


The Notion “Interest of the Legal Nature” in the International Court of Justice’s Jurisprudence

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Abstract: The possibility of the intervention of the third state in cases before the International Court of Justice (ICJ or the Court) is determined by the existence of the “interest of the legal nature” that may be affected by the decision in the case on the side of the intervenient – to – be state. Author analyses the meaning given to this concept by International Court of Justice and the way ICJ uses it in its jurisprudence. The special attention is paid to the search for the difference between the popular civil term “legal interest” and the ICJ’s “interest of the legal nature” – author examines if ICJ uses those two terms synonymously and, if so, why. If on the other hand the Court does not do it, author studies, what meaning the Court attributes to each of them. The ongoing consideration is limited to the interventions based on the art. 62 of the Statute of the International Court of Justice with no reference to any form of participation in the proceedings before the Court based on the art. 63 Statute. Author emphasizes the role of the Court’s statements in the development of the rules of public international law and its contribution to create the international legal language.

Keywords: International Court of Justice (ICJ), interest of the legal nature, legal interest, international jurisprudence, international dispute settlement

1. Introduction

The most international dispute settlement’s systems allows the possibility of the intervention international legal concepts in the proceedings for the third state. Although the intervention before the International Court of Justice (ICJ or the Court) seems to be quite underutilized, it is interesting and scholarly inspiring to analyze its legal basis and ICJ’s practice in the matter with special regard to the notion “the interest of the legal nature” determining the whole procedure¹. The knowledge how the Court understands the scope and meaning of this notion can help understand the reasons of the Court’s examination in the given case. Moreover this knowledge is also important because of the other reason – the intervention in the case before the Court expands the scope of the Court’s impact on the on the states’ legal position and in consequence on the public international law in general (P. Palchetti 2002: 140).

In cases before the International Court of Justice only states can be parties and in

¹ “Interest of the legal nature” is a bit distinct from popularly used in domestic systems “legal interest”. The matter of concern here is the question, do those terms have separate meanings or are they synonyms.

general these are the parties to the Statute² of the Court. The statute of the Court provides for two ways of intervention by third states based on its articles 62 and 63. Any form of these intervention do not create a new dispute with different parties but just constitute incidental proceedings. The ongoing consideration is limited to the intervention based on the article 62 of the Statute.

Having the „interest of the legal nature” that may be affected by the decision in the case is the crucial requirement shaped on the ground of the article 62 of the Statute of International Court of Justice the fulfilment of which makes possible for the so called “third party” (the third state that is not the party of the ongoing dispute) submitting a request to the Court due to be permitted to intervene. The final decision as to the admissibility of the intervention is up to the Court.

Neither the Statute of the Court nor its jurisprudence does explain fully the scope of the meaning the term “interest of the legal nature”. The Court’s approaches according to the intervention and its legal basis (including the existence of the interest of a legal nature) varies from the restrictive (case of Malta: *Continental Shelf; Libyan Arab Jamahiriya/ Malta*, ICJ judgment 21.03.1984³) to the lenient one (according to Nikaragua in the case *Land, Island and Maritime Frontier Dispute*, ICJ judgment 13.09.1990⁴).

The third state’s interest of the legal nature doesn’t have to be directly connected with the sole dispute between its parties. It’s rather the more general interest in the Court’s interpretation of a customary or treaty rule. Any kind of interpretation made by the Court has its persuasive force, that can have an impact on the attitude of more states than just the dispute parties. That is how the provisions of the art. 62 of the Court’s Statute look like. The two questions than arise: is there a need for the state-interventient-to be to have any kind of a legal bond with the parties of the dispute and, if so, does this link justify the intervention. It can also raise the doubt, has the intervention to be limited to the dispute matter or not. Much further goes the next question: what kind of protection can expect the intervening state from the Court. That goes to the most important problem: is the intervention based on the art. 62 of the Court’s Statute for the third state just an opportunity to present its views or is it the occasion to get some kind of the protection. It seems natural to look for the answers in the Court’s jurisprudence.

The international disputes merely are the disputes between the two states. It can be rather said, that they can affect the whole international society. It is worth mentioning that the third party’s intervention enlarges the scope of the Court’s influence on the states’ conduct as well as on the public international law, it is important to know and understand the methods and reasons that the Court uses to make up the assessment of the third party’s intervention legal basis. The examination of the meaning that the Court gives to the term “interest of the legal nature” and the ways

² See the text here: <https://www.icj-cij.org/en/statute>.

³ See the text here: <https://www.icj-cij.org/files/case-related/68/068-19840321-JUD-01-00-EN.pdf>.

⁴ See the text here: <https://www.icj-cij.org/files/case-related/75/075-19900913-JUD-01-00-EN.pdf>.

the Court uses it will go through to just a few judgments, because the institution of the third party intervention, as mentioned earlier, is not much present in the Court's jurisprudence. However it helps providing a rule of law which itself requires the application of equity, in conformity with the ideas that always have underlain the development of the legal regime of the international society (that becomes day by day not only the community of the law but also the community of the democratic discourse, in which the precision and the clarity of the language plays the fundamental role) (D. Kritsiotis 2002: 961–992).

2. “Interest of the legal nature” in continental shelf cases before the International Court of Justice

It is not without the good reason, that the issue of the “interest of the legal nature” appears in those ICJ's judgments, that deal with so important question in public international law like continental shelf.

In general the continental shelf appears in public consciousness not only as the literally “continental shelf” that abounds in mineral resources and that is why so desired by the states, but also as the special concept of public international law. Nor the editorial requirements nor the scope of those considerations allow for more detailed examination of this concept, however it's necessary to at least brief recalling of its most important elements. It is important to mention, that a lot of states still treat the continental shelf as the natural extension of their territory, despite the modern tendencies to perceive the maritime borders' delimitation not as the technical process any more but as the legal one (J. Połatyńska 2012: 86).

In the potential dispute according to the borders of the continental shelf the role of any court is about to make a choice between the two concurring legal titles to shelf of the states – parties to the dispute. The assessment made by the court in such cases creates in fact the division of the shelf and in the consequence all the findings as to the state's jurisdiction over the shelf (and over the other sea areas) made as a result of the delimitation are effective *erga omnes* and may constitute the means of protecting the interest of the international community (P. Palchetti 2002: 177 i nast.). That is why the delimitation process, its criteria and the correctness of its course are crucial not only for the parties of the dispute, but in general for all states interested in the potential possibilities of the exploitation of the “continental shelf”, that is full of different and important mineral resources.

Stepping into the case before the ICJ while the case is about the continental shelf or in general about the delimitation of the sea areas is the fundamental issue for public international law. The admissibility of the joining to this case is determined by the criteria prescribed in article 62 of the Statute of the Court, the main of which is to have “the interest of the legal nature” that can be affected, in any way, by the decision in the case.

The question of the continental shelf is the fundamental feature of the problematic of the demarcating the spheres of the states' jurisdiction on the maritime areas with the special regard to the situation of those states whose coasts adhere to each other or whose coasts are located vis-a-vis each other. The Court had just a few

times the opportunity to analyze this notion during its entire history. The ongoing consideration is about to settle, are the Court's statements in this matter coherent and consistent and does the Court explain or develop this notion on the basis of the public international law enough to create the judicial concept of the "interest of the legal nature".

The state's claim to be permitted to intervene in the given case before the Court has to be based on the interest of the legal nature on which the decision of the Court can have any impact. The Statute of the Court in its article 62 does not require from this interest to be "legal one" nor to be "consistent with the law", but it just has to have "legal nature" and it has to be possibility that this interest could be affected by the Court's decision in the pending case. Therefore, this claim of the state out of necessity has quite a speculative character, because on the preliminary stage of the proceedings not the Court nor the third state can know, what will be the its result.

That is why probably the lawmakers of the Statute decided to use the conditional construction, according to which the sole possibility to affect the interest of the legal nature of the third state entitles it to be permitted to intervene, because the Statute does not require that it would be probable that the interest of the legal nature of the state has been affected nor that it would be affected in the future.

It's up to the Court to decide whether the State, in requesting admission of intervention, showed its important interest of the legal nature in participating in the proceedings and whether the state complies with the standard of proof in the matter. The analyses of *travaux préparatoires*⁵ to the Statute of the ICJ demonstrate, that there were some controversies according to that, what is supposed to be the basis⁶ of the intervention in the proceedings before the Court⁷ – the final shape of article 62 of the Statute is a result of the compromise between the supporters of those two options.

The Court's jurisprudence proves that despite the non-precise and rather liberal language of those provisions of the Statute, in principle the Court adopted quite restrictive interpretation of the criterion of admissibility of intervention (limiting the access to it), especially in such disputes that apply to the land and sea borders.

2.1. *Continental Shelf (Tunisia/ Libyan Arab Jamahiriya)*, ICJ judgment 14.04.1981

In the dispute between Tunisia and Libya⁸ according to the continental shelf Malta put the application to be permitted to intervene, basing its alleged legal (and factual) interest on the geographical location *vis-a-vis* the states-parties to the dispute submitted to the Court. In Malta's opinion it had the legal interest in the Court's interpretation of the legal principles determining the delimitation of the boundaries of its continental shelf, identifying the relevance of local or regional, geographical or ge-

⁵ Eng. Preparatory work.

⁶ Condition, criteria.

⁷ The "interest" or the "right".

⁸ See the text of the Court's decision here: <https://www.icj-cij.org/files/case-related/63/063-19810414-JUD-01-00-EN.pdf>.

omorphological factors in the delimitation. As Malta stated, any pronouncement made by the Court in the context of this dispute between Tunisia and Libya may be relevant to Malta's own legal situation. It has to be stated that the position of the potential intervention is quite awkward, because there is no clear indication on how it should to prove the existence of the interest of a legal nature that can be affected in the decision making of the case.

The Court in this case finalized that Malta's claims concern rather the potential implications of the Court's decision in the given case and that Malta did not prove sufficiently the existence of its interest of a legal nature that might be affected by the decision in the case, because Malta shares this kind of interest with other states of the Mediterranean region. The additional reason for releasing Malta's demand was the fact that Malta in its application made the reservation, that it does not formulate its own claims as to the shelf – that is why the Court assessed, that the legal interest recalled by Malta is not this one, that can be affected by the Court's decision in the case. In fact, the Court recognized Malta's reservation as the negation of the existence of the legal interest that could justify the intervention.

Few judges added separate opinions to this judgment and some of their arguments seemed to be interesting in the context of the analyzed notion. For instance, judge Schwebel⁹ stated that the Court has to be especially careful in considering the existence or non-existence of the interest of a legal nature of the state involved, because the position of the intervener gives it a kind of dominance, like this one, that the intervener knows the reasons of the dispute parties and they do not know its ones.

In this case Judge Schwebel stated that the Court uses the higher standards of proof¹⁰ from the potential interveners, that from the dispute parties. Neither Tunisia nor Libya themselves, advanced particular claims, they just wanted the Court to rather generally indicate what rules and norms of public international law should be used to delimit the area of the continental shelf adjacent to the coast of Tunisia and the shelf adjacent to the coast of Libya. In the judge's opinion the biggest difficulty in Malta's position is about Court's demand that Malta would interpret the provisions of the Statute, that the Court has not interpreted itself. Besides Malta couldn't know the potential ways its interest might be engaged by the case and the Court couldn't either. According to the judge Schwebel: "[...] The State seeking to intervene accordingly need not prove that it has a legal interest that the Court's decision will determine; it need merely show that it has a legal interest which just "may" be no more than "affected" - prejudiced, promoted or in some way altered. [...]". Judge pointed out, that the sole fact, that Malta sits on the very same continental shelf that is the issue between Tunisia and Libya, shows that Malta's continental shelf claims (or their implementation) "may" be "affected" by the Court's decision on the case, because the continental shelf claims of Tunisia and Libya may compete at some points with those of Malta.

⁹ See the text of the opinion here: <https://www.icj-cij.org/files/case-related/63/063-19810414-JUD-01-03-EN.pdf>.

¹⁰ According to the demanded precision of the claim.

Malta apparently maintains by submitting for the intervention that the continental shelf, which divides all three countries, located on the same coast and separated from each other within 200 nautical miles, should be definitely divided between them. Such a claim has its legal basis on the United Nations Convention on the Law of the Sea from 10.12.1982¹¹ with special regards to its Article 76 to which the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

The Malta's claim remains in a close relation to Article 1 of the Special Agreement between Tunisia and Libya, in which the parties request the Court to consider the newest trends in the law of the sea confirmed on the III UN Conference on the Law of the Sea. The parties of the Special Agreement ask the Court to indicate precisely the practical methods of applying the rules and principles which it has guided in this particular situation – the Court could then determine in this case the method of delimitation of the shelf boundaries, which certainly concerns the legal interests of Malta.

According to Judge Schwebel even the fact that Malta in its application for permitting to intervene did not prove the existence of its legal interest, which may be affected by the decision, does not absolve the Court from the recognition that Malta has such an interest in this situation and that it may be affected by the decision of the Court. Judge stressed that indeed similar interest of the legal nature could have Italy, but not the other states of Mediterranean region. Moreover, the mere fact that a similar interest of the legal nature is shared by other states does not justify rejecting Malta's request for admission of intervention.

The above mentioned separate opinion of Judge Schwebel demonstrate how different are the ways, in which the potential intervener could show its interest in the legal nature and the possibilities that it can be affected by the decision in the case. Considering quite liberal pronouncement of the article 62 of the Court's Statute the burden of proof weighing on the potential intervener cannot be to challenging.

2.2. *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, ICJ judgment 21.03.1984

In its judgement of the case of continental shelf in the dispute between Libya and Malta the Court has released Italy's intervention. Italy based its application for permission to intervene mostly on the statement, that the areas of continental shelf that are the subject matter of the dispute all belong to the region of the central Mediterranean, of which Italy is a coastal State, and in which are located some of the continental shelf areas over which Italy considers its rights.

¹¹ See the text here: http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

This judgement in the doctrine is recalled mostly because of its findings as to the using of the rigor of legal equity in disputes settlement. It is about such using the equity that leads to consistent, rightful and predictable implementation of the universal principles.

Moreover, another important feature of this ICJ's judgement is the question of the admissibility criterion of the third state's intervention in the case before the Court. Italy in this case presented its interest in the context of the protection of Italian sovereign rights to the areas of the continental shelf. The Court in its judgment in this case considered, that the state a State which believes that its legal interest may be affected by a decision in a case has the choice, whether to intervene on the basis of article 62 of the Statute, or to refrain from intervening and to rely on Article 59. The Court also stated, that there can be no doubt that it will, in its future judgment in the case, take account, as a fact, of the existence of other States having claims in the region. However the Court made it clear, that it is deciding only between the competing claims of Libya and Malta. The Court underlined next, that the intervener should comply with establishing a basis of jurisdiction as a condition for the submission of the application for permission to intervene. This additional requirement, not based on the text of the Statute has been criticized in the doctrine but also by the judges themselves in their dissenting or separate opinions – see the separate opinion of Judge Schwebel in the dispute between Tunisia and Libya, mentioned above.

In this case the Court used the way of reasoning stating that the question is not whether the participation of Italy may be useful or even necessary to the Court; it is whether, assuming Italy's non-participation, a legal interest of Italy is or is likely to be affected by the decision. In the Court's opinion the Italian Application to intervene aims to create a situation in which the Court would be seized of a dispute between Italy on the one hand and Libya and Malta on the other, or each of them separately, without their consent and this way the character of the case would be transformed. Mostly because of this reason the Court has released Italy's intervention.

2.3. *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)*, ICJ judgment 13.09.1990

The first admissible intervention has been done by Nicaragua in the dispute between Honduras and Salvador in the case Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)¹² Nicaragua used in its application the specific argumentation, namely it considered that there is no its legal interest in the Court's decision according to the land borders between Salvador and Honduras and limited its application to the legal position of the islands and sea areas using general arguments without recalling the question of specific rights as to the Fonseca Gulf. In its application Nicaragua stated that both parties to the dispute aim to clarify the status of the Fonseca Gulf, which also concerns the rights of Nicaragua. According to those rights Nicaragua recalled the judgement of the Central American Court

¹² See the text of the judgement here: <http://www.icj-cij.org/files/case-related/75/075-19900913-JUD-01-00-EN.pdf>.

of Justice from 09.03.1917, in which Salvador, Honduras and Nicaragua have been recognized as “co-owners” (co-holders) of the Gulf with no demarcation of frontiers. The International Court of Justice acknowledged, that the claims of the parties to the dispute can have an impact on the legal interest of Nicaragua, because however Nicaragua has no legal interest according to the sovereignty of some islands and neither to the issue of delimitation of the sea areas; but there can arise the question, if such delimitation could have an influence on the legal interest on Nicaragua. In the practice it happens, that delimitation of the sea areas between the two states affects the third state in one way or another. Therefore, the Nicaragua’s application has been accepted but in the scope limited to those sea areas, in which – as admitted the parties to the dispute – a certain collective regime was in place and that could have an impact on Nicaragua’s rights.

2.4. Territorial and Maritime Dispute (Nicaragua/Colombia), ICJ judgments
04.05.2011 (*Application by Honduras for Permission to Intervene*) and
12.11.2012 (*Application by Costa Rica for Permission to Intervene*)

The concept of the notion “interest of the legal nature” the Court laid down in its judgments in the case *Territorial and Maritime Dispute*¹³ stating, that it has to be “the object of a real and concrete claim of that State, based on law, as opposed to a claim of a purely political, economic or strategic nature”.

In the above mentioned case Costa Rica applied for the permission for its intervention in the case between Nicaragua and Colombia, arguing that it needs to protect its rights and interests of the legal nature on the Caribbean Sea by all accessible and legal means. Costa Rica identified its interest of the legal nature as the implementation of its sovereign rights and exercising its jurisdiction on the areas of the Caribbean Sea, to what it is entitled on the basis of public international law because of its geographical location as the coastal state.

According to the Court Costa Rica demonstrated its interest of the legal nature as to the given sea’s areas but indicated, that the fulfillment of the admissibility condition of the intervention require the existence not any interest of the legal nature, but of the content and scope of which could be affected by the future judgment of the ICJ in the ongoing case. In the Court’s opinion Costa Rica did not demonstrate such kind of its interest.

Such an opinion of the Court and its concept of the interest of the legal nature a few judges questioned in their dissenting and separate opinions. For instance, judge Al-Khasawneh noticed, that “the object of a real and concrete claim of that State, based on law” is difficult to distinguish from the rights and that right can be seen as a form of a legal interest, like, when a State claims its interest to exercise its rights in a maritime area. If the purpose of the Court was to distinguish the right from the interest of a legal nature, that the rejection of the Costa Rica’s application

¹³ See the texts here: <https://www.icj-cij.org/files/case-related/124/124-20110504-JUD-01-00-EN.pdf> and <https://www.icj-cij.org/files/case-related/124/124-20110504-JUD-02-00-EN.pdf>.

creates the situation, in which one can have the concerns, that the other states' applications (meeting even lower standards when it comes to demonstrating the existence of a legal interest that could be affected by the Court's decision) would be rejected. According to the judge Abraham on the other hand the term "interest" is always wider and more flexible than the term "right". The judge Keith in its declaration attached to the Court's judgement asks the question, if the claim is based on law, real and specific; isn't it a claim for the right legally recognized?

In the same case, an interesting circumstance has occurred: Honduras first claimed to be admitted to the proceedings as a party; and alternatively as a non-party and each of those requests has been justified differently. Asking to be permitted as the party Honduras expected from the Court the delimitation of the maritime borders. If, on the other hand, the Court would reject this request, Honduras as a non-party would claim the protection of its legal interests and rights.

The Court however rejected the both requests, stating that the premises listed in the Article 62 of the Court's Statute have to be fulfilled despite the form of the alleged intervention. According to the Court requests of Honduras related to the two issues: if the previous Court's judgement from 2007 demarcated the whole maritime border between Honduras (that was the party of the proceeding than) and Nicaragua and, if this previous decision of the Court can have any impact on the rights of Honduras on the base of the Bilateral Treaty on the Maritime Delimitation between Honduras and Colombia from 02.08.1986¹⁴. In the Court's opinion Honduras did not demonstrate its interest of the legal nature in any of its requests and rejected them both.

3. The interest of the legal nature in environmental cases

Environmental cases make another interesting example of using the term "interest of the legal nature". Such cases, by their nature, definitely can engage the attention of third states. Obligation to protect the environment or not to harm the environment have *erga omnes* character, so violation of those obligations would affect the whole international society. Therefore all states can have the interest of the legal nature in the meaning provided by article 62 of the ICJ Statute that can be affected in the Court's decision as to any environmental case. It does not mean, that the sole appearing of environmental case before ICJ would directly lead to the "right of intervene". But in the consequence of the international society's growing concerns about environment the institution of intervention could become kind of reciprocal interstate control of the ensuring the protection of the environment. We have here the dynamically changing need of international society on one hand and the possibility of the Court to transform its approach to the institution of third party intervention. Finally, the interest of the legal nature can be understood as well as the collective interest of international society.

¹⁴ See the text here: <http://www.un.org/Depts/los/legislationandtreaties/pdf/treaties/col-hnd1986md.pdf>.

4. Concluding remarks

Short and not rich practice of the International Court of Justice makes a frame towards the consideration of interest of the legal nature that can justify the intervention in the case before the Court. According to some uncertainty and lack of clarity connected to this notion, some points have to be settled.

Article 62 of the Court's Statute does not constitute any "right to intervene" considering that it lies in the discretion of the Court to allow or reject the request of a third state to be permitted to intervene. Any interest of the economic, social or political nature has to be excluded here. It is not sufficient for a state to have a general interest in the principles of law that might be stated in the given judgment, but on the contrary – it is necessary for the intervening state to have the interest of the legal nature that may be affected in its content and scope by the Court's future decision in the case. Furthermore, this legal interest must be the object of a real and concrete claim of the third state and has to be based on law.

The approach of the International Court of Justice towards the third states' intervention for the long time was firmly restrictive. It was not justified neither by the normative structure of the Statute of the Court's provisions nor by the goals that the Statute's lawmakers wanted to accomplish. Keeping in mind, that according to the article 59 of the Statute the Court's decisions have limited binding force (between the parties and in respect of given particular case), the institution of the third party intervention expands the impact of the Court's pronouncements on a question of international law. Additionally, recalling that in the practice the states reluctantly submit their disputes to the Court, it can be said, that the possibility of the third party intervention makes the additional field for the Court's activity (by putting it in the position of having to decide taking into account the broader interest involved) and allows to support its authority as well.

It could be understandable that the protection of the legal interests is provided for the parties of the disputes submitted to the Court and that the Court's attitude towards the requirement of the demonstration of this interest has to be censorious. Going along this way of thinking it would be reasonable to expect from the Court scratching the differences between the content and the meaning of those two terms in its consistent practice of using them in its jurisprudence.

However, as to the language questions of the analyzed provisions of the Statute of the Court, it has to be said that *prima facie* interesting concept of "the interest of the legal nature", that seems to have wider meaning (like all the ways to address the concerns of the third states as to all the possible legal implications of the decision of the Court) that just the "legal interest" in fact is just a rhetorical figure, because the Court itself (and the doctrine in the consequence) uses those two terms synonymously in all his decisions in which the issue of the third party's intervention appeared. Therefore, there is no specific difference between the notion "legal interest" used in domestic legal (mostly civil) procedures and the "interest of the legal nature" that appears in the proceedings before the International Court of Justice.

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