International Court of Justice

Nicaragua Granted Permission to Intervene in the (El Salvador/Honduras) Land, Island and Maritime Frontier Case

Background

On 11 December 1986 the governments of El Salvador and Honduras, acting in accordance with a Special Agreement of 24 May 1986, submitted their frontier dispute to a special five-judge Chamber established by the International Court of Justice. The Chamber was constituted as follows: Judge Jose Sette-Camara, President of the Chamber; Judges Shigeru Oda and Sir Robert Jennings; and Judges ad hoc Nicholas Valticos (chosen by El Salvador) and Torre Bernardez (chosen by Honduras). The Parties referred two issues to the Chamber. These were (a) the delimitation of the land frontier between the two States, and (b) the determination of the legal situation of the islands and maritime spaces. The latter part of the Parties' request relates to a dispute over islands and maritime spaces within the Gulf of Fonseca, as well as maritime areas outside that Gulf.

On 17 November 1989 Nicaragua filed an application with the Court for permission to intervene under Article 62 of the Statute on the ground that it had an interest of a legal nature which might be affected by the judgment of the Chamber in the case. The reason for Nicaragua's application lies in the special geographical position of that country in the Gulf of Fonseca. The Gulf of Fonseca lies on the Pacific coast of Central America. As the map (Figure 4) shows, the north-western coast of the Gulf is the land territory of El Salvador, and the south-east coast that of Nicaragua; the land territory of Honduras lies between the two and comprises a considerable proportion of the internal coast of the Gulf. There are a number of islands and islets within the north-western part of the Gulf which are owned either by El Salvador or Honduras. Sovereignty over certain of these islands is disputed between El Salvador and Honduras.

In its judgment of 13 September 1990 the Chamber unanimously found that Nicaragua had shown that it had an “interest of a legal nature which may be affected by the judgment of the Chamber on the merits in the case” and decided that Nicaragua was permitted to intervene in certain respects.

1 *ICJ Reports* (1990), 92. For an account of the background to this Case see Freestone (1988) 3 IJECL 342.
4 See also, *ibid.*, Para 24.
The judgment of 13 September deals exclusively with Nicaragua's intervention. Indeed, it is the first time in the history of the World Court in which a state has been permitted to intervene under Article 62 of the Statute. The judgment has implications beyond the present case in relation to the long-existing doctrinal disputes over the criteria of intervention under Article 62. Certain of these implications are examined below.

The Implications of the Chamber's Judgment

Generally speaking, the Statute of the International Court of Justice envisages two types of intervention. The first is under Article 62 which is termed a "discretionary intervention". Under Article 62, should a state consider that it has "an interest of a legal nature which may be affected by the decision in the case", it may submit a request to the Court to be permitted to intervene. The Court will decide on the question of whether or not to permit intervention. The second type of intervention is under Article 63 of the Statute which has been termed "intervention as of right". This relates to cases involving the construction of a Convention to which states other than those concerned are parties. This is not examined here.

Legal Interest

There is a crucial distinction between Article 62 and Article 63 of the Statute. Under Article 62 the intervening state should show (a) that it has an interest of a legal nature, and (b) that that interest may be affected by the decision of the Court in the case. This is a well-recognized distinction between Article 62 and Article 63. Fitzmaurice points out that where the construction of a Convention is concerned, any party to it necessarily has an interest in the matter, while the question of whether it has a legal interest of the kind specified by Article 62 must be a matter of appreciation, which it is for the Court to decide. In other words, intervention under Article 63 is open to all states that can show that the construction of an international convention to which they are parties is involved. In the words of Judge T. O. Elias, intervention on the basis of Article 63 is automatic for the state intending to intervene and no other requirement need be fulfilled before an intervening state can participate in such proceedings before the

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7 Previously, there have been formal attempts to intervene under Article 62 of the Statute and all were rejected. The first was by Fiji in the Nuclear Tests Cases (Australia/France, Application to Intervene, Order of 12 July 1973, ICJ Reports (1973), 320). The second was by Malta in the Tunisia/Libya Continental Shelf Case (ICJ Reports (1981), 3). The third was by Italy in the Libya/Malta Continental Shelf Case (ICJ Reports (1984), 3). The Monetary Gold Removed from France can also be considered a case under Article 62 (ICJ Reports (1954), 19). Other instances of intervention which may fall under Article 63 of the Statute are to be found in the Wimbledon Case (1923 PCIJ Series A, No. 1, 11) and the Hayà de la Torre Case (Judgment of 13 June 1951, ICJ Reports (1951), 71).

8 Fitzmaurice, The Law and Procedure of the International Court of Justice, 551.