INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

TERRITORIAL AND MARITIME DISPUTE

(NICARAGUA *v.* COLOMBIA)

APPLICATION BY COSTA RICA
FOR PERMISSION TO INTERVENE

JUDGMENT OF 4 MAY 2011

2011

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

DIFFÉREND TERRITORIAL ET MARITIME

(NICARAGUA c. COLOMBIE)

REQUÊTE DU COSTA RICA
À FIN D'INTERVENTION

ARRÊT DU 4 MAI 2011

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JUDGMENT

Present: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Xue, Donoghue; *Judges* ad hoc Cot, Gaja; *Registrar* Couvreur.

In the case concerning the territorial and maritime dispute,

between

the Republic of Nicaragua,

represented by

H.E. Mr. Carlos José Argüello Gómez, Ambassador of the Republic of Nicaragua to the Kingdom of the Netherlands,

as Agent and Counsel;

Mr. Alex Oude Elferink, Deputy-Director, Netherlands Institute for the Law of the Sea, Utrecht University,

Mr. Alain Pellet, Professor at the Université de Paris Ouest, Nanterre-La Défense, Member and former Chairman of the International Law Commission, associate member of the Institut de droit international,

Mr. Paul Reichler, Attorney-at-Law, Foley Hoag LLP, Washington D.C., member of the Bars of the United States Supreme Court and the District of Columbia,
Mr. Antonio Remiro Brotóns, Professor of International Law, Universidad Autónoma, Madrid, member of the Institut de droit international,

as Counsel and Advocates;

Mr. Robin Cleverly, M.A., D.Phil, C.Geol, F.G.S., Law of the Sea Consultant, Admiralty Consultancy Services,
Mr. John Brown, Law of the Sea Consultant, Admiralty Consultancy Services,

as Scientific and Technical Advisers;

Mr. César Vega Masís, Director of Juridical Affairs, Sovereignty and Territory, Ministry of Foreign Affairs,
Mr. Julio César Saborio, Juridical Adviser, Ministry of Foreign Affairs,

Mr. Walner Molina Pérez, Juridical Adviser, Ministry of Foreign Affairs,

Ms Tania Elena Pacheco Blandino, Juridical Adviser, Ministry of Foreign Affairs,

as Counsel;

Ms Clara E. Brillembourg, Foley Hoag LLP, member of the Bars of the District of Columbia and New York,
Ms Carmen Martinez Capdevila, Doctor of Public International Law, Universidad Autónoma, Madrid,
Ms Alina Miron, Researcher, Nanterre Centre for International Law (CEDIN), Université de Paris Ouest, Nanterre-La Défense,
Mr. Edgardo Sobenes Obregon, First Secretary, Embassy of Nicaragua in the Kingdom of the Netherlands,

as Assistant Counsel,

and

the Republic of Colombia,

represented by

H.E. Mr. Julio Londoño Paredes, Professor of International Relations, Universidad del Rosario, Bogotá,

as Agent;

H.E. Mr. Guillermo Fernández de Soto, Chair of the Inter-American Juridical Committee, Member of the Permanent Court of Arbitration and former Minister for Foreign Affairs,

as Co-Agent;

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, member of the Institut de droit international, Barrister,
Mr. Rodman R. Bundy, *avocat à la cour d'appel de Paris*, member of the New York Bar, Eversheds LLP, Paris,
Mr. Marcelo Kohen, Professor of International Law at the Graduate Institute of International and Development Studies, Geneva, associate member of the Institut de droit international,

as Counsel and Advocates;

H.E. Mr. Francisco José Lloreda Mera, formerly Ambassador of the Republic of Colombia to the Kingdom of the Netherlands and Permanent Representative of Colombia to the OPCW, former Minister of State,
Mr. Eduardo Valencia-Ospina, Member of the International Law Commission,
H.E. Ms Sonia Pereira Portilla, Ambassador of the Republic of Colombia to the Republic of Honduras,
Mr. Andelfo García González, Professor of International Law, former Deputy Minister for Foreign Affairs,
Ms Victoria E. Pauwels T., Minister-Counsellor, Ministry of Foreign Affairs,

Mr. Julián Guerrero Orozco, Minister-Counsellor, Embassy of Colombia in the Kingdom of the Netherlands,
Ms Andrea Jiménez Herrera, Counsellor, Ministry of Foreign Affairs,

as Legal Advisers;

Mr. Thomas Fogh, Cartographer, International Mapping,

as Technical Adviser;

on the Application for permission to intervene filed by the Republic of Costa Rica,

represented by

H.E. Mr. Edgar Ugalde Alvarez, Ambassador of the Republic of Costa Rica to the Republic of Colombia,

as Agent;

Mr. Coalter G. Lathrop, Lecturing Fellow at Duke University School of Law, member of the North Carolina State Bar, Special Adviser to the Ministry of Foreign Affairs of Costa Rica,
Mr. Sergio Ugalde, Member of the Permanent Court of Arbitration, Senior Adviser to the Ministry of Foreign Affairs, member of the Costa Rican Bar,
Mr. Arnoldo Brenes, Senior Adviser to the Ministry of Foreign Affairs, member of the Costa Rican Bar,
Mr. Carlos Vargas, Director of the Legal Department, Ministry of Foreign Affairs,

as Counsel and Advocates;

H.E. Mr. Jorge Urbina Ortega, Ambassador of the Republic of Costa Rica to the Kingdom of the Netherlands,
Mr. Michael Gilles, Special Adviser to the Ministry of Foreign Affairs,
Mr. Ricardo Otarola, Minister and Consul General of Costa Rica to the Republic of Colombia,
Mr. Christian Guillermet, Ambassador, Deputy Permanent Representative of Costa Rica to the United Nations Office at Geneva,
Mr. Gustavo Campos, Consul General of Costa Rica to the Kingdom of the Netherlands,
Ms Shara Duncan, Counsellor at the Embassy of Costa Rica in the Kingdom of the Netherlands,
Mr. Leonardo Salazar, National Geographic Institute of Costa Rica,

as Advisers,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 6 December 2001, the Republic of Nicaragua (hereinafter "Nicaragua") filed in the Registry of the Court an Application instituting proceedings against the Republic of Colombia (hereinafter "Colombia") in respect of a dispute consisting of a "group of related legal issues subsisting" between the two States "concerning title to territory and maritime delimitation" in the western Caribbean.

As a basis for the jurisdiction of the Court, the Application invoked the provisions of Article XXXI of the American Treaty on Pacific Settlement signed on 30 April 1948, officially designated, according to Article LX thereof, as the "Pact of Bogotá" (hereinafter referred to as such), as well as the declarations made by the Parties under Article 36 of the Statute of the Permanent Court of International Justice, which are deemed, for the period which they still have to run, to be acceptances of the compulsory jurisdiction of the present Court pursuant to Article 36, paragraph 5, of its Statute.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Registrar immediately communicated the Application to the Government of Colombia; and, pursuant to paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to all States parties to the Pact of Bogotá the notifications provided for in Article 63, paragraph 1, of the Statute. In accordance with the provisions of Article 69, paragraph 3, of the Rules of Court, the Registrar moreover addressed to the Organization of American States (hereinafter the "OAS") the notification provided for in Article 34, paragraph 3, of the Statute. The Registrar subsequently transmitted to that organization copies of the pleadings filed in the case and asked its Secretary-General to inform him whether or not it intended to present observations in writing within the meaning of Article 69, paragraph 3, of the Rules of Court. The OAS indicated that it did not intend to submit any such observations.

4. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise its right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Nicaragua first chose Mr. Mohammed Bedjaoui, who resigned on 2 May 2006, and subsequently Mr. Giorgio Gaja. Colombia first chose Mr. Yves Fortier, who resigned on 7 September 2010, and subsequently Mr. Jean-Pierre Cot.

5. By an Order of 26 February 2002, the Court fixed 28 April 2003 as the time-limit for the filing of the Memorial of Nicaragua and 28 June 2004 as the time-limit for the filing of the Counter-Memorial of Colombia. Nicaragua filed its Memorial within the time-limit thus prescribed.

6. On 21 July 2003, within the time-limit set by Article 79, paragraph 1, of the Rules of Court, Colombia raised preliminary objections to the jurisdiction of the Court. Consequently, by an Order of 24 September 2003, the Court, noting that by virtue of Article 79, paragraph 5, of the Rules of Court, the proceedings on the merits were suspended, fixed 26 January 2004 as the time-limit for the presentation by Nicaragua of a written statement of its observations and

submissions on the preliminary objections made by Colombia. Nicaragua filed such a statement within the time-limit thus prescribed, and the case thus became ready for hearing in respect of the preliminary objections.

7. Between 2003 and 2006, referring to Article 53, paragraph 1, of the Rules of Court, the Governments of Honduras, Jamaica, Chile, Peru, Ecuador and Venezuela asked to be furnished with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties pursuant to that same provision, the Court decided to grant each of these requests. The Registrar duly communicated these decisions to the said Governments and to the Parties.

8. The Court held public hearings on the preliminary objections raised by Colombia from 4 to 8 June 2007. In its Judgment of 13 December 2007, the Court concluded that it had jurisdiction, under Article XXXI of the Pact of Bogotá, to adjudicate upon the dispute concerning sovereignty over the maritime features claimed by the Parties, other than the islands of San Andrés, Providencia and Santa Catalina, and upon the dispute concerning the maritime delimitation between the Parties.

9. By an Order of 11 February 2008, the President of the Court fixed 11 November 2008 as the new time-limit for the filing of Colombia's Counter-Memorial. That pleading was duly filed within the time-limit thus prescribed.

10. On 22 September 2008, referring to Article 53, paragraph 1, of the Rules of Court, the Government of the Republic of Costa Rica (hereinafter "Costa Rica") asked to be furnished with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties pursuant to that same provision, the Court decided to grant this request. The Registrar duly communicated this decision to the Costa Rican Government and to the Parties.

11. By an Order of 18 December 2008, the Court directed Nicaragua to submit a Reply and Colombia to submit a Rejoinder and fixed 18 September 2009 and 18 June 2010 as the respective time-limits for the filing of those pleadings. The Reply and the Rejoinder were duly filed within the time-limits thus prescribed.

12. On 25 February 2010, Costa Rica filed an Application for permission to intervene in the case pursuant to Article 62 of the Statute. In this Application, it stated in particular that its intervention "would have the limited purpose of informing the Court of the nature of Costa Rica's legal rights and interests and of seeking to ensure that the Court's decision regarding the maritime boundary between Nicaragua and Colombia does not affect those rights and interests". In accordance with Article 83, paragraph 1, of the Rules of Court, certified copies of Costa Rica's Application were communicated forthwith to Nicaragua and Colombia, which were invited to furnish written observations on that Application.

13. On 26 May 2010, within the time-limit fixed for that purpose by the Court, the Governments of Nicaragua and Colombia submitted Written Observations on Costa Rica's Application for permission to intervene. In its observations, Nicaragua set forth the grounds on which, in particular, it considered that this Application failed to comply with the Statute and the Rules of Court. For its part, Colombia indicated in its observations the reasons for which it had no objection to the said Application. The Court having considered that Nicaragua

had objected to the Application, the Parties and the Government of Costa Rica were notified by letters from the Registrar dated 16 June 2010 that the Court would hold hearings, in accordance with Article 84, paragraph 2, of the Rules of Court, to hear the observations of Costa Rica, the State applying to intervene, and those of the Parties to the case.

14. After ascertaining the views of the Parties, the Court decided that copies of the Written Observations which they had furnished on Costa Rica's Application for permission to intervene would be made accessible to the public on the opening of the oral proceedings.

15. At the public hearings held on 11, 13, 14 and 15 October 2010 on whether to grant Costa Rica's Application for permission to intervene, the Court heard the oral arguments and replies of the following representatives:

For Costa Rica: H.E. Mr. Edgar Ugalde Alvarez, *Agent*,
Mr. Arnoldo Brenes,
Mr. Carlos Vargas,
Mr. Coalter G. Lathrop,
Mr. Sergio Ugalde.

For Nicaragua: H.E. Mr. Carlos José Argüello Gómez, *Agent*,
Mr. Antonio Remiro Brotóns,
Mr. Paul Reichler.

For Colombia: H.E. Mr. Julio Londoño Paredes, *Agent*,
Mr. Rodman R. Bundy,
Mr. James Crawford.

16. At the hearings, questions were put to the Parties and to Costa Rica by Members of the Court, to which replies were given orally and in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. The Parties and Costa Rica each submitted written comments on the written replies provided by the others after the closure of the oral proceedings.

*

17. In its Application for permission to intervene, the Costa Rican Government stated in conclusion that it

> "respectfully requests [the Court's] permission to intervene in the present proceedings between Nicaragua and Colombia for the object and purpose stated in the present Application, and to participate in those proceedings in accordance with Article 85 of the Rules of Court" (para. 31).

In its Written Observations on Costa Rica's Application for permission to intervene, Nicaragua submitted

> "that the Application filed by Costa Rica requesting permission to intervene fails to comply with the Statute and the Rules of Court",

and that it

> "leaves it to the discretion of the Court to adjudge and determine whether Costa Rica has complied with the legal requirements necessary to base a right to intervene in the present proceedings and, hence whether the request of Costa Rica should be granted".

In its Written Observations on Costa Rica's Application for permission to intervene, Colombia concluded as follows:

> "the Government of Colombia has no objection to the intervention of Costa Rica.
>
> Notwithstanding the fact that Colombia considers that Costa Rica has satisfied the requirements of Article 62 of the Statute and Article 81 of the Rules of Court, Colombia wishes to emphasize that it disagrees with certain points raised in Costa Rica's Application. Colombia reserves its position on these points which it will explain at the appropriate stage of the proceedings."

18. At the oral proceedings, the following submissions were presented:

On behalf of the Government of Costa Rica,

at the hearing of 14 October 2010:

> "[The Court is] respectfully request[ed] . . . to grant the Republic of Costa Rica the right to intervene, in order to inform the Court of its interests of a legal nature which might be affected by the decision in this case, according to Article 62 of the Statute.
>
> . . . . . .
>
> [Costa Rica] seek[s] the application of the provisions of Article 85 of the Rules of Court, namely:
>
> — Paragraph 1: 'the intervening State shall be supplied with copies of the pleadings and documents annexed and shall be entitled to submit a written statement within a time-limit to be fixed by the Court', and
> — Paragraph 3: 'The intervening State shall be entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention.'"

On behalf of the Government of Nicaragua,

at the hearing of 15 October 2010:

> "In accordance with Article 60 of the Rules of Court and having regard to the Application for permission to intervene filed by the Republic of Costa Rica and oral pleadings, the Republic of Nicaragua respectfully submits that:
>
> The Application filed by the Republic of Costa Rica fails to comply with the requirements established by the Statute and the Rules of Court, namely, Article 62, and paragraph 2, *(a)* and *(b)* of Article 81 respectively."

On behalf of the Government of Colombia,

at the hearing of 15 October 2010:

> "In light of the considerations stated during these proceedings, [the] Government [of Colombia] wishes to reiterate what it stated in the Written Observations it submitted to the Court, to the effect that, in Colombia's view, Costa Rica has satisfied the requirements of Article 62 of the Statute and, consequently, that Colombia does not object to Costa Rica's request for permission to intervene in the present case as a non-party."

* * *

19. In its Application for permission to intervene dated 25 February 2010 (see paragraph 12 above), Costa Rica specified that it wished to intervene in the case as a non-party State for the "purpose of informing the Court of the nature of Costa Rica's legal rights and interests and of seeking to ensure that the Court's decision regarding the maritime boundary between Nicaragua and Colombia does not affect those rights and interests". Costa Rica also indicated that it had no intention of intervening in those aspects of the proceedings that relate to the territorial dispute.

20. Referring to Article 81 of the Rules of Court, Costa Rica set out in its Application what it considers to be the interest of a legal nature which may be affected by the Court's decision on the delimitation between Nicaragua and Colombia, the precise object of its intervention, and the basis of jurisdiction which is claimed to exist as between itself and the Parties to the main proceedings.

I. The Legal Framework

21. The legal framework of Costa Rica's request to intervene is set out in Article 62 of the Statute and Article 81 of the Rules of Court.

Under Article 62 of the Statute:

> "1. 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.
>
> 2. It shall be for the Court to decide upon this request."

Under Article 81 of the Rules of Court:

> "1. An application for permission to intervene under the terms of Article 62 of the Statute, signed in the manner provided for in Article 38, paragraph 3, of these Rules, shall be filed as soon as possible, and not later than the closure of the written proceedings. In exceptional circumstances, an application submitted at a later stage may however be admitted.
>
> 2. The application shall state the name of an agent. It shall specify the case to which it relates, and shall set out:
>
> *(a)* the interest of a legal nature which the State applying to intervene considers may be affected by the decision in that case;
> *(b)* the precise object of the intervention;
> *(c)* any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case.
>
> 3. The application shall contain a list of the documents in support, which documents shall be attached."

22. Intervention being a procedure incidental to the main proceedings before the Court, it is, according to the Statute and the Rules of Court, for the State seeking to intervene to set out the interest of a legal nature which it considers may be affected by the decision in that dispute, the precise

object it is pursuing by means of the request, as well as any basis of jurisdiction which is claimed to exist as between it and the parties. The Court will examine in turn these constituent elements of the request for permission to intervene, as well as the evidence in support of that request.

* *

1. The Interest of a Legal Nature which May Be Affected

23. The Court observes that, as provided for in the Statute and the Rules of Court, the State seeking to intervene shall set out its own interest of a legal nature in the main proceedings, and a link between that interest and the decision that might be taken by the Court at the end of those proceedings. In the words of the Statute, this is "an interest of a legal nature which may be affected by the decision in the case" (expressed more explicitly in the English text than in the French "un intérêt d'ordre juridique . . . pour lui en cause"; see Article 62 of the Statute).

24. The finding by the Court of the existence of these elements is therefore a necessary condition to permit the requesting State to intervene, within the limits that it considers appropriate:

> "If a State can satisfy the Court that it has an interest of a legal nature which may be affected by the decision in the case, it may be permitted to intervene in respect of that interest." (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 116, para. 58.)

25. It is indeed for the Court, being responsible for the sound administration of justice, to decide in accordance with Article 62, paragraph 2, of the Statute on the request to intervene, and to determine the limits and scope of such intervention. Whatever the circumstances, however, the condition laid down by Article 62, paragraph 1, shall be fulfilled.

26. The Court observes that, whereas the parties to the main proceedings are asking it to recognize certain of their rights in the case at hand, a State seeking to intervene is, by contrast, contending, on the basis of Article 62 of the Statute, that the decision on the merits could affect its interests of a legal nature. The State seeking to intervene as a non-party therefore does not have to establish that one of its rights may be affected; it is sufficient for that State to establish that its interest of a legal nature may be affected. Article 62 requires the interest relied upon by the State seeking to intervene to be of a legal nature, in the sense that this interest 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. But this is not just any kind of interest of a legal nature; it must in addition be possible for it to be affected, in its content and scope, by the Court's future decision in the main proceedings.

Accordingly, an interest of a legal nature within the meaning of Article 62 does not benefit from the same protection as an established right and is not subject to the same requirements in terms of proof.

27. The decision of the Court granting permission to intervene can be understood as a preventive one, since it is aimed at allowing the intervening State to take part in the main proceedings in order to protect an interest of a legal nature which risks being affected in those proceedings. As to the link between the incidental proceedings and the main proceedings, the Court has previously stated 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*." (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, p. 596, para. 47.)

28. It is for the Court to assess the interest of a legal nature which may be affected that is invoked by the State that wishes to intervene, on the basis of the facts specific to each case, and it can only do so "*in concreto* and in relation to all the circumstances of a particular case" (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 118, para. 61).

2. The Precise Object of the Intervention

29. Under Article 81, paragraph 2 *(b)*, of the Rules of Court, an application for permission to intervene must set out "the precise object of the intervention".

30. Costa Rica asserts that the purpose of it requesting permission to intervene as a non-party is to protect the rights and interests of a legal nature of Costa Rica in the Caribbean Sea by all legal means available and, therefore, to make use of the procedure established for this purpose by Article 62 of the Statute of the Court. It thus seeks to inform the Court of the nature of Costa Rica's rights and interests of a legal nature that could be affected by the Court's maritime delimitation decision between Nicaragua and Colombia. Costa Rica has pointed out that, in order to inform the Court of its rights and interests of a legal nature and ensure that they are protected in the forthcoming judgment, it is not necessary "to establish the existence of a dispute or to resolve one with the Parties to this case".

31. Nicaragua asserts that Costa Rica has failed to identify the precise object of its intervention, and that its "vague" object of informing the Court of its alleged rights and interests in order to ensure their protection is insufficient.

32. Colombia, on the other hand, considers that Costa Rica has satisfied the requirements of Article 62 of the Statute and Article 81 of the Rules of Court.

*

33. In the opinion of the Court, the precise object of the request to intervene certainly consists in informing the Court of the interest of a legal nature which may be affected by its decision in the dispute between Nicaragua and Colombia, but the request is also aimed at protecting that interest. Indeed, if the Court acknowledges the existence of a Costa Rican interest of a legal nature which may be affected and allows that State to intervene, Costa Rica will be able to contribute to the protection of such an interest throughout the main proceedings.

34. The Court recalls that the Chamber formed to deal with the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, when considering the request for permission to intervene submitted by Nicaragua in that case, stated that "[s]o far as the object of Nicaragua's intervention is 'to inform the Court of the nature of the legal rights of Nicaragua which are in issue in the dispute', it cannot be said that this object is not a proper one: it seems indeed to accord with the function of intervention" (*Judgment, I.C.J. Reports 1990*, p. 130, para. 90). The Chamber also considered Nicaragua's second purpose "of seeking to ensure that the determinations of the Chamber did not trench upon the legal rights and interests of the Republic of Nicaragua", and concluded that, even though the expression "trench upon the legal rights and interests" is not found in Article 62 of the Statute, "it is perfectly proper, and indeed the purpose of intervention, for an intervener to inform the Chamber of what it regards as its rights or interests, in order to ensure that no legal interest may be 'affected' without the intervener being heard" *(ibid.)*.

35. The Court is of the view that the object of the intervention, as indicated by Costa Rica, is in conformity with the requirements of the Statute and the Rules of Court, since Costa Rica seeks to inform the Court of its interest of a legal nature which may be affected by the decision in the case, in order to allow that interest to be protected.

36. The Court points out, moreover, that the written and oral proceedings concerning the Application for permission to intervene must focus on demonstrating the interest of a legal nature which may be affected; these proceedings are not an occasion for the State seeking to intervene or for the Parties to discuss questions of substance relating to the main proceedings, which the Court cannot take into consideration during its examination of whether to grant a request for permission to intervene.

3. The Basis and Extent of the Court's Jurisdiction

37. As regards the basis of jurisdiction, Costa Rica, while informing the Court that it has made a declaration under Article 36, paragraph 2, of the Statute and is a party to the Pact of Bogotá, specified that it is seeking to intervene as a non-party State and that, accordingly, it has no need to set out a basis of jurisdiction as between itself and the Parties to the dispute.

38. In this respect the Court observes that its Statute does not require, as a condition for intervention, the existence of a basis of jurisdiction between the parties to the proceedings and the State which is seeking to intervene as a non-party.

As the Chamber of the Court formed to deal with the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* stated:

> "It . . . follows . . . from the juridical nature and from the purposes of intervention that the existence of a valid link of jurisdiction between the would-be intervener and the parties is not a requirement for the success of the application. On the contrary, the procedure of intervention is to ensure that a State with possibly affected interests may be permitted to intervene even though there is no jurisdictional link and it therefore cannot become a party." (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 135, para. 100.)

39. By contrast, such a basis of jurisdiction is required if the State seeking to intervene intends to become itself a party to the case (see *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, p. 589, para. 35).

40. Nicaragua did not contest, on jurisdictional grounds, the right of Costa Rica to seek protection of its interest on the basis of Article 62 of the Statute. It has merely recalled that "the relative effect of the Court's decision which, according to Article 59 of the Statute, 'has no binding force except between the parties and in respect of that particular case', is that it helps to protect third States' interests of all kinds". In addition, Nicaragua has pointed out that Costa Rica has the choice to institute principal proceedings, which would enable it to ensure the recognition of its legal interests going beyond their mere protection.

41. As regards the relative effect of the Court's decision in a case which is brought before it, the Court has previously observed that "the protection afforded by Article 59 of the Statute may not always be sufficient" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 421, para. 238).

42. As for the possibility available to a State of bringing principal proceedings before the Court, that in no way removes its right under Article 62 of the Statute to apply to the Court for permission to intervene.

Where the Court permits intervention, it may limit the scope thereof and allow intervention for only one aspect of the subject-matter of the Application which is before it. As the Chamber of the Court formed to deal with the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* noted: "[t]he scope of the intervention in this particular case, in relation to the scope of the case as a whole, necessarily involves limitations of the right of the intervener to be heard" (*Judgment, I.C.J. Reports 1990*, p. 136, para. 103; see also *ibid.*, para. 104).

43. Thus, Article 85, paragraph 3, of the Rules of Court provides that, if an application is granted, "[t]he intervening State shall be entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention". Clearly, this applies to the subject-matter as defined by the Court, for the purposes of its decision permitting intervention.

4. The Evidence in Support of the Request to Intervene

44. Article 81, paragraph 3, of the Rules of Court provides that "[t]he application shall contain a list of the documents in support, which documents shall be attached".

45. In its Written Observations on Costa Rica's Application for permission to intervene, Nicaragua points out that Costa Rica

> "did not attach documents or any clear elements of proof of its contentions. This lack of supporting documentation, or even illustrations, makes it even more difficult to determine exactly what are the legal interests claimed by Costa Rica."

46. Costa Rica, for its part, states that the attachment of documents to an Application for permission to intervene is not an obligation and that, in any event, it is a matter for it to choose the evidence in support of its Application.

Moreover, Costa Rica distinguishes between two stages of the proceedings in terms of the standard of proof which is required of it: submission of the Application for permission to intervene and, once that Application has been granted by the Court, participation in the oral proceedings on the merits of the case. According to Costa Rica, it is not obliged, at the current stage of the proceedings, to set forth in full every argument that will be made in the subsequent stage. It is thus sufficient for it to demonstrate the existence of a legal interest that may be affected by the decision of the Court, without going any further.

Accordingly, Costa Rica argues that it is not its purpose to inform the Court, at this stage, of the full extent of its interest, which will occur in the second stage of the intervention proceedings, when it will inform the Court on the subject in detail and in full. In any event, for Costa Rica, the initial stage cannot be a substitute for the second stage in providing the Court with information.

47. Nicaragua, by contrast, takes the view that Costa Rica has informed the Court, at this stage of the proceedings, of the content and scope of what it considers to be its interests of a legal nature which may be affected by the decision in the dispute brought before the Court, and that it has thereby accomplished the mission which it had set for itself.

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48. The Court recalls that, since the State seeking to intervene bears the burden of proving the interest of a legal nature which it considers may

be affected, it is for that State to decide which documents, including illustrations, are to be attached to its application. Article 81, paragraph 3, of the Rules of Court only obliges the State in question, should it decide to attach documents to its application, to provide a list thereof (see *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, p. 587, para. 29).

49. The evidence required from the State seeking to intervene cannot be described as restricted or summary at this stage of the proceedings, because, essentially, the State must establish the existence of an interest of a legal nature which may be affected by the decision of the Court. Since the object of its intervention is to inform the Court of that legal interest and to ensure it is protected, Costa Rica must convince the Court, at this stage, of the existence of such an interest; once that interest has been recognized by the Court, it will be for Costa Rica to ensure, by participating in the proceedings on the merits, that such interest is protected in the judgment which is subsequently delivered.

50. Consequently, it is for the State seeking to intervene to produce all the evidence it has available in order to secure the decision of the Court on this point.

51. This does not prevent the Court, if it rejects the application for permission to intervene, from taking note of the information provided to it at this stage of the proceedings. As the Court has already stated, "[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" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, p. 26, para. 43).

II. Examination of Costa Rica's Application for Permission to Intervene

52. The Court recalls that, in its Application, Costa Rica requests the Court's permission to intervene as a non-party (see paragraph 37 above) and maintains that its Application satisfies the requirements of Article 62 of the Statute and of Article 81 of the Rules of Court.

* *

The Interest of a Legal Nature Claimed by Costa Rica

53. The Court will now turn to consider whether Costa Rica has sufficiently set out an "interest of a legal nature" which may be affected by the decision of the Court in the main proceedings. The Court will examine both of the elements, namely the existence of an interest of a legal nature on the part of Costa Rica and the effects that the Court's eventual decision on the merits might have on this interest, in order for the request for inter-

vention to succeed (see *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 19, para. 33).

54. In its Application, Costa Rica states that its:

> "interest of a legal nature which may be affected by the decision of the Court is Costa Rica's interest in the exercise of its sovereign rights and jurisdiction in the maritime area in the Caribbean Sea to which it is entitled under international law by virtue of its coast facing on that sea".

It takes the view that the arguments developed by Nicaragua and Colombia in their delimitation dispute affect its legal interest, which it wishes to assert before the Court. According to Costa Rica, such interest is established in reference to the "hypothetical delimitation scenario between Costa Rica and Nicaragua" and, consequently, if it does not intervene, "the delimitation decision in this case may affect the legal interest of Costa Rica".

55. Costa Rica has indicated that the area in question is bounded in the north by a putative equidistance line with Nicaragua and in the east by a line that is 200 nautical miles from Costa Rica's coast, which was identified as the "minimum area of interest" of Costa Rica.

At the hearings, the geographical scope of Costa Rica's claimed interest was clearly depicted through several illustrations, in many of which the area in dispute in the main proceedings and the "minimum area of interest" of Costa Rica were shown in distinctive colours, used as references in later submissions (see sketch-map, p. 366). Costa Rica has explained that

> "[the] set, in light red, is the part of the Caribbean Sea in dispute between the Parties in this case, and is the very subject-matter of the delimitation case between Nicaragua and Colombia . . . The other set, in blue, is the part of the Caribbean Sea in which Costa Rica has an interest of a legal nature. It is bounded by an agreed boundary with Panama, a notional boundary with Nicaragua and the outer limits of Costa Rica's EEZ entitlement. The purple or the dark blue area is the intersection of the two sets. It represents the area in dispute in this case in which Costa Rica has a legal interest."

56. The Court notes that Costa Rica initially claimed to have an interest in ensuring that its rights and interests under the 1977 Facio-Fernández Treaty with Colombia, which it signed but did not ratify, are not affected by the Court's decision. However, in response to a question put by a Member of the Court, it acknowledged that neither the assumptions underlying the 1977 Treaty, referred to in its Application and oral submissions, nor the "1977 agreement itself constitute an interest of a legal

nature that may be affected by the decision in this case *per se*". Costa Rica clarified therein that it

> "has not asked the Court to adjudicate the legal merits of the notions underpinning the 1977 agreement. Instead, Costa Rica has simply brought to the Court's attention the implications for the geographic scope of Costa Rica's legal interest, should the Court's decision affect its neighbourly relationships in the vicinity of the 1977 agreement. . . ." (See sketch-map, p. 366.)

Finally, Costa Rica states that "it does not seek any particular outcome from this case in relation to this Treaty".

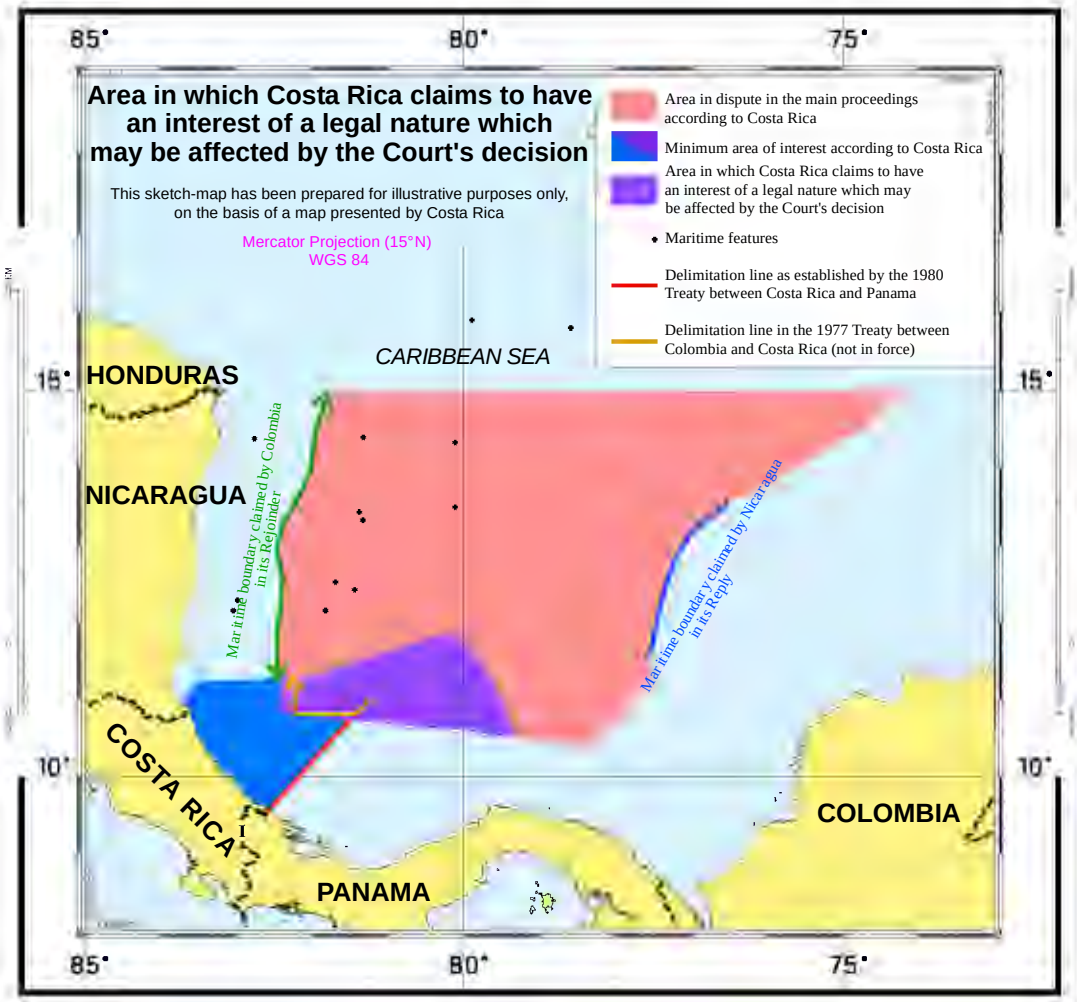
57. Costa Rica contends that its interest is of a legal nature because it is manifest in its Constitution, its domestic laws and regulations, and the international agreements it has concluded.

58. For its part, Nicaragua asserts that the mere fact that Costa Rica and Nicaragua are neighbours and the absence of a lateral maritime delimitation line are not enough to justify the existence of a relevant interest for intervening in the delimitation between the opposite coasts of Nicaragua and Colombia. For Nicaragua,

> "[s]imply voicing a legal claim is not enough for that application to be granted. It is necessary, absolutely necessary, that this claim, proper, real and present, should be affected by the decision which the Court will one day deliver to settle the dispute before it . . . To some extent it is speculation, but speculation based on plausible arguments."

59. Concerning Costa Rica's "minimum area of interest", Nicaragua claims that "Costa Rica's legal interests are confined to a smaller area", which must be bounded by the lines agreed in the treaties with Colombia and Panama (see sketch-map, p. 366). Although Nicaragua recognizes that Costa Rica is not formally bound by the 1977 Treaty, in the absence of its ratification, it asserts that Costa Rica is bound, by its consistent conduct for over 30 years, to its obligations under the treaty; consequently, Costa Rica's interests stop at that treaty line.

60. Nicaragua emphasizes that "the Statute requires the existence of an interest of a legal nature, which excludes interests of all other kinds, whether political, economic, geostrategic or simply material, unless they are connected with a legal interest". Nicaragua concludes that Costa Rica "has not . . . managed to show the existence of a direct, concrete and present legal interest of its own, which is a necessary premise of any intervention. It has not managed to show that this exists in the context of the dispute between Nicaragua and Colombia", but has rather shown that it has



> "legal interests in the delimitation with its neighbour Nicaragua . . . [and] that it is presenting itself as a party — not to the dispute between Nicaragua and Colombia — but to a dispute between itself and Nicaragua regarding the maritime delimitation between the two countries".

61. Colombia, for its part, shares Costa Rica's conclusion that the latter has rights and interests of a legal nature which may be affected by the decision in the main proceedings. Colombia contends that "[t]he legal rights and interests of Costa Rica . . . include the legal rights and obligations that [the latter has] subscribed to in the delimitation agreements with Colombia". Therefore, according to Colombia, Costa Rica has a legal interest relating to the maritime areas delimited by the 1977 Treaty, as well as in the delimitation of an eventual tripoint between Costa Rica, Colombia and Nicaragua.

62. With reference to Costa Rica's "minimum area of legal interest" as depicted at the hearings, Colombia deems this claimed maritime area to be "in acute tension with the long-standing position of Costa Rica as to the maritime entitlements of Colombia's islands".

63. Colombia disputes Nicaragua's assertion that Costa Rica has no interest in areas going beyond the line of the 1977 Treaty. In Colombia's view, while Costa Rica's claims are limited to the areas defined by the treaty vis-à-vis Colombia, it is not limited to claiming only these areas vis-à-vis Nicaragua. In its comments on Costa Rica's response to a question put to it by a Member of the Court, Colombia reaffirms the validity of the 1977 Treaty's boundary lines, despite its non-ratification, since the treaty "has been given effect for more than 30 years".

64. Colombia concludes that: "Costa Rica has a legal interest as against Nicaragua in relation to at least some areas claimed by the latter in these proceedings and going beyond those lines".

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65. The Court notes that, although Nicaragua and Colombia differ in their assessment as to the limits of the area in which Costa Rica may have a legal interest, they recognize the existence of Costa Rica's interest of a legal nature in at least some areas claimed by the parties to the main proceedings. The Court however is not called upon to examine the exact geographical parameters of the maritime area in which Costa Rica considers it has an interest of a legal nature.

66. The Court recalls that the Chamber in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, when rejecting Nicaragua's Application for permission to intervene with respect to any question of delimitation within the Gulf of Fonseca, stated that

> "the essential difficulty in which the Chamber finds itself, on this matter of a possible delimitation within the waters of the Gulf, is that Nicaragua did not in its Application indicate any maritime spaces in

> which Nicaragua might have a legal interest which could be said to be affected by a possible delimitation line between El Salvador and Honduras" (*Judgment, I.C.J. Reports 1990*, p. 125, para. 78).

In the present case, by contrast, Costa Rica has indicated the maritime area in which it considers it has an interest of a legal nature which may be affected by the decision of the Court in the main proceedings (see paragraphs 54-55 above).

* *

67. The indication of this maritime area is however not sufficient in itself for the Court to grant Costa Rica's Application for permission to intervene. Under Article 62 of the Statute, it is not sufficient for a State applying to intervene to show that it has an interest of a legal nature which is the object of a claim based on law, in the maritime area in question; it must also demonstrate that this interest may be affected by the decision in the main proceedings, as the Court has pointed out in paragraph 26 of this Judgment.

68. Costa Rica contends that it need only show that a delimitation decision could affect its legal interest, and that such would be the case if it is shown that there is any "overlap whatsoever between the area in which Costa Rica has a legal interest . . . and the area in dispute between the Parties to this case". In Costa Rica's view, there is a rather large overlap between these two areas, of approximately 30,000 km^2. Costa Rica submits that this area of overlap, which was depicted in purple at the hearings, is sufficient to demonstrate that the delimitation decision in this case may affect the legal interest of Costa Rica (see sketch-map, p. 366). It also contends that Nicaragua has failed to clarify where the line representing the southern limit of its claims would be located, thus leaving Costa Rica in uncertainty. Specifically, Costa Rica asserts that even the most northerly southern limit of the areas claimed by Nicaragua in its written pleadings would encroach on Costa Rica's entitlements.

69. Costa Rica further contends that the location of the southern terminus of the boundary between Nicaragua and Colombia which, in its view, will be decided by the Court may also affect its legal interest in the area, inasmuch as the southern endpoint may be placed in Costa Rica's potential area of interest.

70. Initially, Costa Rica argued that the relationship between its area of interest and the 1977 Treaty's line may be affected by the Court's decision in the main proceedings. It claimed at the time that Nicaragua's asserted boundary claims against Colombia, should they prevail, would not only have the effect of eliminating Costa Rica's boundary relationships with Colombia in the Caribbean Sea, but would also affect the location of Costa Rica's tripoint with Colombia and Nicaragua. Under such a ruling, Costa Rica contended, "the entire basis on which the 1977 line was negotiated would be eliminated by creating a zone of non-Colombian

waters immediately north and east of the 1977 line, thus rendering the agreement between Costa Rica and Colombia without purpose". Costa Rica asserted as well that Colombia has also made a boundary claim in the case that could affect Costa Rica's rights and interests in relation with the 1977 Treaty's line. The boundary claimed by Colombia against Nicaragua, in Costa Rica's view, "is situated west of the line of longitude agreed to separate Costa Rican and Colombian maritime areas and, thereby, encompasses area that would go to Costa Rica under the terms of their 1977 agreement". If Colombia's claims were to prevail, the decision would affect Costa Rica's rights under the 1977 Treaty, as well as the location of Costa Rica's tripoint with Colombia and Nicaragua.

71. However, in its response to a question put to it by a Member of the Court, Costa Rica has acknowledged that the 1977 Treaty does not itself constitute an interest of a legal nature that may be affected by the decision in this case and that it does not seek any particular outcome from this case in relation to this Treaty (see paragraph 56 above).

72. Accordingly, there is no need for the Court to consider Costa Rica's arguments contained in paragraph 70 above or the contentions set forth by Nicaragua and Colombia in response to those arguments.

73. Finally, Costa Rica asserts that its interests could be affected even if the Court places a directional arrow at the end of the boundary line between Nicaragua and Colombia that does not actually touch Costa Rica's potential interests. Costa Rica contends that the Court cannot be sure to place such a directional arrow a safe distance away from Costa Rica's area of interests without it providing "full information about the extent of [its] interests" to the Court by way of intervention.

74. Nicaragua, for its part, notes that since the Parties do not seek delimitation in Costa Rica's area of interest, "Costa Rica's interests will not — cannot — be affected by the decision in this case".

75. Nicaragua reiterates that "it does not seek from the Court any delimitation in the area in which Costa Rica now considers itself to have legal interests". Nicaragua explains that Nicaragua's boundary claims, if adopted by the Court, would not impact this area because the enclaves Nicaragua has placed around San Andrés or any other Colombian islands do not encroach on Costa Rica's area of interest and the line claimed by Nicaragua does not impact the said area either. Nicaragua does not read Colombia's written pleadings as calling for delimitation of, or within, the areas in which Costa Rica has expressed an interest, either.

76. Nicaragua asserts that

> "even if the Court were to take Costa Rica's new definition of its legal interest into consideration, the result would be the same . . . Even the

> expanded area now claimed by Costa Rica as its area of legal interest cannot be affected by the decision of the Court in this case, under any circumstances, because the Court cannot and does not delimit in any area claimed by a third State."

77. Colombia disputes Costa Rica's contention that Colombia's own claims in the case would affect Costa Rica's interests. Colombia asserts that its claims leave open the endpoints of the delimitation so as not to affect third-State interests.

78. Nicaragua contends that Costa Rica is protected by Article 59 of the Statute and the practice of the Court in maritime delimitation cases in that third States' interests are left unaffected. Nicaragua has argued that Costa Rica's intervention should be disallowed because the interest of a legal nature it claims to have would not be affected by the decision of the Court.

79. Costa Rica considers this argument to be flawed for three reasons:

> "[F]irst, Article 59 protection is, in practical terms, insufficient. Second, the avenues suggested by Nicaragua do not provide the Court with what it needs, namely, complete and correct information about Costa Rica's interests that may be affected by the decision of the Court. And third, bringing new claims to protect legal interests, that otherwise could be protected by means of Article 62, is inefficient, unnecessary and only serves to compound the problem faced by the Court in this case, which is, lack of information about the true extent of Costa Rica's interests."

Costa Rica relies in this regard on the Court's finding in the case concerning *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)* (see paragraph 41 above).

80. Costa Rica argues that Article 59 does not offer sufficient protection in practical terms because

> "[a] judgment by this Court, delimiting maritime areas between Nicaragua and Colombia, implies much more than the allocation of the column of water and sea-bed to the Parties. It entails title to maritime areas, the right to exercise their sovereign rights and jurisdiction under international law in those areas, the right to exclude others from them and the right of enjoyment"

and may prompt States to "incorporate into their own legal framework that final and binding judgment".

81. Although Nicaragua acknowledges that a judgment by the Court may have legal consequences for third States, it nevertheless considers that in order to be allowed to intervene, a State must establish that the decision by the Court will affect its legal interest, which Costa Rica has

failed to do. Nicaragua emphasizes that the test for intervention, as the Court stated when it ruled on Italy's Application to intervene,

> "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 *en cause*, or is likely to be affected by the decision" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, p. 25, para. 40).

82. Nicaragua asserts that the only effect of a Court judgment favourable to Nicaragua is that Costa Rica could attempt to claim a delimitation vis-à-vis Nicaragua that would extend beyond the limits it accepted with Colombia. If, in contrast, Colombia is favoured, the 1977 Treaty would dictate the obligations of the parties in this respect.

83. In any event, according to Nicaragua, "Article 59, and the consistent practice of the Court in avoiding running into third States' interests, assure the relational nature of the delimitation in question in this case".

84. Colombia, for its part, contends that Article 62 co-exists in the Statute with Articles 59 and 63 and that each of these provisions has its own role to play. While Colombia agrees that Article 59 affords some protection, it believes that States which comply with the requirements of Article 62 should be allowed to intervene.

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85. The Court recalls that it has stated in the past that "in the case of maritime delimitations where the maritime areas of several States are involved, the protection afforded by Article 59 of the Statute may not always be sufficient" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 421, para. 238).

At the same time, it is equally true, as the Chamber of the Court noted in its Judgment on the Application by Nicaragua for permission to intervene in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, that

> "the taking into account of all the coasts and coastal relationships . . . as a geographical fact for the purpose of effecting on eventual delimitation as between two riparian States . . . in no way signifies that by such an operation itself the legal interest of a third . . . State . . . may be affected" (*Judgment, I.C.J. Reports 1990*, p. 124, para. 77).

Furthermore, in the case concerning *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)*, the Court, after noting that "the delimitation

[between Romania and Ukraine] will occur within the enclosed Black Sea, with Romania being both adjacent to, and opposite Ukraine, and with Bulgaria and Turkey lying to the south" (*Judgment, I.C.J. Reports 2009*, p. 100, para. 112), stated that "[i]t will stay north of any area where third party interests could become involved" *(ibid.)*.

86. It follows that a third State's interest will, as a matter of principle, be protected by the Court, without it defining with specificity the geographical limits of an area where that interest may come into play (see also paragraph 65 above). The Court wishes to emphasize that this protection is to be accorded to any third State, whether intervening or not. For instance, in its Judgment concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)*, the Court adopted the same position with regard to Equatorial Guinea, which had intervened as a non-party, and to Sao Tome and Principe, which had not (*I.C.J. Reports 2002*, p. 421, para. 238).

87. The Court, in its above-mentioned Judgment, had occasion to indicate the existence of a certain relationship between Articles 62 and 59 of the Statute. Accordingly, 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, i.e., Costa Rica must fulfil the requirement of Article 62, paragraph 1, by showing that an interest of a legal nature which it has in the area "may be affected" by the decision in the case (see paragraph 26 above).

88. The Court recalls in this connection that, in the present case, Colombia has not requested that the Court fix the southern endpoint of the maritime boundary that it has to determine. Indeed, as the Court noted earlier (para. 77), Colombia asserts that its claims deliberately leave open the endpoints of the delimitation so as not to affect third State's interests. The Court further recalls that Nicaragua has agreed "that any delimitation line established by the Court should stop well short of the area [in which, according to Costa Rica, it has an interest of a legal nature,] and terminate [with] an arrow pointing in the direction of Costa Rica's area".

89. In the present case, Costa Rica's interest of a legal nature may only be affected if the maritime boundary that the Court has been asked to draw between Nicaragua and Colombia were to be extended beyond a certain latitude southwards. The Court, following its jurisprudence, when drawing a line delimiting the maritime areas between the Parties to the main proceedings, will, if necessary, end the line in question before it reaches an area in which the interests of a legal nature of third States may be involved (see *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 100, para. 112).

90. In view of the above, the Court concludes that Costa Rica has not demonstrated that it has an interest of a legal nature which may be affected by the decision in the main proceedings.

* * *

91. For these reasons,

THE COURT,

By nine votes to seven,

Finds that the Application for permission to intervene in the proceedings filed by the Republic of Costa Rica under Article 62 of the Statute of the Court cannot be granted.

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Xue; *Judge* ad hoc Cot;

AGAINST: *Judges* Al-Khasawneh, Simma, Abraham, Cançado Trindade, Yusuf, Donoghue; *Judge* ad hoc Gaja.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this fourth day of May, two thousand and eleven, in four copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Nicaragua, the Government of the Republic of Colombia, and the Government of the Republic of Costa Rica, respectively.

(Signed) Hisashi OWADA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judges AL-KHASAWNEH and ABRAHAM append dissenting opinions to the Judgment of the Court; Judge KEITH appends a declaration to the Judgment of the Court; Judges CANÇADO TRINDADE and YUSUF append a joint dissenting opinion to the Judgment of the Court; Judge DONOGHUE appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* GAJA appends a declaration to the Judgment of the Court.

(Initialled) H.O.

(Initialled) Ph.C.

DISSENTING OPINION OF JUDGE AL-KHASAWNEH

The test of the "interest of a legal nature which may be affected" under Article 62 is a liberal one — The Court's persistently restrictive approach to Article 62 intervention — Protection of third State interests in maritime delimitation cases — Protection of third State interests under Article 59 cannot substitute for protection under Article 62 — The decision on intervention request should be made on the basis of Article 62 and not on the basis of general policy considerations or on the basis of the relative protection of Article 59 — Costa Rica's Application to intervene should have been granted — The concept of an interest of a legal nature — There is no distinction between an "interest of a legal nature" and a "right" for the purposes of intervention — The Court's attempt to define the concept of an "interest of a legal nature" is unnecessary in the present case and does not bring clarity.

1. My purpose in appending this opinion is twofold: first, to set out the reasons that led me — naturally with much regret — to dissent from the Court's finding that Costa Rica's Application to intervene in the main proceedings cannot be granted (Judgment, para. 91), and, separately from this, to comment on paragraph 26 of the Judgment in which my learned colleagues in the majority attempted, for no apparent need nor with much success, in my respectful opinion, to define and clarify the elusive concept of "an interest of a legal nature".

2. These two issues will be dealt with in Parts I and II of the present opinion, respectively.

I. Why Costa Rica's Request Should Have Been Granted

(a) *Some General Remarks*

3. The municipal law institution of intervention was introduced for the first time into international law in 1920 when the Advisory Committee of Jurists — mandated by the League of Nations with drafting the Statute of the Permanent Court of International Justice — agreed on a text on the basis of which Article 62 of the PCIJ, and of the present Court, was adopted.

4. Article 62 reads:

> "1. 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.
>
> 2. It shall be for the Court to decide upon this request."

5. This language is plainly liberal. The word "affected" is not qualified by a requirement that the effect be of a serious or irreversible nature. The word "interest" is likewise not qualified by any expression that suggests that the interest be a crucial or even an important one for the requesting State, all that is needed is that the interest be of a legal nature and not of a political, economic, strategic, or other non-legal nature. Finally the word "may" is also permissive. There is no need that the interest "must" or "shall" or is "likely to be" affected by the Court's decision.

6. Notwithstanding this liberal language, the record of Article 62 over the past 90 years or so since its inception must be judged to be dismal. Out of the fifteen requests for intervention starting with the *S.S. "Wimbledon", Judgments, 1923, P.C.I.J., Series A, No. 1*, thirteen requests were dismissed, readily disclosing a persistently restrictive approach by the Court to grant requests for intervention. Two recent cases: the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* and the *Land and Maritime Boundary between Cameroon and Nigeria*, have given some hope that the institution of intervention was not dead beyond revivification. In the first case, the Court granted Nicaragua's request to intervene only in as far as the status of the Gulf of Fonseca was concerned but not with regard to maritime delimitation (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, pp. 120-121, paras. 69-72). In the second case, it was the Court that had suggested that certain other States may wish to intervene (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 324, para. 116). Equatorial Guinea requested to intervene (while Sao Tome did not), and its request was unopposed (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Application for Permission to Intervene, Order of 21 October 1999, I.C.J. Reports 1999 (II)*, p. 1034, para. 12). Their paucity and special features would however set those two precedents apart and preclude the drawing of any inference that there exists another more expansive trend to grant requests for intervention or that they herald such a trend. At any rate the present Judgment would have the effect of dashing any such hope and of signalling a reversion to the earlier more restrictive jurisprudence of the admissibility of requests for intervention at least in the field of maritime delimitation.

7. If the fault does not lie with the text of Article 62, where does it lie? And why has the institution of intervention with its potential to avoid repetitive litigation and to afford a fair hearing to those States whose interest may be affected by the Court's decision, and thus to ensure a better administration of justice, been so peripheral as an institution of international law?

8. The answer may be in part because, on the facts of some cases, the would-be intervener failed to persuade the Court that its interests of a

legal nature may be affected even by the relatively low threshold of Article 62. For example, in the *El Salvador/Honduras* case the Chamber stated its reason for rejecting Nicaragua's Application to intervene in the matter of maritime delimitation as follows:

> "the essential difficulty in which the Chamber finds itself, on this matter of a possible delimitation within the waters of the Gulf, is that Nicaragua did not in its Application indicate any maritime spaces in which Nicaragua might have a legal interest which could be said to be affected by a possible delimitation line between El Salvador and Honduras" (*Judgment, I.C.J. Reports 1990*, p. 125, para. 78).

It stands to reason that when an applicant for intervention in a maritime delimitation does not indicate the areas where its interest comes into play, it cannot *ex hypothesi* demonstrate that they may be affected.

9. In other instances a request may be rejected because to grant it would be tantamount to involving the Court in pronouncing on the would-be intervener's rights, and not merely that those may be affected, as was the case with Italy's Application to intervene in the *Continental Shelf* case (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, pp. 19-22, paras. 29-33). Or, when the would-be intervener's interest is simply in ascertaining the impact of the Court's pronouncement on the applicable general principles and rules of international law (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 17, para. 30), which is not a legal interest but more of an academic interest, the request is also rejected.

10. Be all of this as it may, the almost total lack of success in invoking Article 62 can be understood only when regard is had to a parallel development in the Court's practice relating to maritime delimitation. In this field, the Court, whether responding to a request for intervention or when it considers that its delimitations may have consequences for third States, is careful not to tread on the rights and maritime entitlements of other States. Where no request to intervene by potentially affected States has been made, the Court is right in shielding the interests/rights of third States by stopping its delimitation short of those areas where third States have rights, and in indicating that by an arrow (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 100, para. 112, p. 129, para. 209, and pp. 130-131, para. 218; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 109, paras. 221-222 and pp. 115-116, paras. 249-250). Indeed the Court is required by the limits of its jurisdiction to do so. On the other hand, where there has been a request to intervene, i.e., to implement the specific procedure designed in the Statute to

safeguard the interests of a legal nature of third States, there is no justification for falling back on the argument that as a matter of principle the Court will protect the interests of third States even if the area where they come into play is only roughly indicated.

11. The conflation of the protection under Article 59 — which can, at the utmost, shield third States from the effects of *res judicata* — and the protection under Article 62 — which operates before the merits and hopes to give the potentially affected State a fair hearing so as to best ensure that its interests are protected — has been responsible above any other factor for the limited scope and impact of the institution of intervention. This is regrettable, for the protection under Article 59 cannot substitute for protection under Article 62. The protection under Article 62 is not just quantitatively different from that afforded by Article 59: it is of a different nature and operates in a different manner, giving the Court powers of an essentially procedural and preventative nature.

(b) *Costa Rica's Application*

12. Both in its timing (coming after two cases where a breath of life had been blown into the long moribund body of Article 62) and in relation to its facts (the two Parties' recognition of the existence of a Costa Rican interest of a legal nature in at least some areas claimed by the main Parties) (Judgment, para. 65), the (hopeful) expectation was that this was a perfect occasion to put Article 62 of the Statute into effect *(ut res magis valeat quam pereat)*. Instead, the Judgment declined to grant permission to Costa Rica to intervene notwithstanding, as shall be instantly demonstrated, that all the requisites of Article 62 have been met. The reasoning deployed in the Judgment was premised on three contentions, none of which stands scrutiny: *(a)* that Costa Rica had abandoned its earlier claim that the 1977 Facio-Fernández Treaty with Colombia and the assumptions underlying it constitute its interests of a legal nature which may be affected by the Court's decision in the main case; *(b)* that Costa Rica should demonstrate that its interest of a legal nature "needs a protection that is not provided by the relative effect of decisions of the Court under Article 59 of the Statute" (*ibid*., para. 87); and *(c)* that even without defining with specificity the geographical limits of the area where the interests may come into play, the Court will, as a matter of principle, protect third-party interests (*ibid*., para. 89).

13. With regard to Costa Rica's interest of a legal nature (point *(a)* above), the majority misses the point and mischaracterizes Costa Rica's arguments. Costa Rica never claimed — as far as I can ascertain — that the 1977 Treaty and its underlying assumptions are, as such, its interest of

a legal nature. That interest was clearly set out in its Application as "[a]n interest of a legal nature which may be affected by the decision of the Court" that is "Costa Rica's interest in the exercise of its sovereign rights and jurisdiction in the maritime area in the Caribbean Sea to which it is entitled under international law by virtue of its coast facing on that sea" (Judgment, para. 54). True, Costa Rica advanced arguments regarding the 1977 Treaty and its underlying assumptions to demonstrate how its interests, namely in the exercise of its rights and jurisdiction, would be affected by a decision of the Court on the basis of more than one possible scenario. For example, the enclaving of San Andrés as Nicaragua would wish, while at the same time not giving them the full weight to which they are at present entitled under the 1977 Treaty, would have ramifications for Costa Rica's entitlements in the same area. This is not the legal interest itself but rather a demonstration of how the legal interest in the exercise of sovereign rights may be affected.

14. Turning to point *(b)* above, namely that Costa Rica must show that its interest of a legal nature needs protection beyond and above that provided under Article 59, all I need to say — indeed reiterate since I have already commented on this argument — is that this argument has no foundation in law or in logic. Protection under Article 59, in the sense of shielding a non-intervening third party from the effects of *res judicata*, and protection under Article 62, designed to give a would-be intervener a chance to be heard in order to protect an interest before the merits, are entirely different provisions in their purpose and scope. In other words, the differences between them are qualitative and not quantitative.

15. It is also somewhat ironic that the Judgment argues in paragraph 26 for a less stringent test for what constitutes an interest of a legal nature, but then in effect, requires a higher standard of proof than that based on the adequacy of the protection provided under Article 59.

16. With regard to point *(c)* above, namely that the Court will, as a matter of principle, always protect third State interests, all that needs to be said is that when there is no request for intervention this policy consideration (for it is nothing other than that) is commendable. However such protection will of necessity be speculative, rough and negative since the Court does not require that the geographical limits of an area where the interest come into play be defined by it i.e., by the Court, with specificity (Judgment, para. 86). Moreover, requests for intervention do not always relate to maritime or spatial delimitation. In other areas such protection will be even more difficult to speculate on.

17. For all these reasons, I regret that the Court has rejected Costa Rica's request to intervene since all the requisites for meeting the test set out in Article 62 of the Statute have been met.

II. An Interest of a Legal Nature

18. In the present case, Costa Rica contended that the "interest of a legal nature" that it sought to protect under Article 62 was nothing other than its "interest in the exercise of its sovereign rights and jurisdiction in the maritime area in the Caribbean Sea to which it is entitled under international law by virtue of its coast facing on that sea" (Judgment, para. 54).

19. Costa Rica's use of the expression "rights and jurisdiction" and the expression "to which it is entitled" is in line with similar expressions used by the Parties and by the Court itself in previous jurisprudence dealing with maritime delimitation. For example, Italy, in its Application to intervene, in the *Libya/Malta Continental Shelf* case, defined the concept of "an interest of a legal nature" as "an interest of the Applicant State *covered . . . by international legal rules or principles*", and specified its legal interest in the case as "nothing less than respect for its *sovereign rights* over certain areas of continental shelf in issue in the present case" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, pp. 10-11, para. 15 and pp. 19-22, paras. 29-33; emphasis added). Similarly, Nicaragua in the *Land, Island and Maritime Dispute (El Salvador/Honduras)* stated as the two objects for its intervention pursuant to Article 62:

> "*[f]irst*, generally to protect the legal *rights* of the Republic of Nicaragua in the Gulf of Fonseca and the adjacent maritime areas by all legal means available [and] *[s]econdly*, to intervene in the proceedings in order to inform the Court of the nature of the legal *rights* of Nicaragua which are in issue in the dispute" (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 108, para. 38; emphasis added).

In the *Sovereignty over Pulau Ligitan and Pulau Sipadan*, the Philippines likewise defined as the object of its intervention:

> "[f]irst, to preserve and safeguard the historical and legal *rights* . . . of the Philippines arising from its claim to dominion and sovereignty over the territory of North Borneo, to the extent that these rights are affected, or may be affected, by a determination of the Court of the question of sovereignty over Pulau Ligitan and Pulau Sipadan"

and

> "[s]econd, to intervene in the proceedings in order to inform the Honourable Court of the nature and extent of the historical and legal *rights* of the Republic of the Philippines which may be affected by the

Court's decision" (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, p. 604, para. 84; emphasis added).

20. What is of direct interest in the present case is that whilst there may be distinctions at the theoretical level between interests of a legal nature and rights, the issue simply does not arise here: Costa Rica is claiming rights, jurisdiction, as well as entitlements. This therefore was the wrong case to try to define the concept of a legal interest by distinguishing it from the concept of a right. Moreover, while proposing such a distinction, the majority did not follow it through. A lower threshold for proving the existence of a legal interest than for a right leads one to believe that this implies a greater readiness to grant permission to intervene, but here the situation is otherwise: the lower threshold still leads to refusal to grant permission. First of all, nothing turns on the distinction between rights and legal interests, thus rendering such a distinction unnecessary. Moreover, if this is going to be a model for future judgments in intervention proceedings, the Court has inevitably placed itself, unnecessarily, in a straightjacket of a lower threshold for proving that an interest of a legal nature which may be affected existed and yet refused to grant permission to intervene. Would it not have been preferable to have adhered to all the elements of the test of Article 62, rather than try to clarify only one of its elements, namely the phrase "an interest of a legal nature"?

21. The expression "an interest of a legal nature" was born out of a compromise struck in the meetings of the Advisory Committee of Jurists charged with the drafting of the Statute of the Permanent Court of International Justice in 1920. The relevant parts of the discussion bear quoting:

> "Lord Phillimore suggested the following wording:
>
> 'Should a third State consider that a dispute submitted to the Court affects its interests, it may request to be allowed to intervene; the Court shall grant permission if it thinks fit.'
>
> M. Fernandes agreed with Lord Phillimore on principle, but wished to make the right of intervention dependent upon certain conditions; for instance, it should be stated that the interests affected must be legitimate interests.
>
> The President thought that the solution of the question of intervention should be drawn from common law. He proposed a wording based on this idea:
>
> 'Should a State consider that its rights may be affected by a dispute, it may request the Court to grant it permission to intervene, and the Court shall accord such permission.'

M. Adatci suggested to amend the wording proposed by Mr. Loder, by replacing the word 'right' by the word 'interest.'

. . . . . .

The President proposed to following new wording:

'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.'" (*Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920)*, pp. 593-594.)

22. It was not long after, that the incoherence apparent in this compromise was noticed by Farag, the first commentator on the subject of intervention who described the expression as "a monster that defies definition" (W. M. Farag, *L'intervention devant la Cour permanente de Justice internationale (articles 62 et 63 du Statut de la Cour)*, Librairie générale de droit et de jurisprudence, 1927, p. 59). It is apparent that the Committee of Jurists was concerned with excluding any intervention of a political, economic or strategic nature but, inopportune as the compromise was, there is nothing in the *travaux préparatoires* to suggest that the Committee intended (nor logically could) create a third category, a hybrid which is neither a right nor an interest.

23. It is remarkable that notwithstanding the inherent contradiction of the phrase "an interest of a legal nature", it nevertheless gained acceptance and currency in legal parlance relating to intervention and was rarely commented on. A notable exception is however to be found in Judge Roberto Ago's dissenting opinion in *Continental Shelf (Libyan Arab Jamahiriya/Malta)*:

"However, I feel it is being overlooked here that the fact of a third State asserting the existence of a right of its own *(an interest of a legal nature being nothing other than a right)* in a field constituting the subject-matter of a dispute between two other States, is the very essence and *raison d'être* of the institution of intervention in its strictest and most uncontroversial sense. It was for the very purpose of protecting the potential rights of third parties that the institution was devised and enshrined in Article 62 of the Statute." (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, dissenting opinion of Judge Ago, p. 124, para. 16; emphasis added.)

24. Whilst it is true that it was only Judge Ago — as far as I could ascertain — who addressed the question of legal interests being nothing other than rights, this does not mean that there was general acceptance that they are different from each other. On the contrary, any reading of the case law, whether relating to intervention or whether dealing, more generally, with the potential effects of the Court's decisions on third States, reveals that the

words "right", "legal interests" and "entitlements" are used interchangeably (see for example, *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, pp. 128-129, paras. 208-209, and pp. 130-131, para. 218; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, pp. 596-597, paras. 49-51 and p. 598, para. 60; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 421, para. 238 and p. 432, para. 269; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, pp. 130-131, paras. 89-90 and 92).

25. This being the case with regard to the jurisprudence of the Court what remains to be explored — briefly — is whether legal reasoning admits of a hybrid category of legal interests that falls short of rights, or to be more precise, of asserted rights. The concepts of rights and interests are of course among the basic tools of lawyers and the Court had a chance, in a celebrated passage in paragraph 46 of its Judgment in the *Barcelona Traction*, to draw a distinction between the two concepts: "[n]ot a mere interest affected, but solely a right infringed" (*Barcelona Traction, Light and Power Company, Limited, (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 36, para. 46). However when the word "interest" is qualified by the adjective "legal", we are of necessity expressing the concept of "rights" through other words. Thus, if Costa Rica's interest is not to have Nicaragua as its neighbour in the maritime area under consideration that would definitely be a strategic or a political interest but not a legal interest. If Malta seeks to intervene simply on the basis that it has "an interest" in the Court's pronouncement in the case regarding the applicable general principle and rules of international law (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 17, para. 30), that interest is an academic interest and it is significant that the Court referred to this as "an interest" and not as a "legal interest". To my mind a legal interest cannot but be a right asserted.

26. Paragraph 26 of this Judgment in fact recognizes this, stating, *inter alia*: "Article 62 requires the interest relied upon by the State seeking to intervene to be of a legal nature, in the sense that this interest has to be the object of a real and concrete claim of that State, based on law".

27. If a real and concrete claim based on law is not an assertion of a right or rights, what is? I also fail to discern the causal link between this statement and the last paragraph of paragraph 26 which reads: "[a]ccordingly, an interest of a legal nature within the meaning of Article 62 does not benefit from the same protection as an established right and is not subject to the same requirements in terms of proof".

28. The contents of this sentence do not flow from the arguments advanced in the first sentence, but even as a proposition standing on its

own, it is neither self-evident nor does it say much. Thus, even if one were to accept *arguendo* that a right and an interest of a legal nature can be different, it does not follow that they will always be different. A right can be seen as a form of a legal interest, namely, when a State claims that its interest is to exercise a right in a maritime area.

29. Ultimately, the out-of-context elaboration of the expression "an interest of a legal nature" does not bring one nearer to understanding that concept nor will it be of help to counsel or to the Court. On the contrary, this attempt seems to be terminally confused.

(Signed) Awn Shawkat AL-KHASAWNEH.

DISSENTING OPINION OF JUDGE ABRAHAM

[Translation]

Conditional right of third States to intervene in the main proceedings — Lack of discretionary power of the Court — Disagreement with the rejection of Costa Rica's request for permission to intervene — Existence of Costa Rica's "minimum area of interest" — Possibility of the future delimitation line entering Costa Rica's area of interests — Risk that the 1977 bilateral treaty might be rendered without effect — The Judgment's departure from the Court's most recent jurisprudence — Erroneous character of the reasoning followed in the Judgment.

1. I have voted against the operative clause of the Judgment whereby the Court rejected Costa Rica's Application for permission to intervene in the case concerning the dispute between Nicaragua and Colombia, which relates in particular to the maritime delimitation between those two States.

2. In another Judgment issued on the same day, the Court also rejected Honduras's Application to intervene in the same case. Since I was also obliged to dissociate myself from the majority of my colleagues in respect of that decision, I have set forth my dissenting opinion, which is attached to that Judgment.

3. In the present opinion, I shall not repeat the general considerations concerning the nature of intervention, its statutory requirements and the role of the Court when called upon to rule on an application to intervene, which I have set out in my opinion attached to the Judgment on Honduras's Application.

I would ask interested readers to refer to that opinion. I believe that the point of view which I develop therein naturally applies to any request to intervene, including that made by Costa Rica.

4. In summary, it is my opinion that intervention by a third State as provided for in Article 62 of the Statute of the Court — at least when the third State does not seek to become a party to the proceedings — is a right, not in the sense that the State only has to express its desire to intervene in order to be automatically granted permission by the Court to do so — that is clearly not the case — but in the sense that intervention is not an option whose exercise is subject to permission to be granted or withheld at the discretion of the Court, according to what it considers, on a case-by-case basis, to be in the interest of the sound administration of justice. Article 62 lays down a necessary and sufficient condition for a third State to be authorized to intervene: it is necessary and sufficient that the Judgment to be delivered in the main proceedings might affect its interests of a legal nature. It falls to the third State to persuade the Court that this is so. Naturally, when making its assessment on the basis of the

arguments presented to it, and in light of any objections that the parties to the main proceedings may have raised to the request by the third State, the Court exercises a power which allows it some latitude: deciding whether, in a particular case, a future Judgment might affect certain interests of a third party is not a purely objective process. Nevertheless, the Court must always determine whether or not a legal requirement has been met, and not rule on the basis of policy considerations — and, no matter what the extent of the Court's margin of discretion in the former case, these two approaches are by nature very different.

5. Such is the jurisprudence of the Court to date, and the present Judgment sets it out correctly in substance — even if in some places the wording does not seem sufficiently clear to me — in the first part of the Judgment, entitled "The Legal Framework", which covers paragraphs 21 to 51, namely, approximately the first half of the Judgment.

6. I subscribe to most of what is stated in those paragraphs. In particular, I welcome the manner in which the Court distinguishes (in paragraph 26 of the Judgment) between an "interest of a legal nature", which the third State must prove in order for its request to intervene to be declared admissible, and a "right" (which may be affected) whose existence it does not have to establish at this stage.

It is well known and well recognized, both in doctrine and in jurisprudence, that an "interest" should not be confused with a "right"; while it is not always easy to define the dividing line between the two categories, it is certainly not permissible to confuse them. Doubtless, the authors of Article 62 of the Statute required, as a condition for intervention, proof that not just any interest of a third State may be affected, but an interest "of a legal nature". But even when thus qualified, an interest should not be confused with a right: it is always a notion that is both more flexible and broader; any person or entity has a legitimate interest in protecting the exercise of their rights; however one may have an interest to protect without its being linked, strictly speaking, to a corresponding right, or at least to an established right. If Article 62 specifies that the interest concerned must be "of a legal nature", it is, as explained in paragraph 26 of the Judgment, in order to distinguish such an interest from those which are "of a purely political, economic or strategic nature", and which are not sufficient to justify a request for permission to intervene.

7. I also concur with the Judgment in the proposition that Costa Rica has sufficiently set out the "precise object of the intervention" (for which it seeks authorization), as required under Article 81, paragraph 2 *(b)*, of the Rules of Court. Since Costa Rica was not seeking permission to intervene as a party, it merely had to state, as it did, that the object of its intervention was to inform the Court of the nature of its rights and interests of a legal nature that might be affected by the future decision. The Court has consistently adjudged such an object to be adequate and sufficient for the purpose of applying Article 81, paragraph 2 *(b)*, of the Rules of Court (see the decision cited in paragraph 34 of the Judgment, to which

we might add the Order of 21 October 1999 rendered on Equatorial Guinea's Application for permission to intervene in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Application for Permission to Intervene* (*I.C.J. Reports 1999 (II)*, p. 1034, para. 14)).

8. I also agree with the Judgment in recalling that the State which seeks to intervene does not need to establish the existence of a basis of jurisdiction between that State and the parties to the main proceedings when it is not seeking permission to intervene as a party. On this point, the Judgment also cites well-established jurisprudence (Judgment, para. 38).

9. Finally, the Court was correct in recalling that the fact that the State seeking permission to intervene can, if need be, bring principal proceedings before the Court, through a separate application, in order to uphold its rights vis-à-vis one or other, or even both, of the parties in the proceedings already under way — if there is a basis of jurisdiction to that effect —, "in no way removes its right under Article 62 of the Statute to apply to the Court for permission to intervene" (*ibid*., para. 42).

10. On the other hand, I strongly dissent from the second part of the Court's Judgment. In this part, in proceeding to examine the requirement in the present case concerning an "interest of a legal nature which may be affected" by the future Judgment, which in my view, as I have said, is a necessary and sufficient requirement, the Court finds that the said requirement has not been met and that therefore Costa Rica's Application should be rejected.

I feel that such a finding does not correspond to what is disclosed by careful examination of the case file; furthermore, it clearly departs from the Court's most recent jurisprudence in respect of intervention; finally, it is based on grounds which are, to say the least, highly questionable, and which are likely to puzzle the reader considerably as to the Court's current approach to the matter.

11. First, the Court's finding is contradicted by a careful examination of the documents in the file.

Costa Rica defined a "minimum area of interest", within which it maintains that it clearly has "interests of a legal nature" to protect. This area is shown on the sketch-map inserted in the Judgment, page 366. It is bounded in the south by the line established by the 1980 bilateral treaty between the applicant State and Panama, in the north-east by the line established by the 1977 Treaty with Colombia, which is not yet ratified, and in the north-west by an equidistance line drawn, according to Costa Rica, on the basis of the orientation of the adjacent coasts of Costa Rica and Nicaragua — since there is no delimitation agreement between the two countries.

Throughout the entire extent of this area, there are no sovereign rights which have been established with certainty and definitively to the benefit of Costa Rica. But the claims of that State are founded on legal bases which at first sight are defendable; they are neither unfounded nor artifi-

cial. Accordingly, in my view Costa Rica has a legitimate interest in protecting its rights, namely, for the time being to preserve its future chances of successfully asserting them, of establishing the rights which it claims to possess — without allowing a decision taken by the Court in a case between two other States to limit or nullify in advance its ability to establish the (potential) merits of its claims in due course. That is precisely the object of the intervention procedure. It remains for Costa Rica to show that the Judgment to be rendered by the Court in the case between Nicaragua and Colombia is liable to affect its own interests.

12. This is the case, in my opinion, for two reasons.

First, the delimitation line to be established by the Court will in all likelihood, given the position of the Parties' respective coasts, run from north to south, with a more or less marked inclination to the north-east. In the area bounded, on one side, by the line proposed by Colombia, situated fairly close to the Nicaraguan coast, and, on the other, by that proposed by Nicaragua, situated much further east, it is impossible to foresee where the line to be drawn by the Court in its Judgment will run, and the Court is not permitted, at the current stage of the proceedings, to prejudge its decision in even the slightest respect. All that can be said is that, in accordance with the principle that it cannot rule *ultra petita*, the Court will have to keep within the limits defined by the Parties' claims, namely, not to give either Party more than it is seeking. For the rest, in order to assess the interest of the State requesting permission to intervene, the Court must agree to consider all possible scenarios, and not rule out any *a priori*.

However, if the Court accepts the line proposed by Colombia, or even if it draws a line slightly further to the east, the line retained will extend to the south and thus may enter Costa Rica's area of interests. There is thus a risk — albeit, of course, not a certainty — that the forthcoming Judgment will affect Costa Rica's legitimate interests, of a legal nature, as I have just defined them.

It is true that the Court will most probably use the "directional arrow" method, as it has in similar cases. It will not extend the delimitation line too far south and will stop it at a certain point, where an arrow will indicate that it is intended to continue in the same direction until it meets the area in which a third State has rights. However, in order to determine where it must stop the line it is drawing and place the arrow, the Court needs to be adequately informed of the rights claimed by one or more third States. That is the purpose of the intervention procedure.

It is true that, in requesting permission to intervene, the third State must indicate to the Court which interests it claims to have that may be affected, so that, in maritime delimitation cases, that State will usually submit a sketch-map to the Court showing the limits of the area within which it claims potential rights — and this was so in this case. But it would be strange and paradoxical to rely on the information provided in

the proceedings for permission to intervene to infer that, on the pretext that this information is sufficiently complete, intervention is unnecessary and permission should be refused. It is clear to see that such an argument could have perverse effects: third States would be encouraged to submit applications to intervene for the sole purpose of providing the Court with information which they know the Court will take account of in the main proceedings, even if it refuses permission to intervene because the conditions have not been met. It is regrettable that the present Judgment might appear to encourage such practices, because of the ambiguous wording of paragraph 51. In any event, the evidence provided by an applicant State in proceedings for permission to intervene cannot replace the complete information and observations which that State might submit once it has been granted permission to intervene.

13. There is a second, more specific, reason why, to my mind, the legal interests of Costa Rica might be affected. Costa Rica signed a maritime delimitation treaty with Colombia in 1977. As it has not been ratified, this treaty has not entered into force; but it is a fact that Costa Rica applies it on a provisional basis, in agreement with Colombia, and that its ratification has been suspended until the conclusion of the case between Nicaragua and Colombia pending before the Court, the very case in which Costa Rica has sought to intervene. The link between the conclusion of that case and the fate of the 1977 bilateral treaty is clear to see. If the Court upholds Nicaragua's claims, or even if, without going so far, it fixes the delimitation line in its future Judgment substantially east of the line proposed by Colombia and, more specifically, east of the easternmost point of the line established by the bilateral treaty as the maritime boundary between Colombia and Costa Rica, the effect would be to deny that treaty any possibility of taking effect, and to render its ratification moot. In effect, the area situated immediately to the Colombian side of the line established by the bilateral treaty would fall within the scope of Nicaragua's sovereign rights — subject only to potential claims by Panama. There is therefore at least a serious risk that the line agreed between Costa Rica and Colombia will be called into question, given that, since Nicaragua has no treaty agreement with Costa Rica, it would be under no obligation whatsoever to recognize the validity of the 1977 Treaty line. Strictly speaking, such a situation would not call Costa Rica's rights into question, because, in respect of the line under consideration, those rights exist only in the relations between that State and Colombia. But it is hard not to accept that such a consequence could prejudice the interests of Costa Rica, and those interests, since they are treaty based, are indeed "of a legal nature". In my view, this was an additional reason to allow Costa Rica's intervention.

14. The very restrictive position adopted by the Court in the present case is all the more surprising in that it runs contrary to its most recent

jurisprudence on the subject of intervention, and in particular to the decision on Equatorial Guinea's request for permission to intervene in the proceedings between Cameroon and Nigeria concerning, *inter alia*, their maritime boundary (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Application for Permission to Intervene, Order of 21 October 1999, I.C.J. Reports 1999 (II)*, p. 1029). The situation of Equatorial Guinea in relation to the maritime areas in dispute between Cameroon and Nigeria was hardly more capable of endowing it with an interest such as to make its intervention admissible than that of Costa Rica in the present case in relation to the dispute between Nicaragua and Colombia. Equatorial Guinea asserted that

> "in accordance with its national law, [it] claim[ed] the sovereign rights and jurisdiction which pertain to it under international law up to the median line between [itself] and Nigeria on the one hand, and between [itself] and Cameroon on the other hand" (*ibid.*, p. 1031, para. 3).

It added that its aim was not to become a party to the proceedings in order to obtain from the Court a determination of its boundaries with Cameroon and Nigeria, but to

> "protect its legal rights and interests . . . and that requires that any Cameroon-Nigeria maritime boundary that may be determined by the Court should not cross over the median line with Equatorial Guinea . . . [and if it were to do so] Equatorial Guinea's rights and interests would be prejudiced" (*ibid.*, pp. 1031-1032, para. 3).

15. In the Judgment on the preliminary objections in the main proceedings, the Court had previously found that

> "it is evident that the prolongation of the maritime boundary between the Parties . . . will eventually run into maritime zones where the rights and interests of Cameroon and Nigeria will overlap those of third States" (case concerning *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 324, para. 116),

and that

> "[i]n order to determine where a prolonged maritime boundary . . . would run, where and to what extent it would meet possible claims of other States, . . . the Court would of necessity have to deal with the merits of Cameroon's request" *(ibid.)*.

16. In its Order ruling on Equatorial Guinea's Application for permission to intervene, after recalling the key elements in the procedural history of the main proceedings up to that point, and after summarizing the reasons put forward in support of the Application, the Court considered that

> "Equatorial Guinea had sufficiently established that it had an interest of a legal nature which could be affected by any judgment which the Court might hand down for the purpose of determining the maritime boundary between Cameroon and Nigeria" (*Order of 21 October 1999, I.C.J. Reports 1999 (II)*, p. 1034, para. 13).

The key factor for such a finding was manifestly the risk — and only the risk — that the extension of the line that the Court might be led to indicate in order to determine the maritime boundary between the two Parties in the main proceedings might cross into maritime areas over which the third State requesting permission to intervene had claims that, at first sight, were not without a serious legal basis.

17. Admittedly, in that case the task of the Court was no doubt facilitated by the fact that neither Cameroon nor Nigeria had objected to Equatorial Guinea's intervention. But in accordance with the established interpretation of Article 62 of the Statute, the absence of any objection by the parties to the main proceedings has only a procedural consequence: it dispenses the Court from holding hearings before ruling on the application for permission to intervene (which, moreover, has the rather dubious consequence that its decision is called an "order" and not a "judgment"). On the other hand, it does not dispense the Court from not only deciding whether to allow the intervention, but from doing so after due consideration of whether the requirement under Article 62 has been fulfilled, and stating the reasons for its decision on this point — even though it is reasonable to assume that, if the Court finds that the requirement has been fulfilled, and if, moreover, the parties to the main proceedings have not objected, the decision's reasoning will be briefer than in other cases.

18. That is why the Order issued in 1999 on Equatorial Guinea's Application is underpinned by legal and factual reasoning. On the basis of this precedent, it is difficult to see on what grounds Costa Rica's situation in this case did not warrant it being granted permission to intervene, as was the case for Equatorial Guinea in circumstances which were no more favourable — it being understood that this difference in treatment cannot be explained by the mere fact that the Parties to the main proceedings in the previous case did not raise any objections, whilst one of the Parties in the present case objected to Costa Rica's intervention.

19. Unfortunately, reading the reasoning given by the Court in the present Judgment will not shed any more light on the reasons which led to the rejection of Costa Rica's Application. On the contrary, in my view these reasons only add a large dose of confusion to what is an already questionable solution in itself.

20. The reasoning is brief — which would be no bad thing if it were only convincing. All in all, it takes up the last six paragraphs of the Judgment — from paragraph 85 to paragraph 90 — and the last one should be not be counted, as all it does is set out the negative conclusion reached by the Court. It is necessary, therefore, to focus on two pages.

21. It seems, at first sight, that there is some form of reasoning present. Thus the Court sets out a syllogism, which is presented in the following manner — I allow myself to reproduce the substance if not the actual terms.

For intervention to be permitted, the third State must show that the future Judgment may affect one of its interests of a legal nature, and that Article 59 of the Statute, which limits the force of *res judicata* to the Parties to the proceedings, does not offer it sufficient protection in this respect (Judgment, para. 87).

However, the Court, "following its jurisprudence", will end the line it is to draw with a view to delimiting the maritime areas between the two Parties to the main proceedings "before it reaches an area in which the interests of a legal nature of third States may be involved" (*ibid.*, para. 89), and particularly in view of the fact that neither Colombia nor Nicaragua have requested it to fix the southern endpoint of their maritime boundary (*ibid.*, para. 88).

Therefore, Costa Rica's legal interests are not liable to be affected, since the line that the Court will draw will not extend southwards beyond the point where it would come into contact with the area claimed by Costa Rica: it follows that the latter State has no legal grounds to request permission to intervene (*ibid.*, paras. 89 and 90).

22. I find this reasoning flawed for the following reasons.

23. First, it is based on an error in law. It is not correct to say that "following its jurisprudence" the Court ends the delimitation line it draws between the respective maritime areas of two Parties to a case before it reaches an area in which the *interests* of third States are involved. The Court's practice is to place an arrow at the end of the line it draws, and which it is careful not to prolong too far on its own sketch-map, and to make clear that beyond the point where the arrow appears, the line is to continue until it reaches the area in which the *rights* of a third State are involved. In other words, it is not the *interests* of a third State which may interrupt the line representing the boundary between two States, but the *rights* of that third State, namely the point where the sovereign rights of one State must end because the sovereign rights of another State begin. Moreover, how could it be otherwise? The rights of a State can only be bounded by the rights of another State, and not by the interests of another State, which would make no sense at all. What kind of boundary would be intended merely to extend until it met the "interest" of a third State? It is regrettable that having taken such care, in paragraph 26 of the Judgment, to make a distinction between a "right" and an "interest", even when the latter is qualified as it is in Article 62 of the Statute ("of a legal nature"), the Court confuses the two in paragraph 88 and thus significantly weakens its reasoning.

24. It is true that paragraph 89 refers to paragraph 112 of the Judgment rendered in the case concerning *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)*. In that paragraph, the Court noted that "the delimitation [would] occur within the . . . Black Sea . . . north of any area where third party interests could become involved" (*Judgment, I.C.J. Reports 2009*, p. 100, para. 112).

But when it came to fixing the delimitation line and determining the endpoint, the operative clause of the same Judgment unambiguously chose the only appropriate wording: "From point [X] the maritime boundary line shall continue . . . in a southerly direction starting at a[n] . . . azimuth of [Y] until it reaches the area where the *rights of third States* may be affected" (*I.C.J. Reports 2009*, p. 131, para. 219; emphasis added). All other precedents use essentially the same wording to define (in abstract terms) the endpoint of the line which ends in an arrow on the sketch-map attached to the Judgment: this line continues until it comes into contact with an area where a third State has rights (see, for example, among others, the Judgment rendered in the case concerning the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 760, para. 321).

25. Accordingly, it follows that a Judgment of the Court, in maritime delimitation as well as elsewhere for that matter, cannot prejudice the rights of a third State. But it can prejudice the interests of a third State — if we accept, as the Court does expressly in paragraph 26, that these two notions are not to be confused. And this is precisely why the intervention procedure was conceived.

26. Further, if we follow the reasoning set out in paragraphs 85 to 90 of the present Judgment, it is hard to see in what circumstances the Court would ever grant permission in the future for a third State to intervene in a maritime delimitation case. If the Court is wise enough, without any need of help from an intervening party, not to render a decision which would prejudice the interests of third parties, simply by reserving those interests in the actual decision, logic dictates that it is pointless for any State to request permission to intervene, as the requirement to which Article 62 of the State makes intervention subject will never be fulfilled.

27. More generally, we may ask ourselves whether the intervention procedure itself is not rendered meaningless by the extremely restrictive reasoning applied in this case.

28. I doubt that the Court intended to go as far as the reasoning it adopted here would imply, if it were taken literally. However, I can only regret that it was unable — and no doubt it would have found it difficult — to give a reasonably solid legal basis for refusing to grant Costa Rica permission to intervene.

(*Signed*) Ronny Abraham.

DECLARATION OF JUDGE KEITH

1. I agree with the conclusions the Court reaches, essentially for the reasons it gives. This declaration addresses one aspect of those reasons.

2. For nearly 90 years, the International Court of Justice and its predecessor, the Permanent Court of International Justice, have had the power to permit a State, not a party to the main proceeding before it, to intervene in the proceeding if the State persuades the Court that it has "an interest of a legal nature which may be affected by the decision in the case" (Article 62 of the Statute). If permission is granted, the intervening State is supplied with copies of the pleadings and may submit a written statement to the Court and its observations in the oral proceedings, with respect to the subject-matter of the intervention (Rules of Court, Article 85). Of the 15 requests that have been made in 12 cases since 1923, two have been granted, one without objection and the other in part only.

3. Until today, the Court has not attempted to provide a definition or an elaboration of the expression "an interest of a legal nature" as it appears in Article 62 of the Statute. Rather, having considered the evidence and submissions presented to it by the requesting State and the parties to the main proceeding, it has determined whether "*in concreto* and in relation to all the circumstances of a particular case" the requesting State has demonstrated what it asserts including showing that its interest may be affected (*Land, Island and Maritime Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, pp. 117-118, para. 61).

4. There are, I think, good reasons for the Court's practice to date of keeping closely to the statutory test laid down in Article 62 and not attempting to elaborate on a single phrase within that test. I begin with the nature of the power which the Court exercises under Article 62. It is of a preliminary, procedural, interlocutory character. In terms of its legal or binding effect, it does no more than to allow (or not) the requesting State to participate in the process. It involves the Court in making a future-looking, speculative assessment about the possible impact of the decision in the main proceeding on the interest asserted by the requesting State. That assessment is whether the decision "may", not "will" or "is likely" to affect that interest.

5. The principal features of the power of the Court to make its decision in the main proceeding differ sharply from those of the Article 62 power. The parties have much more extensive opportunities, in written and oral

proceedings, to make their case and answer the case against them. They must have given their consent in one form or other to the Court having jurisdiction over the case. The Court makes a final decision on the merits which is binding on the parties and without appeal. In the course of making that decision, the Court determines the existence or not of rights under law and whether those rights have been breached. That process of fact finding will in general be backward looking. The party asserting a fact in support of its case usually has the burden of establishing it on the balance of probabilities — a standard which is plainly more demanding than that stated in Article 62.

6. It is true that one of the differences in the elements to be found in the two functions is that between a (legal) right and an interest of a legal nature, but the two preceding paragraphs suggest that that difference has a very small role. The problematic character of that difference is to be seen in the definition which the Court gives to "an interest of a legal nature" and the consequences it draws from the difference. The Court defines today "an interest of a legal nature", as opposed to an "established right", as "a real and concrete claim . . . based on law" (Judgment on Application by Costa Rica, para. 26; Judgment on Application by Honduras, para. 37). If the claim is based on law and is real and concrete, is it not a claim of a right (or a liberty or a power) recognized by the law? Is the Court drawing a real distinction?

7. The Court draws two consequences from its definition: an established right has greater protection and the requirement of proof is not as demanding in the case of an interest of a legal nature. But those consequences are a result of the full range of contrasting features of the two powers set out in paragraphs 4 and 5 above. They do not arise simply and solely from any difference between an established right and an interest of a legal nature.

8. The elusive character of the difference is further demonstrated by the practice of States requesting permission to intervene. They do not appear to find assistance in any such distinction. To take the two cases being decided today, Costa Rica, at the outset of its Application, stated that its "interests of a legal nature which could be affected by a decision in this case are the *sovereign rights and jurisdiction* afforded to Costa Rica under international law and claimed pursuant to its constitution" (emphasis added). It said essentially the same at the end of the proceedings in answering a question from a judge. Similarly, as the Court records in the Honduras case, that State, to demonstrate that it has an interest of a legal nature, contends that it is entitled to claim sovereign rights and jurisdiction over a certain maritime area (Judgment, paras. 16 and 18).

9. That close linking of interests of a legal nature to rights under international law has appeared from the outset to the present day:

— In the *S.S. "Wimbledon"* case, Poland referred to "violations of the rights and material advantages guaranteed to Poland by Article 380 of The Treaty of Versailles"; it changed its request to one under Article 63 and the Court accepted it (*S.S. "Wimbledon", Judgments, 1923, P.C.I.J., Series A, No. 1* (Question of Intervention by Poland), p. 13).

— In the *Nuclear Tests* cases, Fiji in its request having referred to the claims made by Australia and New Zealand — respectively, that the testing was not consistent with applicable rules of international law or constituted a violation of New Zealand rights under international law — contended that "[I]t will be evident from the facts set out above that Fiji is affected by French conduct at least as much as [Australia] New Zealand and that similar legal considerations affect its position." (*I.C.J. Pleadings, Nuclear Tests (New Zealand* v. *France)*, Application for Permission to Intervene Submitted by the Government of Fiji, p. 91.) The Court did not rule on the substance of this request (*Nuclear Tests (New Zealand* v. *France), Application for Permission to Intervene, Order of 20 December 1974, I.C.J. Reports 1974*, p. 536.

— While Malta in the *Tunisia/Libya* case used the terms of Article 62 in its request it at once defined its "interest of a legal nature" as rights under the law:

> "There can be no doubt that Malta's interest in her continental shelf boundaries is of a legal character since the continental shelf rights of States are derived from law, as are also the principles and rules on the basis of which such areas are to be defined and delimited. In other words these rights are created and protected by law, and the question of the proper spatial extent of the regions over which they can be exercised by any given State is also a matter of law." (*I.C.J. Pleadings, Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Application for Permission to Intervene by the Government of the Republic of Malta, p. 258, para. 7.)

— Italy in its request in the *Libya/Malta* case under the heading *l'intérêt d'ordre juridique* similarly referred to its rights and legal title, as it saw them, in areas of continental shelf off its coast, the relevant areas being within 400 nautical miles of the relevant coasts (*I.C.J. Pleadings, Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Vol. II, Application for Permission to Intervene, pp. 422-424, paras. 6-13).

— Nicaragua in the *El Salvador/Honduras* case stated two objects for its intervention:

> "*First*, generally to protect the legal rights of the Republic of Nicaragua in the Gulf of Fonseca and the adjacent maritime areas by all legal means available.

Secondly, to intervene in the proceedings in order to inform the Court of the nature of the legal rights of Nicaragua which are in issue in the dispute. This form of intervention would have the conservative purpose of seeking to ensure that the determinations of the Chamber did not trench upon the legal rights and interests of the Republic of Nicaragua, and Nicaragua intends to subject itself to the binding effect of the decision to be given." (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Application for Permission to Intervene by the Government of Nicaragua, p. 4, paras. 5-6.)

— In *Cameroon* v. *Nigeria*, Equatorial Guinea, again under a heading using the terms of Article 62, recalled what the Court had said in its judgment on preliminary objections in that case and continued by reference to the law:

"In fact, Equatorial Guinea has claimed an exclusive economic zone and territorial sea under its own domestic law, in terms which it believes consistent with its entitlements under international law. The maritime area thus claimed would produce a boundary in the north-east corner of the Gulf of Guinea, based upon median line principles, which would be both an exclusive economic zone boundary and — in some circumstances — a territorial sea boundary with Cameroon for a limited distance." (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)*, Application for Permission to Intervene by the Government of Equatorial Guinea, pp. 6-8.)

It further developed this position by reference to the detail of its national law and said this:

"in accordance with its national law, Equatorial Guinea claims the sovereign rights and jurisdiction which pertain to it under international law up to the median line between Equatorial Guinea and Nigeria on the one hand, and between Equatorial Guinea and Cameroon on the other hand. It is these legal rights and interests which Equatorial Guinea seeks to protect." (*Ibid.*, p. 8.)

— In the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case*, Australia, also under a heading based on Article 62, began with two New Zealand claims:

"If, as New Zealand claims, the rights . . . are of an *erga omnes* character in the sense described above, it necessarily follows that the New Zealand claim against France puts in issue the rights of *all* States, including Australia. Assuming that France is subject to the corresponding *erga omnes* obligations invoked by New Zealand (a matter which will fall to be determined by the Court at the merits

> stage of the proceedings), Australia, in common with New Zealand and all other States, has — in the words of the Court in the *Barcelona Traction* case — a 'legal interest' in their observance by France.
>
> As indicated above, New Zealand argues that these obligations 'by their very nature, are owed to the whole of the international community, and it makes no sense to conceive of them as sets of obligations owed, on a bilateral basis, to each member of that community'. If so, it must follow that a decision by the Court on the merits of the New Zealand claim would not be a decision as to bilateral rights and obligations of France and New Zealand, capable of being considered in isolation from identical bilateral rights and obligations existing between France and every other member of the international community." (*Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case*, Application for Permission to Intervene under the Terms of Article 62 of the Statute submitted by the Government of Australia, p. 9, paras. 18-19.)

Again the basis for the intervention is *rights* which Australia claims. Its reference to "legal interest" from *Barcelona Traction* may be noted — a reference relating to the capacity of a State to bring a claim rather than to the substantive character of the right or interest, a matter apparently distinct from the "interest of a legal nature" to be assessed in determining a request for intervention.

The Solomon Islands, the Federated States of Micronesia, the Marshall Islands and Samoa made requests in similar terms, invoking Article 63 as well as Article 62. On the latter, they comment that "disputes about obligations owed *erga omnes* have an inherent unity . . ." (*Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case*: Application for Permission to Intervene under Article 62 — Declaration of Intervention under Article 63 Submitted by the Government of Solomon Islands, p. 6, para. 19; Application for Permission to Intervene under Article 62 — Declaration of Intervention under Article 63 Submitted by the Government of the Federated States of Micronesia, p. 6, para. 19; Application for Permission to Intervene under Article 62 — Declaration of Intervention under Article 63 Submitted by the Government of the Marshall Islands, p. 6, para. 19; Application for Permission to Intervene under Article 62 — Declaration of Intervention under Article 63 Submitted by the Government of Samoa, p. 6, para. 19).

The Court did not rule on the five requests made in this case (*Request for an Examination of the Situation in Accordance with Paragraph 63*

of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand *v.* France) *Case, Order of 22 September 1995, I.C.J. Reports 1995*, pp. 306-307, para. 67).

— In *Sovereignty over Pulau Ligitan and Pulau Sipadan* the Philippines stated the following objects for its request:

> "*(a)* First, to preserve and safeguard the historical and legal rights of the Government of the Republic of the Philippines arising from its claim to dominion and sovereignty over the territory of North Borneo, to the extent that these rights are affected, or may be affected, by a determination of the Court of the question of sovereignty over Pulau Ligitan and Pulau Sipadan.
>
> *(b)* Second, to intervene in the proceedings in order to inform the Honourable Court of the nature and extent of the historical and legal rights of the Republic of the Philippines which may be affected by the Court's decision." (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Application for Permission to Intervene by the Government of the Philippines, p. 4, para. 5.)

10. I now turn to the Court's decisions on intervention under Article 62, beginning with one of the two cases in which the application was granted. In that case, Nicaragua was successful in respect of the legal régime of the waters of the Gulf of Fonseca. Honduras was not opposed to that part of its request, saying that a special legal regime was called for in terms of the community of interest of the coastal states; the Chamber of the Court, noting that El Salvador had claimed by the time of the proceedings that the waters were subject to a condominium of the three coastal states, allowed the request for intervention in that respect (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, pp. 120-122, paras. 69-72). It did not however allow the Application in respect of maritime delimitation within the Gulf and outside it (*ibid.*, pp. 123-128, paras. 74-84). Those refusals are the significant findings for the purpose of the present cases. Along with the other two failed delimitation intervention requests (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 20, para. 37; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, pp. 26-28, paras. 42-43, 47), those refusals may be related to two common features of the Court's decisions in maritime delimitation cases. One was recalled by the Chamber in its decision on Nicaragua's request (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 124, para. 77): delimitations between two States, I would add by treaty as well as by third-party decision, often take account of the coasts of one or

more States. The second feature is that the Court in drawing delimitation lines takes care to ensure that they stop short of the rights or interests of third States (e.g., *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, pp. 93-94, para. 133; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, pp. 25-28, paras. 21-22; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, pp. 115-117, paras. 250-252; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 448, paras. 306-307; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, pp. 756-759, paras. 312-319; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 131, para. 219). As this practice suggests, the parties do appear to provide the Court with the necessary information about the interests of third States. That information has sometimes indeed been invoked in support of an objection to jurisdiction or admissibility based on the *Monetary Gold* principle; see the submissions of Nigeria in *Cameroon* v. *Nigeria* (*I.C.J. Pleadings, Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening),* Preliminary Objections of the Federal Republic of Nigeria, paras. 4.1-4.11, 8.11-8.17) and of Nicaragua in *El Salvador/Honduras* (*I.C.J. Pleadings, Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Vol. III, pp. 737-738, paras. 9-12; *ibid*., Vol. VI, pp. 3-27).

11. The one successful application for intervention in respect of maritime delimitation was that by Equatorial Guinea in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Application for Permission to Intervene, Order of 21 October 1999, I.C.J. Reports 1999 (II)*, p. 1029. Several features of that decision lessen its significance for today's cases: the Court in its jurisdictional judgment had suggested, when rejecting a *Monetary Gold* argument, that certain third States may wish to intervene (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 323-324, paras. 115-116); only one of them, Equatorial Guinea, in fact applied to intervene; that application was not opposed and was accepted by way of an order, not a judgment, of the Court; and the Court, in the judgment in the main proceeding, said that in fixing the maritime boundary it must ensure that it did not adopt any position which might affect the rights of Equatorial Guinea and Sao Tome and Principe (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 421, para. 238). The latter State had not applied to intervene and obtained exactly the same protection as the State that did

apply; and the Court refers to the "rights" and not to the "interests" of the two States (*I.C.J. Reports 2002*, p. 421, para. 238).

12. In summary, I have three difficulties with the Court's elaboration of the distinction between "the rights in the case at hand" and "an interest of a legal nature". Those terms or concepts are being taken out of context. The definition given to the second is problematic. And, to the extent that it exists, the distinction does not appear to be useful in practice.

(Signed) Kenneth KEITH.

JOINT DISSENTING OPINION OF JUDGES CANÇADO TRINDADE AND YUSUF

Disagreement with Court's decision not to grant permission to intervene — We consider decision to be based on simple policy grounds — Disagreement with the Court's affirmation that third party's interest will be protected by Court without affording it a hearing — This closes the door to future applications for interventions — Application of Costa Rica is classic example of where non-party intervention should be granted — Object of non-party intervention is to alert the Court to third State interest of a legal nature — It is not proper for the Court to substitute itself to would-be intervenors without affording them a hearing — Standard of proof for demonstrating existence of interest less demanding than that for rights — No requirement to show that protection by Article 59 might be insufficient — Mischaracterization of Applicant's "interest of a legal nature" — Disagreement with introduction of new standard of proof in application of Article 62 — Costa Rica has fully satisfied the criteria for intervention — Court appears to exercise general discretionary powers which it does not possess under Article 62 — The purported special relationship between Articles 62 and 59 neither persuasive nor well-founded — Court's practice appears reminiscent of traditional arbitral proceedings where third party intervention not considered desirable.

I. Introduction

1. We regret that we are unable to join the Court's majority in the present case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* (Application by Costa Rica for Permission to Intervene), since we believe that the conditions under Article 62 of the ICJ Statute have been met by the Applicant. We are of the view that the Court's decision is based on policy grounds, and not on a determination of the fulfilment of the requisites of Article 62. Instead of assessing whether the Applicant has succeeded to demonstrate the existence of an interest of a legal nature which may be affected by the decision of the Court in the main proceedings, and coming to a clear conclusion on that, the Court has decided not to grant permission to intervene on the simple policy ground that "a third party's interest will, as a matter of principle, be protected by the Court, without it defining with specificity the geographical limits of an area where that interest may come into play" (paragraph 86 of the Judgment).

2. Moreover, we cannot agree with the view of the Court that the aims which Article 62 of the Statute was established to achieve can be attained

through the exercise of some kind of "judicial due diligence" with respect to third-party interests of a legal nature, without affording a hearing to the would-be intervenor in the proceedings on the merits (paragraph 89 of the Judgment). Such an approach voids Article 62 of its object and substance, which is to enable the intervenor, if granted permission, to inform the Court of what it considers as its interests of a legal nature so that they may not be affected without a hearing. By affirming that it is able to protect the interests of a legal nature of would-be intervenors without affording them a hearing in the proceedings on the merits, the Court is closing the door to future applications for intervention, especially in territorial and maritime delimitations, and depriving Article 62 of its purpose. Therein lies the essence of our joint dissenting opinion. We shall elaborate it below by successively dealing with: *(a)* the scope and object of Article 62; *(b)* the need to identify an "interest of a legal nature"; *(c)* the need to demonstrate that such interest "may be affected by a decision in the case"; *(d)* the purported special "relationship" between Articles 62 and 59 of the Court's Statute. We shall then present our conclusion.

II. The Scope and Object of Article 62 of the Statute

3. By dismissing the Application of Costa Rica for permission to intervene, which we believe is a classic example of where non-party intervention should be granted, the Court appears to have misconstrued the scope and object of Article 62 of the Statute. There is no doubt that the subject of intervention is a difficult one for an international judicial body whose jurisdiction is based on the consent of the main parties. Moreover, Article 62 has always been considered as one of the most difficult provisions to apply to concrete cases. It is not, however, so much the difficulty of the application *in concreto* of the provision itself, but rather the restrictive manner in which it has been interpreted and applied by the Court over the years, including in the present instance, that has substantially reduced its role in the case law of the Court and risks pushing it progressively into irrelevance.

4. Although Article 62 itself does not specify it, a State applying for permission to intervene may do so either as a party or as a non-party in the main proceedings. Intervention as a party has many legal implications for the adjudication of the case on the merits and is much wider in scope than intervention as a non-party. Conversely, the purpose of the limited intervention as a non-party is to permit a State which considers that it has "an interest of a legal nature which may be affected by the decision in the case" to alert the Court of the manner in which the decision in the main proceedings may affect such interest in order to protect it without becoming a party to those proceedings. Thus, if granted permission to intervene, the opportunity given to such a non-party is meant to have an effect in

the main proceedings through the substantive information provided by the intervenor to the Court.

5. In the present Judgment, the Court has decided that there is no need to grant the Applicant permission to provide such information to the Court in the main proceedings on the grounds that:

> "The Court, following its jurisprudence, when drawing a line delimiting the maritime areas between the Parties to the main proceedings, will, if necessary, end the line in question before it reaches an area in which the interests of a legal nature of third States may be involved" (paragraph 89 of the Judgment).

This reasoning suffers from several fundamental flaws. First, it is based on the assumption that the delimitation of all maritime areas in contention between two parties can be somewhat mechanically effected in the same manner without taking into account all the circumstances of a particular case or the facts specific to each case. Secondly, even in the only Judgment of the Court cited in support of this proposition (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 100, para. 112), the reference to "interests of third parties" is contained in the reasoning; while in the operative clause it is stated that:

> "From Point 5 the maritime boundary line shall continue along the line equidistant from the opposite coasts of Romania and Ukraine in a southerly direction starting at a geodetic azimuth of 185 23′ 54.5″ until it reaches *the area where the rights of third States may be affected.*" (*ibid.*, p. 131, para. 219; emphasis added).

In delimiting maritime boundaries between contending parties, the Court can of course take cognizance of the areas where the rights of third States may be involved. It is not, however, clear how it would know about areas where third State interests of a legal nature may exist, without affording a hearing to such States in the main proceedings. Thirdly, the Judgment fails to address this issue and to clarify how, and by whom, the Court will be informed of the extent of such third State interests in the relevant maritime area. In order to end a delimitation line before it reaches an area where third State interests of a legal nature may exist, is the Court to base its decision on the merits on the main parties' conception of what constitutes third States interests of a legal nature or is it to determine by itself, without the requisite information, where such interests may lie? This question remains unanswered in the Judgment.

6. We find it very surprising that the Court wishes to take upon itself a task for which non-party intervention under Article 62 of the Statute was specifically conceived. Indeed, it is the function of such non-party inter-

vention, when granted by the Court, to inform the Court of the intervenor's specific interest of a legal nature in the maritime areas on which there is a dispute between the main parties in order to ensure that such interest is protected. It is not, therefore, proper for the Court, in our view, to portray itself as a potential substitute to would-be non-party intervenors in the main proceedings to justify its refusal to grant permission to the Applicant to intervene. Such refusal should be based on a clear determination of the failure of the Applicant to show in the specific case at hand that it has an interest of a legal nature which may be affected by the decision on the merits of the case.

7. Article 81, paragraph 2 *(b)* of the Rules of Court requires a State applying for permission to intervene to set out "the precise object of the intervention". In the present case, Costa Rica has indicated in its Application that the object of its request for permission to intervene is twofold: *(a)* to inform the Court of what it regards as its interest of a legal nature in the adjacent maritime spaces on which there is a dispute between Nicaragua and Colombia; and *(b)* to protect its rights and interests by all legal means available. The Court recognizes that "the object of the intervention, as indicated by Costa Rica, is in conformity with the requirements of the Statute and the Rules of Court" (paragraph 35 of the Judgment). Yet, the Court concludes that "a third party's interest will, as a matter of principle, be protected by the Court without it defining with specificity the geographical limits of an area where that interest may come into play" (paragraph 86 of the Judgment). If the Court is to claim, as it does in this case, that it can always protect by itself and on its own wisdom the interests of would-be non-party intervenors, without affording such parties a hearing in the main proceedings, then the object of intervention of any State applying to intervene loses all significance, despite recognition by the Court that such object of intervention is in conformity with the Statute.

III. The Need to Identify an "Interest of a Legal Nature"

8. Looking back at the case law of the Court in respect of applications for intervention, we find that, in most cases, the Court did not recognise an interest of a legal nature which may be affected by the decision in the case pursuant to Article 62 of the Statute, and thus rejected the Applicants' requests for permission to intervene[1]. Yet, on two occasions so far,

[1] Cf. cases of *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, pp. 3 *et seq.* (Application by Malta); *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, pp. 575 *et seq.*, paras. 81-83, 93 (Application by the Philippines). Cf. also case of *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, pp. 3 *et seq.* (Application by Italy — note, however, that in this case the Court dismissed Italy's claim, *inter alia*, because to have granted it would involve the Court pronouncing

the Court found that the respective Applicants (one from Latin America (Nicaragua in 1990) and one from Africa (Equatorial Guinea in 1999)) had demonstrated an interest of a legal nature which may be affected by the decision in the case pursuant to Article 62 of the Statute and, accordingly, granted the Application for permission to intervene[2].

9. For the first time in its history, the Court attempts, in the present Judgment, to bring some clarification to the concept of an "interest of a legal nature" (paragraph 26). This is a welcome development. Yet, the Court does not make full use of this clarification in assessing whether the requirements of Article 62 have been met by the Applicant. It might therefore be useful to say a few words about the origins, meaning and scope of that concept.

10. The origins of the expression "interest of a legal nature" lie in the work of the Advisory Committee of Jurists, appointed by the League of Nations, which drafted the PCIJ Statute in 1920. The Advisory Committee of Jurists, drawing on domestic law principles, considered and combined various elements which led to the adoption of that concept[3]. It appears from the *travaux préparatoires* that the choice of the formulation of an "interest of a legal nature", as opposed to "rights" or general "interest" was reached as somewhat of a "hybrid" compromise between distinct proposals by some of the members of the Advisory Committee of Jurists. The final choice of words prompted the comment that "the desire to accommodate opposing views prevailed over the need for clarity and pre-

upon Italy's "sovereign rights"). — It also occurred, in previous cases, that requests for permission to intervene were dismissed when the main case was found inadmissible. Cf. cases of *Nuclear Tests (Australia* v. *France), Application for Permission to Intervene, Order of 20 December 1974, I.C.J. Reports 1974*, pp. 530 *et seq.; Nuclear Tests (New Zealand* v. *France), Application for Permission to Intervene, Order of 20 December 1974, I.C.J. Reports 1974*, pp. 535 *et seq.; Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case, Order of 22 December 1995, I.C.J. Reports 1995*, pp. 288 *et seq.*

[2] Cf. case of *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, pp. 92 *et seq*. Note, however, that it was held that Nicaragua had an "interest of a legal nature which may be affected" by part of the Chamber's Judgment on the merits and thus the Chamber decided that Nicaragua was accordingly permitted to intervene *in certain respects* in the case (concerning the status of the Gulf); and cf. case of *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Application for Permission to Intervene, Order of 21 October 1999, I.C.J. Reports 1999 (II)*, pp. 1029 *et seq.* (Application by Equatorial Guinea).

[3] For a detailed account of distinct proposals made within the Advisory Committee of Jurists, 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 H. Mosler* (eds. R. Bernhardt *et alii*), Berlin/ Heidelberg, Springer-Verlag, 1983, pp. 630-635; S. Torres Bernárdez, "L'intervention dans la procédure de la Cour Internationale de Justice", 256 *Recueil des cours de l'Académie de droit international de La Haye* (1995), pp. 238-245.

cision"[4]. In fact, the resulting formulation has been criticized as "an almost indefinable monster"[5].

11. In his thematic course delivered at The Hague Academy of International Law in 1988, Judge Kéba Mbaye pointed out, as to the aforementioned formulation, that:

> "It was evidently a sort of compromise whereby the two notions (interest and right) were combined into a single formulation. This compromise is hardly satisfactory for some, who take the view that, while it is clear what is meant by 'interest' and 'right' separately, it is much less clear what is meant by an 'interest of a legal nature'".[6]

Judge Mbaye then clarified an interest of a legal nature as meaning "an interest which can be justified by reference to a rule of law "[7]. And, in his projection of this matter into the future, he ventured to state that "*locus standi* will develop so as to keep pace with an international society which is moving inexorably towards solidarity and therefore interdependence"[8].

12. In a similar line of reasoning, in his dissenting opinion in the case concerning the *Continental Shelf* (*Libyan Arab Jamahiriya/Malta, Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, p. 71 (Application by Italy for Permission to Intervene), Judge Sette-Câmara argued that "there is a considerable difference between the object of a principal case (. . .) and an incidental procedure of intervention, which is intended only to seek the protection of interests of a legal nature" (paragraph 64). To him, "intervention is an important device of procedural law in all legal systems of the world without exception (. . .). It is an instrument indispensable for good administration of justice" *(la bonne administration de la justice)* (paragraph 85). And Judge Sette-Câmara added that

> "When the founding fathers of the Statute of the old Court decided to find a place in the draft prepared by the Hague Advisory Committee of Jurists for the institution of intervention, they were not innovating in any way. They did nothing but introduce in the basic document of the Court a procedural remedy known and recognized by all the legal systems of the world as a legitimate means by which third parties, extraneous to a legal dispute, have the right to come into the proceedings to defend their legal rights or interests which might be impaired or threatened by the course of the contentious proceedings" (paragraph 2).

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[4] T. Licari, "Intervention under Article 62 of the Statute of the I.C.J.", 8 *Brooklyn Journal of International Law* (1982), p. 271.

[5] W. M. Farag, *L'Intervention devant la Cour Permanente de Justice Internationale*, Paris, LGDJ, 1927, p. 59; he added that "the desire to please everyone prevailed over precision and legal clarity" (*ibid*., p. 60 *[translation by the Registry]*).

[6] K. Mbaye, "L'intérêt pour agir devant la Cour Internationale de Justice", 209 *Recueil des cours de l'Académie de droit international de La Haye* (1988), p. 290 *[translation by the Registry]*.

[7] *Ibid*., p. 263.

[8] *Ibid*., p. 340 *[translation by the Registry]*.

13. The clarification put forward by the Court in the present case does not substantially differ from the above descriptions of the concept of an interest of a legal nature (paragraph 26 of the Judgment). It also recognizes that "an interest of a legal nature within the meaning of Article 62 does not benefit from the same protection as an established right and is not subject to the same requirements in terms of proof". We are in agreement with this conclusion; but we find it regrettable that it has not been applied in the Court's assessment of whether the requirements of Article 62 have been met by Costa Rica. Indeed, this less demanding standard of proof should have been applied by the Court in assessing whether the Application meets the requisites of Article 62 of the Statute.

14. An "interest of a legal nature" constitutes a legitimate means whereby a third party may request permission to intervene in contentious proceedings to seek protection from a future judgment which may, in the absence of such intervention, affect its claims. As a matter of fact, Article 59 of the Statute has no relevance for the assessment of the requirements of a request for permission to intervene under Article 62, whose purpose is for the Applicant to seek the permission of the Court so as to be able to provide substantive information to the Court in the course of the main proceedings and prior to the issuance of a judgment by the Court. Thus, it is our view that the standard of proof applied in the assessment of such requirements should neither be as demanding as that applicable to the establishment of the existence of a right, nor should it be made dependent, as the Court does in this Judgment, on showing that the "protection" afforded by Article 59 might be insufficient. We shall return to the analysis of this point in Section V below.

IV. The Need to Demonstrate that such Interest "May Be Affected by the Decision in the Case"

15. The Court recognizes in paragraph 66 of the Judgment that Costa Rica "has indicated the maritime area in which it considers it has an interest of a legal nature which may be affected by the decision of the Court in the main proceedings". It does not however assess, on the basis of the facts specific to this case and the evidence placed before it by the Applicant, whether or not Costa Rica has an interest of a legal nature which may be affected by the decision of the Court in that maritime area. Instead, the Court appears to have decided not to grant Costa Rica permission to intervene on the basis of general considerations, which, in our view, are neither well-founded nor persuasive. First, the Court, in paragraphs 71-72 of the Judgment, sets aside one of the main arguments of Costa Rica aimed at showing how its interest of a legal nature may be affected by a decision of the Court on the factually erroneous ground that Costa Rica had initially claimed its 1977 Facio-Fernandez Treaty with Colombia, and the assumptions underlying it, as an interest of a legal nature, but later retracted that claim. Secondly, the Court introduces a

new standard of proof based on the adequacy of the protection provided under Article 59 of the Statute by stating that "Costa Rica must show that its interest of a legal nature (. . .) needs a protection that is not provided by the relative effect of decisions of the Court under Article 59 of the Statute". Thirdly, by observing, in paragraph 86, that "a third State's interest will, as a matter of principle, be protected by the Court, without it defining with specificity the geographical limits of an area where that interest may come into play", the Court resorts to policy grounds and to the exercise of a general discretionary power, instead of determining on the basis of the evidence placed before it, whether Costa Rica has fulfilled the conditions required for intervention under Article 62 (1). Our views on these issues are elaborated in the paragraphs that follow.

(a) *The Mischaracterization of Costa Rica's "Interest of a Legal Nature"*

16. It is stated in paragraph 71 of the Judgment that

> "Costa Rica has acknowledged that the 1977 Treaty does not itself constitute an interest of a legal nature that may be affected by the decision in this case and that it does not seek any particular outcome from this case in relation to this Treaty".

The Court then concludes, on the basis of this statement, that "there is no need for the Court to consider Costa Rica's arguments contained in [the preceding paragraph 70] or the contentions set forth by Nicaragua and Colombia in response to those arguments" (paragraph 72). It should, however, be pointed out that Costa Rica had never claimed that the 1977 Treaty represented an interest of a legal nature for it.

17. In its Application, as quoted under paragraph 54 of the Judgment, Costa Rica states that its:

> "interest of a legal nature which may be affected by the decision of the Court is Costa Rica's interest in the exercise of its sovereign rights and jurisdiction in the maritime area in the Caribbean Sea to which it is entitled under international law by virtue of its coast facing on that sea".

It is clear from the above quotation that Costa Rica had clearly specified in its Application what it considered to constitute its interest of a legal nature in the maritime area disputed by the main Parties to the case, and that the 1977 Treaty, between itself and Colombia, was not claimed to constitute for it "an interest of a legal nature that may be affected by the decision in this case". Thus, in its reply to the question put to it by a member of the Court, it reiterated this position by stating that neither the assumptions underlying the 1977 Treaty nor the treaty itself constitute an interest of a legal nature that may be affected by the decision in the case.

It is our view that the purpose of the arguments presented by Costa Rica with respect to the 1977 Treaty was to demonstrate the manner in which its interest of a legal nature, as specified in its Application, may be affected by a decision of the Court.

18. Indeed, Costa Rica contended, first, that its 1977 delimitation agreement with Colombia is based on giving full weight and effect to Colombia's San Andres Island, recognizing a notional 200 nautical mile entitlement. This resulted, according to Costa Rica, in the negotiation and conclusion of a simplified equidistant maritime border by drawing a median line between the islands and the Costa Rican coast. In the view of Costa Rica, since Nicaragua's claim calls for the enclaving of those islands, the premise on which the 1977 delimitation with Colombia was based would be eliminated, thus necessitating the re-evaluation of Costa Rica's entitlements in the relevant maritime area. Secondly, Costa Rica argued that if Nicaragua's claims prevail in this area, Colombia would no longer be Costa Rica's neighbour in this part of the Caribbean Sea, a situation which would effectively extinguish the essential basis of the 1977 Treaty and require new delimitation between Costa Rica and its new neighbour — Nicaragua.

19. It is unfortunate that the Court decided to exclude Costa Rica's arguments related to the 1977 Treaty and the assumptions underlying it on the erroneous ground that Costa Rica had initially claimed the said treaty as an interest of a legal nature, but later retracted that claim, instead of assessing whether the arguments of Costa Rica relating to the maritime area in which it considers to have an interest of a legal nature show the possibility that its interests may be affected by such a decision in view of the existence of overlapping interests and claims in that area. An unwarranted and erroneous link appears to have been established between the requirement that Costa Rica's request has to satisfy in terms of demonstrating the manner in which its interest of a legal nature may be affected by a decision and the fact that the 1977 Treaty is not its legal interest *per se*. We find it also surprising, to say the least, that the Court has decided to base its conclusions on a misunderstanding of the manner in which Costa Rica characterized its interest of a legal nature.

(b) *A Decision that Introduces a New Standard of Proof*

20. Although the burden of proof of the existence of an interest of a legal nature which may be affected by a decision in the case clearly lies with the Applicant, this does not imply that the standard of proof is a very demanding one. As pointed out by the Chamber of the Court in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*:

> "[I]t is clear, first, that it is for a State seeking to intervene to demonstrate convincingly what it asserts, and thus to bear the burden of

> proof; and, second, that it has only to show that its interest 'may' be affected, not that it will or must be affected." (*I.C.J Reports 1990*, p. 117, para. 61.)

Article 62 cannot however be interpreted to require, as stated in paragraph 87 of the Judgment, that "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".

21. While the purported existence of a special relationship between Article 62 and Article 59 of the Statute will be examined below (Section V), we consider it important to emphasize here that the requirement of a standard of proof based on the adequacy of the protection provided by "the relative effect of decisions of the Court under Article 59 of the Statute" cannot be founded in the wording of Article 62 (1) of the Statute. This does not only constitute a new, and hitherto unheard of, requirement under Article 62 (1) of the Statute or Article 81 (2) of the Rules, but it also appears to contradict the statement by the Court in paragraph 27 of the Judgment that "[t]he decision of the Court granting permission to intervene can be understood as a preventive one, since it is aimed at allowing the intervening State to take part in the main proceedings in order to protect an interest of a legal nature which risks being affected in those proceedings".

(c) *A Decision Apparently Based on Policy Grounds*

22. It is our view that Article 62 (2) does not confer a discretionary power on the Court so as to allow it to refuse an application for intervention even though the applicant has satisfied all criteria for intervention established under Article 62 (1). The Court itself recognized this in *Tunisia/Libya* and observed that it had no discretion "to accept or reject a request for permission to intervene for reasons simply of policy" (*Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 12, para. 17). This appears however to be the case in the present instance although the policy underlying the Court's decision has not been clearly enunciated in the present Judgment. We believe that Costa Rica has fully satisfied the criteria for intervention and clearly shown that it has an interest of a legal nature which may be affected by the decision of the Court in the proceedings. Nevertheless, the Court appears to exercise general discretionary powers with respect to the application for intervention without assessing whether or not the requirements for intervention under that paragraph have been met by Costa Rica. This is confirmed by the fact that the Court observes in paragraph 86 that "a third party's interest will, as a matter of principle, be protected by the Court".

23. In determining whether or not the conditions for intervention established under Article 62 (1) have been met by the Applicant, the Court has to assess whether the grounds invoked by the Applicant are sufficiently convincing. This does not however give it unfettered latitude. As observed by Judge Jennings, in his dissenting opinion on Italy's Application for intervention in the *Continental Shelf* case *(Libyan Arab Jamahiriya/Malta)*:

> "This is far from saying the Court has a complete discretion. What it has to do is to decide whether the requirements of intervention under Article 62 are complied with or not: that is to say it has to decide in this case whether there are sufficiently cogent and convincing grounds upon which Italy might reasonably 'consider' that it does indeed have interests of a legal nature which 'may' be affected by the decision in the case between Libya and Malta. And that is all." (*I.C.J. Reports 1984*, p. 151, para. 9)

Instead of examining and assessing whether the arguments and evidence presented by Costa Rica convincingly show that its interest of a legal nature may be affected by the decision in the case between Nicaragua and Colombia, the Court appears to have taken a short cut and opted for a policy decision, although the grounds of the policy itself have not been clearly specified.

V. The Purported Special "Relationship" between Articles 62 and 59 of the Statute

24. Article 59 of the ICJ Statute determines that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case". For its part, Article 62 provides that

> "1. 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.
> 2. It shall be for the Court to decide upon this request".

The view that Article 59 of the Statute extends protection to third States' interests of a legal nature remains, in our perception, to be demonstrated. Article 59 limits the binding force of a Court's decision to the contending parties in the concrete case. It does not, however, ensure the protection to third States' interests of a legal nature, unless such States are granted permission to intervene under Article 62 so that they can inform the Court of their interest of a legal nature before a final decision is adopted. Moreover, Article 59 has a specific and narrow focus and applies to all decisions of the Court, and not in any particular way those relating to Article 62.

25. Distinctly from the provision of Article 59, third States are entitled, by means of intervention under Article 62, to submit arguments to the Court in order to fully defend their interests of a legal nature, so that the Court's decision does not impinge on them. The provision of Article 59, on its part, does not have a direct bearing on the aforementioned procedure of intervention under Article 62, which, if granted, actually takes place prior to the issuance of the final decision on the merits.

26. The question of the purported "relationship" between Articles 62 and 59 was the object of much discussion in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984.* In his dissenting opinion, Judge Jennings argued that the idea that Article 59 was protective of third States' interests was rather illusory. We fully agree with this assessment.

27. The institution of intervention was conceived in a broader perspective, which should be kept in mind in our days, even more so with the growing complexity of issues in contemporary international disputes. As aptly pointed out a few years ago,

> "the ever-increasing complexity and multilateralization of international relations (. . .) must give rise to doubts whether a dispute settlement mechanism based on the single assumption that disputes exist only between two parties is adequate or even appropriate for modern needs"[9].

28. To conclude this section, it is important to emphasize that Article 62 does not say anything about the necessity for a State applying for permission to intervene to show that an interest of a legal nature needs a protection that is not provided by the relative effect of decisions of the Court under Article 59. Intervention under Article 62 was conceived, for the purposes of the sound administration of justice, to operate prior to the issuance of a final decision by the Court, and thus before Article 59 comes into operation, to enable a third party which considers to have an interest of a legal nature to make its case to the Court, so that the Court may take such an interest into account before reaching its decision on the main proceedings. It therefore constitutes a means whereby the Court can be alerted to the broader interests of a legal nature which may be involved in the case besides the positions of the main Parties to the dispute. It is regrettable that the Court, by focusing on an unproven special "relationship" between Article 59 and Article 62, has ignored these important characteristics of the institution of intervention.

[9] S. Rosenne, "Article 59 of the Statute of the International Court of Justice Revisited", in *El Derecho Internacional en un Mundo en Transformación – Liber Amicorum en Homenaje al Profesor E. Jiménez de Aréchaga* (ed. M. Rama-Montaldo), Vol. II, Montevideo, Fundación de Cultura Universitaria, 1994, p. 1157.

VI. Conclusion

29. The ICJ has not developed to date a consistent jurisprudence on the institution of intervention in international proceedings, established in Article 62 of the Statute, despite the fact that it has had successive occasions to clarify the legal issues involved[10]. There appears, however, to be a hardly visible thread of avoidance of the concrete application of intervention, running through the majority of the Court's Judgments relating to Applications for permission to intervene. In his dissenting opinion in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta) Application for Permission to Intervene, Judgment, I.C.J. Reports 1984)*, Judge Roberto Ago went as far as to suggest that the Court's decision in the *cas d'espèce* might "well sound the [death] knell of the institution of intervention in international legal proceedings" (paragraph 22). Somewhat distinctly, we are of the view that the institution of intervention has not yet passed away; it remains alive in 2011, in spite of the fact that the Court's practice to date seems to amount to a slow-motion asphyxiation of the institution of intervention, to which we cannot at all subscribe, as such practice appears reminiscent of traditional bilateral arbitral proceedings where a barrier against third party intervention may be considered desirable. It is our view that such practice is not in line with contemporary demands of the judicial settlement of disputes, nor with challenges faced by present-day international law within the framework of a universalist outlook.

(Signed) Antônio Augusto Cançado Trindade.

(Signed) Abdulqawi A. Yusuf.

[10] Cf. notes (2) and (3), *supra*.

DISSENTING OPINION OF JUDGE DONOGHUE

Disagreement with outcome and approach of the Court in rejecting Costa Rica's Application to intervene — Cross-reference to separate dissent regarding Honduras's Application to intervene for general discussion of intervention and Court's practice in maritime delimitation cases involving overlapping claims — Overlap of Costa Rica's claims with area at issue sufficient to show that Costa Rica has an interest of a legal nature that "may" be affected — Parties' opposition to intervention not dispositive where Article 62 criteria are met.

1. I have dissented from the decision to reject Costa Rica's Application to intervene as a non-party in these proceedings. I part company with the Court not only as to the result, but also as to its approach to Article 62 of the Statute of the Court.

2. I have also dissented today from the Court's decision to reject the Application of Honduras to intervene as a non-party. In Part I of my dissenting opinion with respect to the Application of Honduras to intervene in this case, I address the factors relevant to consideration of an application to intervene under Article 62 of the Statute of the Court and examine the Court's practice of protecting third States that "may be affected" by its judgments regarding maritime boundaries. The general conclusions that I draw in Part I of my Honduras opinion also provide a foundation for the conclusions that I reach in this opinion. Rather than reproducing the same text here, I refer the reader to Part I of my Honduras opinion.

3. In Part I of my Honduras opinion, I discuss the Court's practice in delimitation cases in which the third States may have an interest in the area at issue, calling attention in particular to its practice of using directional arrows to avoid delimiting boundaries in areas in which the rights of a third State "may be affected". I rely on this practice to support my conclusion that a decision in a case in which the area to be delimited overlaps (at least in part) an area claimed by a third State "may affect" the "interest of a legal nature" of the third State, providing a basis for granting the application of such a third State to intervene under Article 62 of the Statute.

4. I turn now to the Application of Costa Rica. The area that Costa Rica has described as a "minimum area of interest" in the Caribbean Sea overlaps the area at issue in this case, as can be seen on the sketch-map attached to the Judgment. As that map shows, Costa Rica and Colombia have agreed to a maritime boundary, pursuant to a treaty that is not in

force but that both Costa Rica and Colombia observe in practice. Costa Rica also has an agreed maritime boundary with Panama. On the other hand, Costa Rica and Nicaragua have no agreed maritime boundary. Instead, to support its assertion of an "interest of a legal nature", Costa Rica has defined the minimum area to which it asserts a claim vis-à-vis Nicaragua (based on its calculation of an equidistance line) (CR 2010/12, pp. 33-40, paras. 4-29 (Lathrop)).

5. At this stage in the proceedings, the Court is not equipped to draw any conclusions about the likelihood that it would accept the position of one Party or the other or would establish another line entirely. Thus, to assess whether its decision in this case "may affect" Costa Rica's interest of a legal nature, it is appropriate for the Court to take into account the claim of each Party. The way that a decision in the main proceedings "may affect" the interest of a legal nature of Costa Rica is especially clear if one examines the delimitation proposed by Colombia. As the Court notes, Colombia has not requested that the Court fix the southern endpoint of the maritime boundary that it is asked to determine (Judgment, para. 88). The sketch-map shows that the line proposed by Colombia would eventually intersect with the "minimum area of interest" claimed by Costa Rica.

6. The Court today does not clearly state whether it concludes that the overlap of Costa Rica's claim with the area at issue in the case gives rise to an "interest of a legal nature", although I see nothing in the Judgment that would call that conclusion into question. The Court appears to decide, however, that it can protect any such interest of a legal nature by delimiting the boundary between Colombia and Nicaragua in a manner that stops short of the area claimed by Costa Rica (*ibid.*, para. 89). The prospect of protecting Costa Rica's interests through such means then leads the Court to reject Costa Rica's Application. As I explain in Part I of my Honduras opinion, the expectation that the Court would decline to set an endpoint and would instead use a directional arrow does not counsel against intervention, but rather supports the conclusion that there the third State has an interest of a legal nature that may be affected. Even accepting that the Court is equipped to protect the interests of a third State without intervention, Article 62 of the Statute does not require the applicant for intervention to prove that intervention is the *only* means by which the Court can avoid affecting an interest of a legal nature. (The area claimed by Nicaragua also overlaps the area that Costa Rica describes as its "minimum area of interest". The line proposed by Nicaragua (as shown on the sketch-map) does not intersect with Costa Rica's "minimum" area of interest, but a decision by the Court to accept the line proposed by Nicaragua (as between Colombia and Nicaragua) could have implications for the delimitation of Costa Rica's boundary with respect to either or both of the Parties.)

7. As discussed in Part I of my Honduras opinion, when the Court is aware of the potential claim of a third State, it has typically affixed a

directional arrow at the end of the boundary line to indicate that the prolongation of the boundary line established by its decision extends only until it reaches the area where the rights or claims of a third State "may be affected". To determine the location of the last turning point and thus the location where such a directional arrow should be placed, the Court inevitably must assess or estimate the point at which a third State may have an interest of a legal nature (i.e., in this case, a claim to maritime areas that overlaps the area at issue in the case). If the Court does not make that assessment, it risks placing a directional arrow within an area that is subject to claim by a third State. This could be seen to prejudge the delimitation of an area as between the third State and one or both of the parties, neither of which may be entitled to the area vis-à-vis the third State.

8. Thus, I conclude that Costa Rica has met its burden of demonstrating that it has an "interest of a legal nature that may be affected" by the Judgment in this case. The Applicant also has defined a purpose that is consistent with non-party intervention — that of informing the Court of Costa Rica's legal rights and interests and of seeking to ensure that the Court's decision "does not affect those rights and interests" (Application by Costa Rica for Permission to Intervene, p. 12, para. 24).

9. As discussed in Part I of my Honduras opinion, Costa Rica need not establish an independent basis for jurisdiction in order to support its application for non-party intervention.

10. In concluding that Costa Rica should be permitted to intervene, I have taken account of the Parties' arguments with respect to the law and have considered the views of the Parties, which were divided in their attitudes towards the proposed intervention. Nicaragua opposed intervention and made clear its concerns about the procedural consequences of intervention. While I have an appreciation for those concerns, they do not alter my conclusion that the Applicant has met its burden under Article 62 and that the Court should have granted the Application, as it did in the most recent case in which a third State with overlapping claims applied to intervene (see *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Application for Permission to Intervene, Order of 21 October 1999, I.C.J. Reports 1999 (II)*).

11. In my Honduras dissenting opinion, I make some general observations about the Court's current practice in intervention cases, which appears to invite third States to apply to intervene as a means to present their views to the Court, whether or not the Application is granted, and I offer some thoughts on how this approach might be improved.

(Signed) Joan E. DONOGHUE.

DECLARATION OF JUDGE *AD HOC* GAJA

1. When rejecting Costa Rica's Application for permission to intervene as a non-party, the majority of the Court considered that the Judgment on the merits would at any event protect the Applicant's "interest of a legal nature" that might be affected. Protection would be "accorded to any third party, whether intervening or not" (para. 86). While the Court's intention to do this is clear, one cannot be certain that all the necessary information would be available for effectively protecting a third State's interest. Thus, a third State may wish to intervene in the proceedings in order to contribute to the determination of the nature and scope of its legal interest at stake.

2. The only mechanism offered for that purpose by the Statute and the Rules of Court to the third State is to request permission to intervene under Article 62 of the Statute. In its most recent decision concerning intervention in a case relating to maritime delimitation, the Court had unanimously granted Equatorial Guinea permission to intervene (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Application for Permission to Intervene, Order of 21 October 1999, I.C.J. Reports 1999 (II)*, pp. 1034-1035, paras. 13-16). The parties to that case had not objected to the request, but the Court, while noting this fact, did not rely on it as a justification for granting permission.

3. I fail to see how one could distinguish Equatorial Guinea's request in that case from Costa Rica's Application in the present case. Moreover, I cannot find compelling reasons for the Court to revert to its earlier and more restrictive jurisprudence on the admissibility of intervention in cases of maritime delimitation (*Continental Shelf (Libyan Arab Jamahiriya/ Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, pp. 18-27, paras. 28-43).

4. It is true that, when deciding the merits, the Court may take into account (para. 51) the information provided by a party that has unsuccessfully sought permission to intervene. However, it seems paradoxical that, in a case of maritime delimitation, the only way for a third State to submit information about its interest of a legal nature which may be affected by a decision of the Court would be to make an application that the Court considers inadmissible. This the more so given the cumbersome procedure provided by Article 84 of the Rules when an objection to an application for permission to intervene is filed.

5. If one accepts the approach taken by the majority of the Court in the present Judgment, it would seem that the Court should establish a

new procedural mechanism short of intervention that would allow third States to submit information which they consider useful in order to protect their interests of a legal nature.

(Signed) Giorgio GAJA.