DECLARATION OF JUDGE KOOIJMANS

Philippines must not only demonstrate how legal interest may be affected but also provide clarity about its nature and source — Reluctance to address issues which are relevant for plausibility of claim — Existence of legal interest insufficiently demonstrated.

Considerations of judicial policy — Third-party intervention and consensual basis of jurisdiction — Desirability of strict requirements for specification of legal interest.

1. I wholeheartedly agree with the Court's finding that the Philippines has not discharged its obligation to convince the Court that specified legal interests may be affected in the particular circumstances of this case (paragraph 93 of the Judgment) and that consequently the Philippine Application for permission to intervene cannot be granted.

2. In my opinion, the Philippines has convincingly demonstrated that it has a prima facie interest in the case between Indonesia and Malaysia concerning the sovereignty over Pulau Ligitan and Pulau Sipadan, two islands which are located off the coast of North Borneo (or the State of Sabah as it is nowadays called), to (part of) which the Philippines claims title. As its interest of a legal nature, it has indicated "the appreciation by the Court of the Treaties, agreements and other evidence to be furnished by the Parties which have a direct or indirect bearing on the matter of the legal status of North Borneo".

3. The Philippines contends that its interest would be affected were the Court to interpret these treaties and agreements as conferring title to the territory of North Borneo on Malaysia or as confirming such title. The Court, however, rightly concludes from the text of the various instruments and from the statements of Indonesia and Malaysia during the oral hearings in the present phase of the proceedings that there is no evidence that the legal interest of the Philippines may be affected by a decision of the Court in the main case, since none of these instruments is a source of title over the territory of North Borneo. Nor does the Philippines assert that they do, with the exception of the 1878 Sulu-Overbeck grant which, however, did not include the two islands at issue in the case before the Court and is, anyhow, not relied on by either Indonesia or Malaysia as a source of title to Pulau Ligitan and Pulau Sipadan (paragraph 66 of the Judgment).

4. There is, however, another element which in my view deserves more attention than it has been given by the Court. In paragraph 60 of the Judgment it is stated that

> "the Philippines may not introduce a new case before the Court nor make comprehensive pleadings thereon, but must explain *with sufficient clarity its own claim* of sovereignty in North Borneo and the *legal instruments* on which it is said to rest" (emphasis added).

This requirement is in conformity with the objects of the intervention sought by the Philippines, viz., to preserve and safeguard its legal and historical rights to the territory of North Borneo and to inform the Court of their nature and extent. The Court, however, has not given a follow-up to the statement just quoted, nor has it determined whether the Philippines has provided sufficient clarity about its own claim.

5. It is not contested between Indonesia and Malaysia, on the one hand, and the Philippines, on the other, that there is a dispute between Malaysia and the Philippines concerning sovereignty over North Borneo (even if that dispute has been dormant for the last 20 years). In the 1963 Manila Accord, the three countries took note of the Philippine claim and agreed to exert their best endeavours to bring the claim to a just and expeditious resolution by peaceful means.

6. The fact that the existence of the claim is recognized does not, however, relieve the Philippines of the obligation to explain that claim with sufficient clarity and the legal instruments on which it is said to rest, and I am not at all convinced that the Philippines has complied with that obligation.

7. It has repeatedly explained that title to North Borneo under the 1878 Sulu-Overbeck agreement remained with the Sultan of Sulu uninterruptedly until 25 November 1957, when the grant was terminated by the Sultan, and thereafter until 1962 when the heirs of the Sultan transferred the title to the Philippines. It was explicitly stated by counsel for the Philippines that the Philippines own title dates back no further than 1962 and is not derived from its legal predecessors, Spain and the United States of America.

8. Although explicitly invited to do so by counsel for Malaysia, the Philippines, however, did not provide sufficient clarity about a number of highly relevant issues; for instance, how did the Sultanate of Sulu survive a number of events, which took place at the end of the nineteenth and in the first half of the twentieth century, as an entity able to hold sovereign rights? What was the legal nature of the instrument through which sovereignty was transferred to the Philippines? How could the Philippines express a legal interest in or even manifest a claim to North Borneo before 1962, the year it allegedly obtained its title?

9. Now, it may be said that such issues should not be discussed during the Application proceedings, but that they belong to the merits phase, once the intervention is granted. That may be true in so far as such questions amount to *refutations* of the claim. But in my opinion, this is not

the case as far as the questions just mentioned are concerned, even if they have been formulated by Malaysia, the opponent of the Philippines in the dispute over North Borneo. These questions serve to provide the Court with sufficient clarity about the claim and that clarity is needed "to make concrete its submission that it has an interest of a legal nature which might be harmed by the reasoning of the Court", to quote again paragraph 60 of the Judgment; they, therefore, properly have to be answered during the Application phase of the procedure, since they do not bear on the soundness of the claim, but on its plausibility.

10. The failure to explain with sufficient clarity its own claim and the underlying legal instruments is therefore an argument which is additional to the Court's finding that the treaties and agreements furnished by the Parties either form no part of the arguments of the Parties in the main case or do not bear on the issue of retention by the Sultanate of Sulu of sovereignty over North Borneo; in combination, both lead to the conclusion that the Philippines has not been able to demonstrate that its legal interest may be affected by the Court's decision.

11. In my opinion, it would have been preferable if the Court had explicitly stated that the Philippines has not explained with sufficient clarity its own claim in spite of its purported intention to inform the Court of the nature and extent of the rights which may be affected by the Court's decisions. This point is not merely of theoretical importance, but it also has practical implications.

12. Fear is sometimes expressed that a liberal policy of granting permission to intervene might encourage States to attempt to intervene more often, which might lead to a situation at odds with the system of consensual jurisdiction; moreover, the risk of potential interventions might make States parties to a dispute less inclined to conclude a Special Agreement to submit that dispute to the Court.

13. This line of reasoning is certainly not without ground; it seemingly, however, overlooks the fact that the discretion conferred upon the Court by Article 62, paragraph 2, of the Statute is not a

> "general discretion to accept or reject a request for permission to intervene for reasons simply of policy. On the contrary . . . [the Court's task] is to determine the admissibility or otherwise of the request by reference to the relevant provisions of the Statute." (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 12, para. 17.)

Judicial policy alone therefore cannot allay the fears just mentioned.

14. The all-important criterion mentioned in Article 62, paragraph 1, of the Statute is the legal interest. In this respect, the legal interest itself is

as important as the risks to which it may be exposed by the Court's decision if the intervention is not granted, and this is clear from the Court's jurisprudence in previous cases. With all due respect, I have the impression that in this case the Court has concentrated too much on the second aspect.

15. In cases of requests for permission to intervene, the alleged legal interest will often not be a separate legal claim of the would-be intervener, whether that claim reflects an interest in the subject-matter of the main case or not. Parties to a dispute will, however, be extra-sensitive with regard to potential interveners which present as their legal interest a claim against one or both of them. In such cases, the Court should, for reasons of judicial policy, already give special attention to the plausibility of the claim and thereby to the specificity of the legal interest. In this respect, it is highly relevant that the Court has explicitly stated that a State which relies on an interest of a legal nature other than in the subject-matter of the case itself necessarily bears the burden of showing with a particular clarity the existence of the interest of a legal nature which it claims to have (paragraph 59 of the Judgment).

16. In the present case the Philippines has, in my opinion, failed to make its claim sufficiently plausible by not providing answers to highly pertinent questions which were put during the oral proceedings. I regret that the Court has not explicitly said so. A State which wishes to intervene should know that, in order to be allowed to do so, it must establish with fully convincing arguments the legal interest which may be affected by the Court's decision.

(Signed) P. H. KOOIJMANS.