at 326. Cf. also Chinkin, *supra* note 76, at 526; Torres Bernárdez, *supra* note 11, at 436; Santulli, *supra* note 18, at 302 f.
[83] Cf. Institut de droit international, Resolution of 24 August 1999 on judicial and arbitral settlement of international disputes involving more than two states, *Annuaire IDI*, Vol. 68-II, 376, Art. 17: 'The decision of the court or tribunal is binding on the intervening State to the extent of the admitted intervention. To the same extent, the decision is binding on the principal parties in their relations with the intervening State'.
[84] Cf. *Whaling in the Antarctic* case, *supra* note 22, at 9, para. 18.

effect constitutes the 'price' of the third State's participation in the discussion on the interpretation of the judgment.[85]

By analogy, given the equivalent object of intervention in both cases, the same principle should apply to non-party intervention under Article 62. As noted by Judge *ad hoc* Torres Bernárdez in *Land, Island and Maritime Frontier Dispute (El Salvador* v. *Honduras)*

> I cannot, as a general proposition, conceive of rights without obligations as well as upon the general economy of the institution of intervention as embodied in Articles 62 and 63 of the Statute of the Court. Interventions under Article 63, for example, are non-party interventions and nevertheless the intervening State is under the obligation set forth in that Article. *Mutatis mutandis*, an obligation of that kind also exists, in my opinion, for a non-party State intervening under Article 62, notwithstanding the fact that that Article does not say so in plain words.[86]

This solution is not prevented by the fact that, unlike Article 63(2), Article 62 does not expressly provide that the judgment binds the intervener on the object of intervention. Although Article 62 does not expressly establish this consequence for the general pattern of non-party intervention, it does not exclude it either. Historically, this silence may be explained by the fact that, according to the prevailing opinion at the time of the adoption of the Statute of the Permanent Court, intervention before the Court should have been modelled on the features of intervention as known in domestic systems of civil procedure, which in most

[85] Cf. Greig, *supra* note 76, at 333; B.I. Bonafè, *La protezione degli interessi di Stati terzi davanti alla Corte internazionale di giustizia* (2014), 57.
[86] *Land, Island and Maritime Frontier* case, *supra* note 7, at 730 f., para. 208 (Judge *ad hoc* Torres Bernárdez, Separate Opinion).

cases implied the acquisition by the intervener of the status of a party and its submission to *res judicata*.[87] But in the new conception of non-party intervention, this silence in Article 62 does not exclude the possibility that the judgment may be binding on the third state with respect to the object of intervention.

Having concluded that the judgment in the case is binding on the non-party intervener under Article 62, the precise nature and extent of this binding effect still need to be identified. Again, the analogy with intervention under Article 63 offers a valuable hint. The phrase 'equally binding' in Article 63(2) suggests that the binding effect of the construction of the relevant convention between the intervener and the original parties is *of the same quality* as the binding effect between the original parties.

As regards the relationship between the original parties, it is recalled that, according to the Court's case law, *res judicata* encompasses not only the operative part of a judgment, but also the findings – contained in its reasoning – that by necessary implication constitute 'a condition essential to the Court's decision' ('essential reasons').[88] This conclusion also applies to the findings addressing the interpretation of a treaty, to the extent that they form an essential

[87] Cf. Kolb note 76 *supra*, at 720. During the preliminary session of the Court in 1922 (*CPJI*, *Série D*, n. 2, 349, para. 3), Judge Beichmann summarised the debate as follows: 'La question de savoir si, l'intervention ayant été admise et effectuée, l'Etat intervenant sera lié par la sentence de même que les parties originaires doit également rester ouverte'.

[88] Cf. *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów) (Germany* v. *Poland)*, Judgment of 16 December 1927, PCIJ Rep Series A No 13, 4 ff., at 20; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment of 26 February 2007, [2007] ICJ Rep 43 ff., at 99, para. 133; *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia* v. *Thailand)*, Judgment of 11 November 2013, [2013] ICJ Rep 281 ff., at 296, para. 34. This conclusion, though, is widely debated among legal authors: in particular cf. G. Gaja, 'Considerazioni sugli effetti delle sentenze di merito della Corte internazionale di giustizia', XIV Comunicazioni e studi 313 (1975); R. Bernhardt, 'Article 59', in A. Zimmermann, C. Tomuschat, K. Oellers-Frahm (eds.), *The Statute of the International Court of Justice. A Commentary* (2006), 1231; Kolb, note 76 *supra*, at 767.

condition for the decision of the main dispute: these findings are *res judicata* between the parties.

As regards the third state, if it does not intervene, it will not be subject to any formal binding effect of the judgment, including as regards the solution of a preliminary issue of interpretation.[89] This is because it has not taken part in the discussion within the proceedings on the interpretation of the convention. After intervention, however, this obstacle is removed. Having presented its observations on the interpretation of the convention before the Court and the parties, nothing prevents that the third state be bound, to the same extent as the original parties, by the solution of the issue of interpretation contained in the reasons of the judgment.[90] It is precisely this binding effect on the third state that is contemplated in Article 63(2), when providing that 'the construction given by the judgment will be equally binding upon it'.[91]

It is submitted that this explanation is also valid for non-party intervention under Article 62. As for intervention under Article 63, the binding effects of a judgment on a non-party intervener under Article 62 are of the same nature as those deriving on the parties from the solution by the Court of preliminary issues (so called 'essential reasons'). As with Article 63, a non-party intervener under Article 62 does not put forward any claim of its own, but only presents its arguments on certain aspects of the main case related to its legal interest. Hence, it is certainly

[89] A third state that does not intervene, however, is subject to the persuasive authority of international judgments (and notably judgments of the Court) in determining rules and principles of international law: see note 34 and accompanying text, *supra*.
[90] Of course, the binding effects for the third state only concern the judicial interpretation of the convention, with the exclusion of any further aspect of the main dispute.
[91] Cf. E. Hambro, 'The reasons behind the decisions of the International Court of Justice', [1954] Current Legal Problems 212, at 217 f.

not bound by the decision of the Court on the original parties' conclusions (which is normally contained in the operative part of the judgment). However, having been permitted to take part in the discussion on issues related to its legal interest, it shall be bound by the solution given to them by the Court, to the same extent as the parties are bound by the 'essential reasons' of a judgment concerning the solution of the issues related to the object of its intervention.

4. Specific applications of the binding effects of a judgment on a non-party intervener under Article 62

Based on the above analysis, it is now possible to test the conclusion reached so far and identify the specific binding effects of the judgment on the intervener for each of the three potential objects of non-party intervention 62.[92]

For each, the determination of the binding effect of the judgment on the non-party intervener depends on which issues related to the intervener's legal interest have been decided (expressly or by implication) by the judgment.

4.1 Binding effect of the judgment on a non-party intervener invoking the **Monetary Gold** *principle*

In the first pattern of non-party intervention,[93] a third state intervenes to invoke the *Monetary Gold* principle and prevent a judgment from interfering with its

[92] Cf. Section 2, *supra*.
[93] Cf. Section 2.1, *supra*.

legal interest. This category of non-party intervention has most frequently been resorted to in cases of maritime delimitation.

When the claims submitted by the parties before the Court concern areas which are also claimed by a third state, that state has two options: it may decide not to intervene and rely on the protection of Article 59 of the Statute, or intervene as a non-party under Article 62 and invoke the application of the *Monetary Gold* principle.[94]

If the third state does not intervene, based on the principle of the relative effects of decisions in Article 59 of the Statute, the third state is not formally bound by the judgment, which is *res inter alios judicata* for it. This judgment could only cause *factual* prejudice to its legal interest.[95] It is precisely to protect the third state's legal interest against this factual prejudice that Article 62 entitles this state to intervene.

If the third state intervenes (as a non-party), it does so to invoke the application of the *Monetary Gold* principle. Through its intervention, the third state aims to inform the Court about the content and extent of its legal interests capable of being affected by a decision of the case, so that the Court may protect them by: *i)* excluding the areas claimed by the third state from the scope of the delimitation

[94] For the sake of completeness, a third state that has a jurisdictional link towards the original parties could – at least theoretically – also intervene as a party and ask the Court to adjudicate on its own claims over the areas concerned by the original parties' claims. See, for instance, Honduras's application to intervene in the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, note 64, *supra*, and accompanying text. As explained above (cf. note 77 and accompanying text, *supra*), in this scenario the judgment is *res judicata* on the intervener as any other judgment deciding on the parties' claims. The following analysis does not address this scenario.

[95] See note 34 and accompanying text, *supra*.

sought by the original parties; or, in cases of international responsibility, *ii)* fully refraining from exercising its jurisdiction.[96]

The Court's decision as to the application of the *Monetary Gold* principle is based on considerations of judicial propriety.[97] The Court should consider the degree of connection between the original parties' claims and the third state's legal interest as well as, in delimitation cases, the *prima facie* plausibility of the third state's claims on the disputed areas.

Within this evaluation of judicial propriety, the demonstration by the intervener of the legal basis and extent of its legal interests helps the Court to understand the reasonableness of its claims. It is precisely on these aspects – which relate to the object of this pattern of intervention – that the judgment issued following a successful intervention may have binding effects on the third state.

Two scenarios should be distinguished.

In a first scenario, the decision by the Court as to the application of the 'necessary party' rule does not resolve any issue related to the intervener's legal interest (either expressly or by implication).

This could happen when the Court, for the sake of caution, decides to refrain from delimiting certain sectors on which the intervener *could* have certain rights. For

[96] Cf. Torres Bernárdez, *supra* note 11, at 266: 'L'intervention, toujours volontaire, du tiers, pourrait, dans ce type de situation particulière, mitiger d'une façon indirecte les effets négatifs dont nous avons fait état dans la mesure où la Cour disposerait alors d'une information plus précise, fournie par le tiers lui-même, sur ses intérêts d'ordre juridique en cause dans l'affaire, ce qui lui permettrait de mieux apprécier si, effectivement, ces intérêts risquent non seulement d'être affectés par sa décision dans le litige, mais constituent l'objet même de ladite décision'. Cf. also G. Sperduti, 'Notes sur l'intervention dans le procès international, in *Le droit international à l'heure de sa codification. Etudes en l'honneur de Roberto Ago*, Vol. III (1987) 429, at 435 f.; Jacob, *supra* note 67, at 220.

[97] Cf. G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence and Procedure', [1958] BYBIL 1, at 126 s.; Shaw, *supra* note 76, 1638, note 207; Greig, *supra* note 76, at 334; Palchetti, *supra* note 18, at 150 f.

instance, in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)*, the Court refrained from drawing the full boundary line between the two main parties, and instead decided that 'from point X, the boundary between the maritime areas appertaining respectively to the Republic of Cameroon and to the Federal Republic of Nigeria follows a loxodrome having an azimuth of 187" 52' 27"'.[98] This decision was grounded on the proposition that the Court 'can take no decision that might affect rights of Equatorial Guinea, which is not a party to the proceedings'.[99]

This first scenario could also occur (although it has not happened to date) if, after having heard the third state's arguments following its admission as intervener, the Court were to find that the intervener's claims are very weakly connected to the claims of the original parties.

In the cases falling within this first scenario, the Court's decision will have no binding effect whatsoever on the intervener, because it does not resolve (either expressly or by implication) any issue relating to its legal interest.

In a second scenario, the Court, after examining the arguments of the intervener (following its admission), decides that it has enough elements to exclude any right of this state in the areas concerned by the main dispute.

It is submitted that such decision, having been taken upon consideration of the intervener's arguments, shall be binding on this state. As noted by Judge Oda, in this situation

[98] *Land and Maritime Boundary* case, *supra* note 29, at 457, para. 325.IV.D
[99] *Land and Maritime Boundary* case, *supra* note 29, at 448, para. 307.

> [t]he intervening State will have been able to protect its own right merely in so far as the judgment declines to recognize as countervailing the rights of either of the original two litigant States. On the other hand, to the extent that the Court gives a judgment positively recognizing rights of either of the litigant States, the intervening State *will certainly lose all present or future claim* in the conflict with those rights.[100]

A clear illustration of this consequence is offered by the argument of Italian counsel Riccardo Monaco in *Continental Shelf (Lybia* v. *Malta),* although at that time the features of non-party intervention had not been fully clarified. As he noted, by acquiring the status of a 'partie intervenante' (which in many respects reflected the modern concept of 'non-party intervention') and submitting itself to *res judicata* despite not being a full party, Italy assumed a significant judicial risk, 'puisque la Cour pourra décider que, dans les zones où elle indiquera aux Parties principales comment procéder à la délimitation, l'Italie ne peut revendiquer aucun droit, *ce qui aura autorité de chose jugée à son égard*'.[101]

4.2. Binding effects of the judgment on a non-party intervener trying to influence the substantial solution of certain preliminary issues

In the second pattern of non-party intervention,[102] the intervener strives to influence the solution of certain preliminary issues connected to its legal interest.

[100] Cf. Oda, *supra* note 76, at 644 (emphasis added). See also Kolb note 76 *supra*, at 720.
[101] Cf. *Continental Shelf (Lybia* v. *Malta),* ICJ Pleadings, Vol. II, 512 f., par. 10 f. (emphasis added).
[102] Cf. Section 2.2, *supra*.

As for the situations falling within the first pattern of non-party intervention, also in this second pattern a third state has two options: it may either decide not to intervene and rely on the protection of Article 59 or intervene as a non-party under Article 62 and participate in the discussion relating to the preliminary issue connected with its legal interest.

In this case, the solution given to these issues by the judgment shall be binding on the intervener. The contrary solution, consisting of permitting the third state to take part in the discussion and influence the Court's solution of a certain preliminary issue, while at the same time remaining immune from any effect of the decision as if it had remained absent from the proceedings, would grant this state an unjustified privilege.[103]

Greece's intervention in *Jurisdictional Immunities (Germany* v. *Italy*) offers a first example of this binding effect. The finding, contained in the judgment of 3 February 2012, as to the absence of a customary exception to state immunity for *iure imperii* acts amounting to serious breaches of human rights and humanitarian law, also binds Greece, following its intervention as a non-party.[104] This finding could not, for instance, be put in question in any future proceedings between Greece and Germany relating to Greece's potential responsibility for denying Germany's immunity in the *Distomo* case.[105]

A second example is offered by the *Land, Island and Maritime Frontier Dispute (El Salvador* v. *Honduras)*, where Nicaragua was permitted to intervene, and extensively argued, on the legal regime of the waters of the Gulf of Fonseca. For

[103] Cf. Section 3, *supra*.
[104] Cf. *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, Judgment of 3 February 2012, [2012] ICJ Rep. 139, para. 91.
[105] Greece actively participated to the discussion on this point: cf. Section 2.2, *supra*.

the reasons set out above, and despite the Chamber's statement to the contrary,[106] it is submitted that the decision, contained in its judgment of 11 September 1992, that these waters 'were… held in sovereignty by the Republic of El Salvador, the Republic of Honduras and the Republic of Nicaragua, jointly, and continue to be so held' binds not only the El Salvador and Honduras reciprocally, but also should be considered to bind these states vis-à-vis Nicaragua, although the latter intervened as a non-party. As noted by Vice-President Oda in a declaration appended to the judgment, 'Nicaragua, as a non-party intervener, will certainly be bound by this Judgment as far as it relates to the legal situation of the maritime spaces of the Gulf'.[107]

Therefore, should the same issue arise in any subsequent proceedings between Honduras and Nicaragua, it is submitted that this conclusion should not be put in question.[108]

4.3. Binding effects of the judgment on a non-party intervener trying to influence the decision of the dispute between the original parties

In the third pattern of non-party intervention,[109] a third state has a legal interest that could be affected depending on whether the judgment recognises that the disputed areas belong to one or other of the original parties.

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[106] Cf. Section 3, *supra*.
[107] Cf. *Land, Island and Maritime Frontier* case, *supra* note 7, at 619 f. (Vice-President Oda, Declaration). See also ibid., 730 f., para. 208 (Judge *ad hoc* Torres Bernárdez, Separate Opinion).
[108] Between El Salvador and Nicaragua, this issue had already been determined with *res judicata* effect by a judgment of 9 March 1917 of the Central American Court of Justice, which reached the same conclusion: [1917] AJIL 674.
[109] Cf. Section 2.3, *supra*.

If the third state intervenes, having taken part in the discussion in support of one of the parties, it may no longer rely on the protection of Article 59 and consider the judgment as *res inter alios judicata*. The decision in the main dispute also binds the intervener in its relationship with the original parties.[110]

For instance, in *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, if Honduras had been permitted to intervene as a non-party, the judgment of 19 November 2012 (between Nicaragua and Colombia)[111] that attributed to Nicaragua the areas already attributed to it by the 2007 judgment against Honduras[112] would have bound not only the parties of the case (Nicaragua and Colombia), but also Honduras. Neither Honduras nor the original parties (in their relationship with Honduras) could have contested that, as between Nicaragua and Colombia, the border was finally set according to the terms of the 2012 judgment.

In the reverse scenario, had the 2012 judgment between Nicaragua and Colombia attributed these areas to the latter, the binding force of this judgment as between these two states and Honduras – because of the latter's non-party intervention – would have strongly impaired Nicaragua's ability to persist in asserting its rights over the areas attributed to it by the 2007 judgment.

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[110] This outcome shows a certain analogy with the regime of 'dependant' intervention in domestic systems of civil procedure. For instance, under Art. 68 of the German Code of Civil Procedure, following intervention as 'dependent intervener' (i.e. in support of one of the parties, '*Nebenintervention*'), a third party is precluded from asserting against the supported party that the dispute forming the subject matter of the main proceedings, as presented to the judge, was decided incorrectly.

[111] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Judgment of 19 November 2012, [2012] ICJ Rep 624. Cf. S. Forlati, 'Delimitazione dei confine marittimi e Stati terzi: il caso *Nicaragua* c. *Colombia*', [2013] RDI 135.

[112] Cf. *Territorial and Maritime Dispute between Nicaragua and Honduras* case, *supra* note 29, at 659. Cf. Section 2.3, *supra*.

As recalled above, in this case Honduras had requested to intervene as a party and, only in the alternative, as a non-party.[113] The potential binding effects discussed in this section deriving from non-party intervention must be kept distinct from the *res judicata* effect that a hypothetical judgment would have had on Honduras if that state had been permitted to intervene as a party asking the Court to determine its maritime boundary and tripoint with Nicaragua and Colombia.

5. Conclusion

This study has been devoted to understanding the objects and effects of non-party intervention under Article 62 of the Statute of the International Court of Justice.

Although a non-party intervener does not put forward any claim of its own, it nevertheless actively participates in the proceedings with a view to steering the future judgment towards a favourable result. Depending on the case, a non-party intervener under Article 62 may invoke the application of the *Monetary Gold* principle, contend for a certain solution to a preliminary issue connected to its legal interest or support the claims of one of the original parties to the dispute.

As a result of its participation in the proceedings, a non-party intervener cannot remain totally immune from the effect of the judgment. A non-party intervener under Article 62 is bound by the judgment in so far as the judgment, whether expressly or by implication, decides issues related to the object of its intervention.

The binding effects of the judgment as between the third State and the original parties are therefore directly related to the object of intervention: *(i)* in non-party

[113] Cf. note 64 and accompanying text, *supra*.

intervention aimed at invoking the *Monetary Gold* principle in a delimitation dispute, should the Court decide that it has enough elements to exclude any right of the third state in the areas concerned by the main dispute, such decision will be binding on the third state; *(ii)* in non-party intervention aimed at influencing the approach to a certain preliminary issue, the solution regarding this issue contained in the judgment will be binding on the intervener; *(iii)* in non-party intervention aimed at supporting the claims of one of the parties in the main dispute, the decision of this dispute by the Court will also bind the intervener as a final settlement of the dispute as between the original parties.

The decision of a third state as to whether to intervene as a non-party or remain 'absent' is a strategic choice, which entails weighing the advantages of participating in the proceedings against the disadvantage of being subject to certain binding effects of the judgment in relation to the object of intervention.

If the third state does not intervene, the judgment rendered between the original parties will be *res inter alios judicata* and, according to Article 59 of the Statute, will have no binding effect on it. However, Article 59 does not shield the absent third state from any potential factual prejudice that the judgment may cause to its legal interest.

It is precisely to protect the third state against this factual prejudice that Article 62 allows it to intervene. But if it decides to intervene, the third state will be subject to the binding effect of the judgment in relation to the object of its intervention. Perhaps the fear of being exposed to such binding effects explains the small number of applications to intervene submitted to the International Court to date.