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RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

DIFFÉREND TERRITORIAL ET MARITIME

(NICARAGUA c. COLOMBIE)

REQUÊTE DU HONDURAS
À FIN D'INTERVENTION

ARRÊT DU 4 MAI 2011

2011

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

TERRITORIAL AND MARITIME DISPUTE

(NICARAGUA *v.* COLOMBIA)

APPLICATION BY HONDURAS
FOR PERMISSION TO INTERVENE

JUDGMENT OF 4 MAY 2011

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JUDGMENT

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4 May 2011

TERRITORIAL AND MARITIME DISPUTE

(NICARAGUA *v.* COLOMBIA)

APPLICATION BY HONDURAS FOR PERMISSION TO INTERVENE

Legal framework — Conditions for intervention under Article 62 of the Statute and Article 81 of the Rules of Court.

The capacities in which Honduras is seeking to intervene, as a party or, alternatively, as a non-party — The status of intervener as a party requires the existence of a basis of jurisdiction as between the States concerned, but such a basis of jurisdiction is not a condition for intervention as a non-party — If it is permitted by the Court to become a party to the proceedings, the intervening State may ask for rights of its own to be recognized by the Court in its future decision, which would be binding for that State in respect of those aspects for which intervention was granted, pursuant to Article 59 of the Statute — Whatever the capacity in which a State is seeking to intervene, it is required to establish the existence of an interest of a legal nature which may be affected by the decision in the main proceedings, and the precise object of its intervention.

Article 81, paragraph 2 (a)*, of the Rules of Court — Interest of a legal nature which may be affected by the decision of the Court in the main proceedings — In contrast to Article 63 of the Statute, a third State does not have a right to intervene under Article 62 of the Statute — Difference between right and interest of a legal nature in the context of Article 62 of the Statute — Interest of a legal nature to be shown is not limited to the* dispositif *alone of a Judgment but may also relate to the reasons which constitute the necessary steps to the* dispositif.

Article 81, paragraph 2 (b)*, of the Rules of Court — Precise object of intervention certainly consists in informing the Court of the interest of a legal nature which may be affected by the decision of the Court in the main proceedings, but also in protecting that interest — Proceedings on intervention are not an occasion for the State seeking to intervene or for the Parties to discuss questions of substance relating to the main proceedings — A State requesting permission to intervene may not,*

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under the cover of intervention, seek to introduce a new case alongside the main proceedings — While it is true that a State which has been permitted to intervene as a party may submit claims of its own to the Court for decision, these have to be linked to the subject of the main dispute.

Examination of Honduras's Application for permission to intervene.

Whether Honduras has set out an interest of a legal nature in the context of Article 62 of the Statute — Honduras has indicated the maritime area in which it considers that it has an interest of a legal nature which may be affected by the decision of the Court in the main proceedings — Honduras has stated that it can assert rights relating to oil concessions, naval patrols and fishing activities in that area — With regard to the area north of the bisector line established by the Court in its 8 October 2007 Judgment in the case concerning the Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua *v.* Honduras)*, Honduras may have no interest of a legal nature which may be affected by the decision in the present proceedings because the rights of Honduras over that area have not been contested by Nicaragua or by Colombia — By virtue of the principle of* res judicata*, as applied to the Court's 8 October 2007 Judgment, Honduras cannot have an interest of a legal nature in the area south of the bisector line established by the Court in that Judgment.*

Whereas Honduras has claimed that it has an interest of a legal nature in determining if and how the Court's 8 October 2007 Judgment has affected the status and application of the 1986 Maritime Delimitation Treaty between Honduras and Colombia, the Court in that Judgment did not rely on that Treaty, in conformity with the principle of res inter alios acta*.*

Whereas Honduras has requested that the Court grant it permission to intervene as a party to fix the tripoint between Honduras, Nicaragua and Colombia, the Court, having clarified matters pertaining to the 8 October 2007 Judgment and the 1986 Treaty, does not see any link between the issue of the tripoint raised by Honduras and the current case.

Honduras has thus failed to satisfy the Court that it has an interest of a legal nature that may be affected by the decision of the Court in the main proceedings — There is consequently no need for the Court to consider any further questions that have been put before it in the present proceedings.

JUDGMENT

Present: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, 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;

H.E. Mr. Samuel Santos, Minister for Foreign Affairs,
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,

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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 Honduras,

represented by

H.E. Mr. Carlos López Contreras, Ambassador, National Counsellor at the Ministry of Foreign Affairs,

as Agent;

Sir Michael Wood, K.C.M.G., member of the English Bar, Member of the International Law Commission,

Ms Laurence Boisson de Chazournes, Professor of International Law at the University of Geneva,

as Counsel and Advocates;

H.E. Mr. Julio Rendón Barnica, Ambassador, Ministry of Foreign Affairs,

H.E. Mr. Miguel Tosta Appel, Ambassador, Chairman of the Honduran Demarcation Commission, Ministry of Foreign Affairs,

Mr. Sergio Acosta, Chargé d'affaires a.i. at the Embassy of Honduras, in the Kingdom of the Netherlands,

Mr. Richard Meese, *avocat à la Cour d'appel de Paris*,

Mr. Makane Moïse Mbengue, Doctor of Law, Senior Lecturer at the University of Geneva,

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Ms Laurie Dimitrov, pupil barrister at the Paris Bar, Cabinet Meese,
Mr. Eran Sthoeger, Faculty of Law, New York University,

as Counsel;

Mr. Mario Licona, Ministry of Foreign Affairs,

as Technical Adviser,

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.

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6. On 15 May 2003, referring to Article 53, paragraph 1, of the Rules of Court, the Government of the Republic of Honduras (hereinafter "Honduras") 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 Honduran Government and to the Parties.

7. 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.

8. Between 2005 and 2008, referring to Article 53, paragraph 1, of the Rules of Court, the Governments of Jamaica, Chile, Peru, Ecuador, Venezuela and 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 each of these requests. The Registrar duly communicated these decisions to the said Governments and to the Parties.

9. 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.

10. 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.

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 10 June 2010, Honduras filed an Application for permission to intervene in the case pursuant to Article 62 of the Statute. It stated therein that the object of this Application was:

> "*Firstly*, in general terms, to protect the rights of the Republic of Honduras in the Caribbean Sea by all the legal means available and, consequently, to make use for that purpose of the procedure provided for in Article 62 of the Statute of the Court.
>
> *Secondly*, to inform the Court of the nature of the legal rights and interests of Honduras which could be affected by the decision of the Court, taking account of the maritime boundaries claimed by the Parties in the case brought before the Court . . .

> *Thirdly*, to request the Court to be permitted to intervene in the current proceedings as a State party. In such circumstances, Honduras would recognize the binding force of the decision that would be rendered. Should the Court not accede to this request, Honduras requests the Court, in the alternative, for permission to intervene as a non-party."

In accordance with Article 83, paragraph 1, of the Rules of Court, certified copies of Honduras's Application were communicated forthwith to Nicaragua and Colombia, which were invited to furnish written observations on that Application.

13. On 2 September 2010, within the time-limit fixed for that purpose by the Court, the Governments of Nicaragua and Colombia submitted written observations on Honduras's Application for permission to intervene. In its observations, Nicaragua stated that the request to intervene failed to comply with the Statute and the Rules of Court and that it therefore "opposes the granting of such permission, and . . . requests that the Court dismiss the Application for permission to intervene filed by Honduras". For its part, Colombia indicated *inter alia* in its observations that it had "no objection" to Honduras's request "to be permitted to intervene as a non-party", and added that it "considers that [Honduras's request to be permitted to intervene as a party] falls to the Court to decide". Nicaragua having objected to the Application, the Parties and the Government of Honduras were notified by letters from the Registrar dated 15 September 2010 that the Court would hold hearings, in accordance with Article 84, paragraph 2, of the Rules of Court, to hear the observations of Honduras, 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 Honduras'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 18, 20, 21 and 22 October 2010 on whether to grant Honduras's Application for permission to intervene, the Court heard the oral arguments and replies of the following representatives:

For Honduras: H.E. Mr. Carlos López Contreras, *Agent*,
Sir Michael Wood,
Ms Laurence Boisson de Chazournes.

For Nicaragua: H.E. Mr. Carlos José Argüello Gómez, *Agent*,
Mr. Alain Pellet.

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

*

16. In its Application for permission to intervene, the Honduran Government stated in conclusion that it

"seeks the Court's permission to intervene as a party in the current proceedings in order to settle conclusively, on the one hand, the dispute over the delimitation line between the endpoint of the boundary fixed by the Judgment of 8 October 2007 [in the case concerning the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*] and the tripoint on the boundary line in the 1986 Maritime Delimitation Treaty, and, on the other hand, the determination of the tripoint on the boundary line in the 1986 Maritime Delimitation Treaty between Colombia and Honduras. *In the alternative*, Honduras seeks the Court's permission to intervene as a non-party in order to protect its rights and to inform the Court of the nature of the legal rights and interests of the Republic of Honduras in the Caribbean Sea which could be affected by the decision of the Court in these proceedings." (Para. 36.)

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

"that the Application for permission to intervene filed by Honduras does not comply with the Statute and Rules of Court and therefore [it]: (1) opposes the granting of such permission, and (2) requests that the Court dismiss the Application for permission to intervene filed by Honduras" (para. 39).

In its Written Observations on Honduras's Application for permission to intervene, Colombia submitted as follows:

"With respect to the request to be permitted to intervene as a non-party, Colombia has no objection. Colombia has acknowledged that vis-à-vis Honduras it is bound by the delimitation agreed in the 1986 Treaty between Colombia and Honduras. However, this is not the case vis-à-vis Nicaragua and Colombia has consequently reserved its rights in this area.

With respect to the Honduran request to be permitted to intervene as a party, Colombia understands that this request raises issues relating to the Court's 2007 Judgment in the *Nicaragua* v. *Honduras* case to which Colombia was not a party. Consequently, Colombia considers that this request falls to the Court to decide under Article 62 of the Statute, taking into account whether the object and purpose of the request relates to intervention under Article 62 in the main case between Nicaragua and Colombia or to another dispute not directly at issue in the pending case."

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

On behalf of the Government of Honduras,

at the hearing of 21 October 2010:

"Having regard to the Application and the oral pleadings,

May it please the Court to permit Honduras:

(1) to intervene as a party in respect of its interests of a legal nature in the area of concern in the Caribbean Sea (paragraph 17 of the Application) which may be affected by the decision of the Court; or

(2) *in the alternative*, to intervene as a non-party with respect to those interests."

On behalf of the Government of Nicaragua,

at the hearing of 22 October 2010:

"In accordance with Article 60 of the Rules of the Court and having regard to the Application for permission to intervene filed by the Republic of Honduras and its oral pleadings, the Republic of Nicaragua respectfully submits that:

The Application filed by the Republic of Honduras is a manifest challenge to the authority of the *res judicata* of your 8th of October 2007 Judgment. Moreover, Honduras has failed to comply with the requirements established by the Statute and the Rules of the Court, namely, Article 62, and paragraph 2, *(a)* and *(b)*, of Article 81 respectively, and therefore Nicaragua (1) opposes the granting of such permission, and (2) requests that the Court dismiss the Application for permission to intervene filed by Honduras."

On behalf of the Government of Colombia,

at the hearing of 22 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, Honduras has satisfied the requirements of Article 62 of the Statute and, consequently, that Colombia does not object to Honduras's request for permission to intervene in the present case as a non-party. As concerns Honduras's request to be permitted to intervene as a Party, Colombia likewise reiterates that it is a matter for the Court to decide in conformity with Article 62 of the Statute."

* * *

18. In its Application for permission to intervene dated 10 June 2010 (see paragraph 12 above), Honduras made clear that it primarily sought to be permitted to intervene in the pending case as a party, and that if the Court did not accede to that request, it wished, in the alternative, to be permitted to intervene as a non-party.

Honduras defined the object of its intervention according to whether its primary or alternative request to intervene were granted: if the former, to settle the maritime boundary between itself and the two States Parties to the case; if the latter, to protect its rights and legal interests and to inform the Court of the nature of these, so that they are not affected by the future maritime delimitation between Nicaragua and Colombia.

19. Referring to Article 81 of the Rules of Court, Honduras 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 the intervention, and the basis

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of jurisdiction which is claimed to exist as between itself and the Parties to the main proceedings.

I. The Legal Framework

20. The legal framework of Honduras'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."

21. Intervention being a proceeding 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 first examine the capacities in which Honduras is seeking to intervene, before turning to the other constituent elements of the request for permission to intervene.

* *

1. The Capacities in which Honduras Is Seeking to Intervene

22. Honduras is seeking permission to intervene as a party in the case before the Court in order to achieve a final settlement of the dispute

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between itself and Nicaragua, including the determination of the tripoint with Colombia, and, in the alternative, as a non‑party, in order to inform the Court of its interests of a legal nature which may be affected by the decision the Court is to render in the case between Nicaragua and Colombia, and to protect those interests.

23. Referring to the jurisprudence of the Court, Honduras considers that Article 62 of the Statute allows a State to intervene either as a party or a non‑party. In the former case, a basis of jurisdiction as between the State seeking to intervene and the parties to the main proceedings is required, and the intervening State is bound by the Court's judgment, whereas in the latter, that judgment has effect only between the parties to the main proceedings, pursuant to Article 59 of the Statute. Honduras maintains that in the present proceedings, Article XXXI of the Pact of Bogotá founds the Court's jurisdiction as between itself, Nicaragua and Colombia. For a State seeking to intervene as a party, according to Honduras, intervention consists in "asserting a right of its own with respect to the object of the dispute", so as to obtain a ruling from the Court on such a right.

24. Honduras points out that, unlike intervention as a non‑party, intervention as a party, in view of its object, results in making the Court's decision on the specific point or points on which the intervention was permitted binding on the intervener, and thus in making Articles 59 of the Statute and 94 of the Charter applicable to the intervener.

25. For Nicaragua, whatever the two alternative capacities in which Honduras is seeking to intervene, both would continue to be governed by Article 62 of the Statute and would have to meet the *sine qua non* condition or conditions laid down by that provision, namely that the State must be able to show an interest of a legal nature which may be affected by the decision in a dispute submitted to the Court. It points out that Honduras, in any event, may not intervene as a party, if for no other reason than the absence of a basis of jurisdiction, since Article VI of the Pact of Bogotá excludes from the Court's jurisdiction "matters already settled . . . by decision of an international court". In Nicaragua's view, Honduras's argument consists in reopening delimitation issues already decided by the Judgment of the Court of 8 October 2007 (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 659).

26. Colombia notes that intervention is an incidental procedure and may not be used to tack on a new case, distinct from the case that exists between the original parties. It accepts that both forms of intervention, as a party and as a non‑party, require proof of the existence of an interest of a legal nature, although it questions whether the same criterion applies to this interest in both cases.

*

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27. The Court observes that neither Article 62 of the Statute nor Article 81 of the Rules of Court specifies the capacity in which a State may seek to intervene. However, in its Judgment of 13 September 1990 on Nicaragua's Application for permission to intervene in the case concerning *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, the Chamber of the Court considered the status of a State seeking to intervene and accepted that a State may be permitted to intervene under Article 62 of the Statute either as a non-party or as a party:

> "It is therefore clear that a State which is allowed to intervene in a case, does not, by reason only of being an intervener, become also a party to the case. It is true, conversely, that, provided that there be the necessary consent by the parties to the case, the intervener is not prevented by reason of that status from itself becoming a party to the case." (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, pp. 134-135, para. 99.)

28. In the opinion of the Court, the status of intervener as a party requires, in any event, the existence of a basis of jurisdiction as between the States concerned, the validity of which is established by the Court at the time when it permits intervention. However, even though Article 81 of the Rules of Court provides that the application must specify any basis of jurisdiction claimed to exist as between the State seeking to intervene and the parties to the main case, such a basis of jurisdiction is not a condition for intervention as a non-party.

29. If it is permitted by the Court to become a party to the proceedings, the intervening State may ask for rights of its own to be recognized by the Court in its future decision, which would be binding for that State in respect of those aspects for which intervention was granted, pursuant to Article 59 of the Statute. *A contrario*, as the Chamber of the Court formed to deal with the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* has pointed out, a State permitted to intervene in the proceedings as a non-party "does not acquire the rights, or become subject to the obligations, which attach to the status of a party, under the Statute and Rules of Court, or the general principles of procedural law" (*ibid.*, p. 136, para. 102).

30. The fact remains that, whatever the capacity in which a State is seeking to intervene, it must fulfil the condition laid down by Article 62 of the Statute and demonstrate that it has an interest of a legal nature which may be affected by the future decision of the Court. Since Article 62 of the Statute and Article 81 of the Rules of Court provide the legal framework for a request to intervene and define its constituent elements, those elements are essential, whatever the capacity in which a State is seeking to intervene; that State is required in all cases to establish its interest of a legal nature which may be affected by the decision in the main case, and the precise object of the requested intervention.

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

31. Honduras takes the view that there are two principles underpinning Article 62 of the Statute. Under the first of these, it is for the State wishing to intervene to "consider" whether one or more of its interests of a legal nature may be affected by the decision in the case, and it alone is able to appreciate the extent of the interests in question. According to the second principle, it is for that State to decide whether it is appropriate to exercise a right of intervention before the Court.

For Honduras, therefore, Article 62, like Article 63, lays down a right to intervene for the States parties to the Statute, whereby it is sufficient for one of them to "consider" that its interests of a legal nature may be affected in order for the Court to be bound to permit intervention. According to Honduras, if that interest is genuine, the Court does not have the discretion not to authorize the intervention.

32. Nicaragua, for its part, sees it as incorrect to contend that a right to intervene exists under Article 62 of the Statute, this being, rather, a right to apply to intervene, since it is for the Court to determine objectively whether the legal interest relied upon is real and whether it really may be affected in the case in relation to which it is raised in incidental proceedings. For Nicaragua, the claims of the State seeking to intervene must be credible enough to be seen as a genuine legal interest at stake.

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33. 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).

34. It is up to the State concerned to apply to intervene, even though the Court may, in the course of a particular case, draw the attention of third States to the possible impact that its future judgment on the merits may have on their interests, as it did in its Judgment of 11 June 1998 on preliminary objections in the case concerning *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)* (*I.C.J. Reports 1998*, p. 324, para. 116).

35. In contrast to Article 63 of the Statute, a third State does not have a right to intervene under Article 62. It is not sufficient for that State to consider that it has an interest of a legal nature which may be affected by the Court's decision in the main proceedings in order to have, *ipso facto*, a right to intervene in those proceedings. Indeed, Article 62, paragraph 2,

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clearly recognizes the Court's prerogative to decide on a request for permission to intervene, on the basis of the elements which are submitted to it.

36. It is true that, as it has already indicated, the Court "does not consider paragraph 2 [of Article 62] to confer upon it any general discretion to accept or reject a request for permission to intervene for reasons simply of policy" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 12, para. 17). It is for the Court, responsible for safeguarding the proper administration of justice, to decide whether the condition laid down by Article 62, paragraph 1, has been fulfilled. Consequently, Article 62, paragraph 2, according to which "[it] shall be for the Court to decide upon this request", is markedly different from Article 63, paragraph 2, which clearly gives certain States "the right to intervene in the proceedings" in respect of the interpretation of a convention to which they are parties.

37. 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 it has to be the object of a real and concrete claim of that State, based on law, as opposed to a claim of a purely political, economic or strategic nature. 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.

38. 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.)

39. 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).

3. The Precise Object of the Intervention

40. 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".

41. Honduras is requesting the Court, in the context of its Application for permission to intervene as a party, to determine the course of the maritime boundary between itself, Nicaragua and Colombia in the maritime zone in question, and to fix the tripoint on the boundary line under the 1986 Treaty. In the alternative, the object of Honduras's intervention as a non-party is "to protect its rights and to inform the Court of the nature of the legal rights and interests of the Republic of Honduras in the Caribbean Sea which could be affected by the decision of the Court in the pending case".

42. Nicaragua, for its part, takes the view that Honduras is endeavouring to convince the Court to rule, in fact, on the course of its own boundary with the Parties, and that "the only purpose of Honduras's hoped-for intervention is to call into question the 2007 Judgment determining its maritime boundary with Nicaragua along its entire length".

43. As for Colombia, it points out that intervention may not be used to tack on a new case, distinct from the case that exists between the original parties, but considers that Honduras qualifies to intervene as a non-party under Article 62 of the Statute, and that it is for the Court to go further, if it so decides, by allowing that State to intervene as a party.

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44. The Court recalls that Honduras's request for permission to intervene is an incidental procedure and that, whatever the form of the requested intervention, as a party or as a non-party, the State seeking to intervene is required by the Statute to demonstrate the existence of a legal interest which may be affected by the decision of the Court in the main proceedings. It follows that the precise object of the intervention must be connected with the subject of the main dispute between Nicaragua and Colombia.

45. 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.

46. As the Court has previously stated, the *raison d'être* of intervention is to enable a third State, whose legal interest might be affected by a possible decision of the Court, to participate in the main case in order to protect that interest (see paragraph 38 above).

47. The Court notes that a State requesting permission to intervene may not, under the cover of intervention, seek to introduce a new case alongside the main proceedings. While it is true that a State which has been permitted to intervene as a party may submit claims of its own to the Court for decision, these have to be linked to the subject of the main dispute. The fact that a State is permitted to intervene does not mean that it can alter the nature of the main proceedings, since intervention "cannot be [a proceeding] which transforms [a] case into a different case with different parties" (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 134, para. 98; see also *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, p. 20, para. 31).

48. Therefore, the purpose of assessing the connection between the precise object of the intervention and the subject of the dispute is to enable the Court to ensure that a third State is actually seeking to protect its legal interests which may be affected by the future judgment.

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II. Examination of Honduras's Request for Permission to Intervene

49. In specifying its interests of a legal nature that may be affected by the decision of the Court, Honduras in its Application states that the 1986 Maritime Delimitation Treaty between Honduras and Colombia (hereinafter referred to as "the 1986 Treaty") recognizes that the area north of the 15th parallel and east of the 82nd meridian involves Honduras's legitimate rights and interests of a legal nature (see sketch-map below, p. 441). Honduras argues that the Court should, in its decision in the present case, take full account of such rights and interests in the above-mentioned area, which, it maintains, were not addressed in the 2007 Judgment of the Court in the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* (*Judgment, I.C.J. Reports 2007 (II)*, p. 658) (hereinafter referred to as "the 2007 Judgment"). Since the Court is going to determine the allocation of the "delimitation area" proposed by Nicaragua in the main proceedings, Honduras is of the view that the Court will inevitably have to decide whether the 1986 Treaty is in force and whether it does or does not accord Colombia rights in the area in dispute between Colombia and Nicaragua. Therefore Honduras maintains that the status and substance of the 1986 Treaty are at stake in the present case.

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50. Honduras claims that by virtue of the 1986 Treaty, in the area east of the 82nd meridian, it is still entitled to certain sovereign rights and jurisdiction such as oil concessions, naval patrols and fishing activities. Honduras contends that Nicaragua as a third party to the 1986 Treaty cannot rely on the said treaty to maintain that the maritime area in question appertains to Nicaragua alone. Honduras is convinced that, without its participation as an intervening State, the decision of the Court may irreversibly affect its legal interests if the Court is eventually to uphold certain claims put forward by Nicaragua.

51. Honduras argues that the 2007 Judgment did not settle the entire Caribbean Sea boundary between Nicaragua and Honduras. In its opinion, the fact that the arrow on the bisector boundary appearing on one of the sketch-maps in the 2007 Judgment stops at the 82nd meridian, together with the wording of the *dispositif* of the Judgment, indicates that the Court made no decision about the area lying east of that meridian (see sketch-map below, p. 441). According to Honduras, because the Court in the 2007 Judgment did not rule on the 1986 Treaty, a matter that the Court was not asked to address, there still exists uncertainty to be resolved in regard to the respective sovereign rights and jurisdiction of the three States in the area, namely, Honduras, Colombia and Nicaragua. To be more specific, Honduras takes the view that the Court has not determined the final point of the boundary between Honduras and Nicaragua, nor has it specified that the final endpoint will lie on the azimuth of the bisector boundary line. As the object of its Application, Honduras is requesting the Court, in the event it is granted permission to intervene as a party, to fix the tripoint between Honduras, Nicaragua and Colombia, and thus to reach a final settlement of maritime delimitation in the area.

52. In explaining its understanding of the effect of the 2007 Judgment with respect to the legal reasoning stated in paragraphs 306 to 319 of the Judgment under the heading "Starting-point and endpoint of the maritime boundary", Honduras contends that these paragraphs are not part of *res judicata*, and that, in paragraph 319, the Court was not ruling on a specific matter, but rather indicating to the Parties the methodology it could use without prejudging a final endpoint, and without prejudging which State or States could be considered as the third States. Thus, in its view, paragraph 319 does not rule upon any matter at all and *res judicata* in principle only applies to the *dispositif* of the Judgment.

53. Nicaragua and Colombia, the Parties to the main proceedings, hold different positions towards Honduras's request. Nicaragua is definitely opposed to the Application by Honduras for permission to intervene, either as a party or a non-party. Nicaragua takes the position that Honduras's request fails to identify any interest of a legal nature that may be affected by the decision of the Court as required by Article 62 of the Statute and challenges the *res judicata* of the 2007 Judgment.

54. Nicaragua contends that Honduras has no interest of a legal nature south of the delimitation line fixed by the Court in the 2007 Judgment, including the area bounded by that line in the north and the 15th parallel in the south. According to Nicaragua, the 1986 Treaty cannot be relied on against it because it encroaches on its sovereign rights. Nicaragua argues that the 2007 Judgment, with full force of *res judicata*, settles the entire Caribbean Sea boundary between Nicaragua and Honduras, and that *res judicata* extends not only to the *dispositif*, but also to the reasoning, in so far as it is inseparable from the operative part. Nicaragua is of the view that the Application instituted by Honduras attempts to reopen matters between Nicaragua and Honduras that have already been decided by the Court and therefore should be barred by the principle of *res judicata*.

55. Colombia, on the other hand, is of the view that Honduras has satisfied the test to intervene as a non-party in the case under Article 62 of the Statute. Moreover, it raises no objection to the request of Honduras to intervene as a party. Colombia focused its arguments on the effect of the 2007 Judgment on the legal rights of Colombia vis-à-vis Nicaragua in the area which the 1986 Treaty covers. Colombia asserted that its bilateral obligations towards Honduras under the 1986 Treaty did not prevent it from claiming in the present proceedings rights and interests in the area north of the 15th parallel and east of the 82nd meridian as against Nicaragua, because what it had committed to Honduras under the 1986 Treaty was only applicable to Honduras.

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56. According to Article 62 of the Statute and Article 81 of the Rules of Court, the State applying to intervene has to satisfy certain conditions in order for intervention to be permitted. Either as a party or a non-party, the State requesting permission to intervene should demonstrate to the Court that it has an interest of a legal nature that may be affected by the decision of the Court in the main proceedings. The Court, in ascertaining whether Honduras has or has not met the criteria in Article 62 of the Statute concerning intervention, will first of all examine the interests as claimed by Honduras in its Application. The Court is mindful, as stated previously, that in analysing such interests, the Court neither has the intention to construe the meaning or scope of the 2007 Judgment in the sense of Article 60 of the Statute, nor to address any subject-matter that should be dealt with at the merits phase of the main proceedings (see paragraph 45 above). The Court must not in any way anticipate its decision on the merits (see *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 118, para. 62).

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1. The Interest of a Legal Nature Claimed by Honduras

57. The Court will first examine the interest that Honduras has claimed for protection by intervention. Honduras indicates that the zone containing its interest of a legal nature that may be affected by the decision of the Court lies within a roughly rectangular area as illustrated in the sketch-map attached herewith on page 441. It further states that the south line and the east line of the rectangle, that are identical with the boundary in the 1986 Treaty, run as follows:

> "[S]tarting from the 82nd meridian, the boundary goes due east along the 15th parallel until it reaches meridian 79° 56′ 00″. It then turns due north along that meridian. Some distance to the north, it turns to follow an approximate arc to the west of some cays and Serranilla Bank, until it reaches a point north of the cays . . ."

58. The Court observes that Honduras, in order to demonstrate that it has an interest of a legal nature in the present case, contends that it is entitled to claim sovereign rights and jurisdiction over the maritime area in the rectangle. In concrete terms, Honduras states that it can assert rights relating to oil concessions, naval patrols and fishing activities in that area. In its arguments, Honduras raises a number of issues that directly put into question the 2007 Judgment, in which the maritime boundary between Honduras and Nicaragua was delimited.

59. Honduras's interest of a legal nature relates essentially to two issues: whether the 2007 Judgment has settled the entire maritime boundary between Honduras and Nicaragua in the Caribbean Sea and what effect, if any, the decision of the Court in the pending proceedings will have on the rights that Honduras enjoys under the 1986 Treaty.

60. In its Application, Honduras explains that it and Colombia possess rights in the maritime zone north of the 15th parallel as they are generated by the Honduran coast, on the one hand, and by the Archipelago of San Andrés, Serranilla and the island of Providencia, on the other. Due to their overlapping claims, the 1986 Treaty was concluded. The Court cannot fail to observe that Honduras's position on the status of the 15th parallel as stated in the present case is not raised for the first time as between Honduras and Nicaragua. As a matter of fact, it was duly considered by the Court in the delimitation of their maritime boundary in the 2007 Judgment.

61. In the *Nicaragua* v. *Honduras* case in which the 2007 Judgment was rendered, one of Honduras's principal arguments with respect to the delimitation was that the 15th parallel, either as a traditional line or by tacit agreement of the neighbouring States, should serve as the maritime boundary between Honduras and Nicaragua. The Court in that judgment, however, rejected both of these legal grounds and gave no effect to the 15th parallel as the boundary line. By virtue of the 2007 Judgment,

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therefore, the 15th parallel plays no role in the consideration of the maritime delimitation between Honduras and Nicaragua. In other words, the matter has rested on *res judicata* for Honduras in the present proceedings.

62. In establishing a single maritime boundary between Nicaragua and Honduras, delimiting their respective territorial seas, continental shelves and exclusive economic zones in the disputed area, the Court in the 2007 Judgment drew up a straight bisector line, with some adjustments taking into account Honduras's islands off the coastline. In the present proceedings, Honduras and Nicaragua hold considerably different positions on the effect of this bisector boundary. They differ as to whether the 2007 Judgment has specified an endpoint on the bisector line, whether the bisector line extends beyond the 82nd meridian and, consequently, whether the 2007 Judgment has definitively delimited the entire maritime boundary between Honduras and Nicaragua in the Caribbean Sea. The Court notes Honduras's assertion that these issues, if not answered, would certainly affect the finality and stability of the legal relations between the two Parties.

63. In the Court's reasoning in paragraphs 306-319 of the 2007 Judgment, there are two aspects that the Court considers as directly bearing on the above issues. The Court recalls, first, that in the 2007 Judgment, it was only after the Court came to the conclusion that there may be potential third-State interests in the area that it decided not to rule on the issue of the endpoint. Logically, if Point F on the bisector line had been determined as the endpoint, as interpreted by Honduras, it would have been unnecessary for the Court to continue considering where third-State interests might possibly lie because Point F would in any event be devoid of potential effect on the rights of any third State. Secondly, it was because of the claim raised by Honduras that a delimitation continuing *beyond* the 82nd meridian would affect Colombia's rights that the Court took full account of the arguments put forward by Honduras in regard to the third-State rights and made sure

> "that any delimitation between Honduras and Nicaragua extending *east beyond the 82nd meridian and north of the 15th parallel (as the bisector adopted by the Court would do)* would not actually prejudice Colombia's rights because Colombia's rights under [the 1986 Treaty] do not extend north of the 15th parallel" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, pp. 758-759, para. 316; emphasis added).

According to the Court's reasoning, the bisector line with a defined azimuth, after Point F, is to continue as a straight line subject to the curve of the Earth and run the whole course of the maritime boundary

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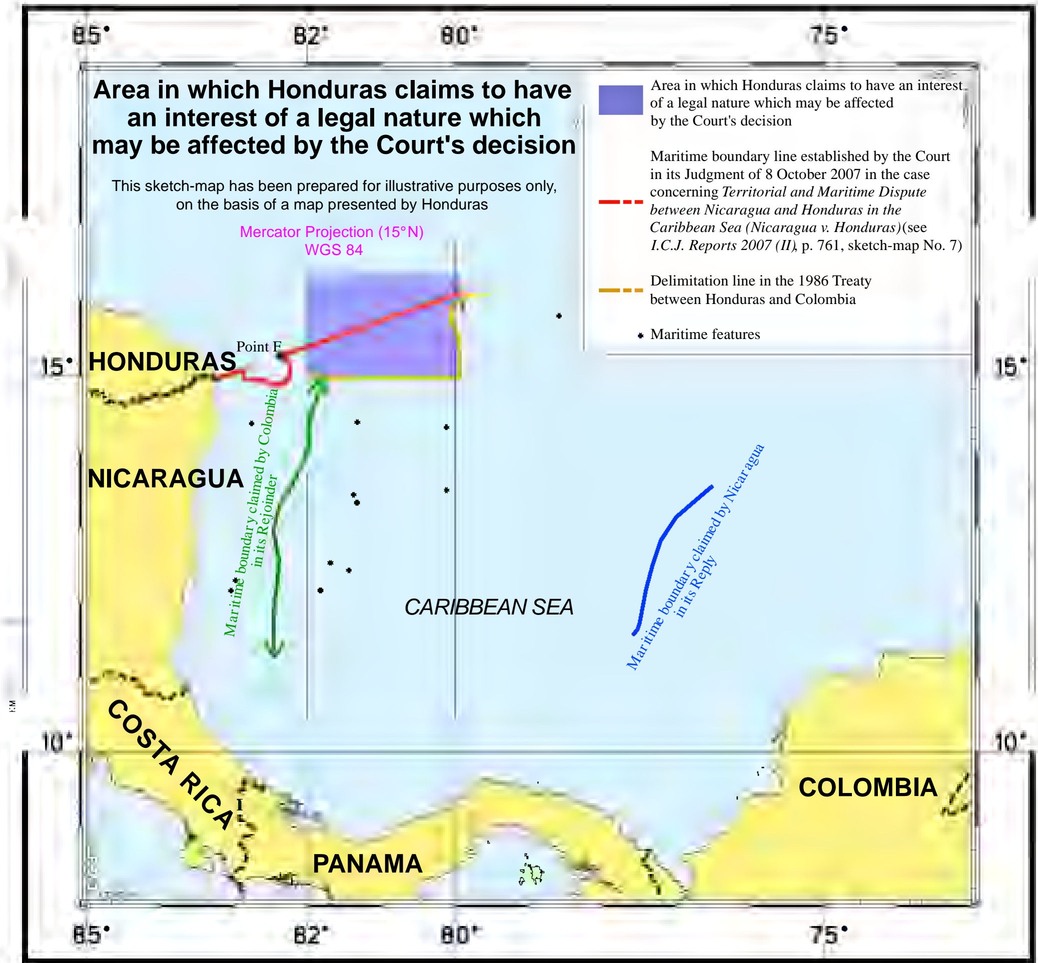
Area in which Honduras claims to have an interest of a legal nature which may be affected by the Court's decision
This sketch-map has been prepared for illustrative purposes only, on the basis of a map presented by Honduras
Mercator Projection (15°N)
WGS 84
Area in which Honduras claims to have an interest of a legal nature which may be affected by the Court's decision
Maritime boundary line established by the Court in its Judgment of 8 October 2007 in the case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)(see I.C.J. Reports 2007 (II), p. 761, sketch-map No. 7)
Delimitation line in the 1986 Treaty between Honduras and Colombia
Maritime features
85°
82°
80°
75°
15°
10°
Point F
HONDURAS
NICARAGUA
COSTA RICA
PANAMA
COLOMBIA
CARIBBEAN SEA
Maritime boundary claimed by Colombia in its Rejoinder
Maritime boundary claimed by Nicaragua in its Reply

between Honduras and Nicaragua as long as there are no third-State rights affected. It thus delimits the maritime zones respectively accruing to Honduras and Nicaragua in the Caribbean Sea, which by definition should cover the area in the rectangle.

64. In examining Honduras's argument, the Court finds it difficult to appreciate Honduras's contention that "a boundary that does not have an endpoint, clearly cannot be settled in its entirety", because that was not the first time that the Court left open the endpoint of a maritime boundary to be decided later when the rights of the third State or States were ascertained. As the Court held in the 2007 Judgment, it is "usual in a judicial delimitation for the precise endpoint to be left undefined in order to refrain from prejudicing the rights of third States" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 756, para. 312; see also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 91, para. 130; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, p. 27; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 116, para. 250; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 421, para. 238, p. 424, para. 245 and p. 448, para. 307; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), I.C.J. Reports 2009*, p. 131, para. 219.) What was decided by the Court with respect to the maritime delimitation between Honduras and Nicaragua in the Caribbean Sea is definitive. Honduras could not be a "third State" in the legal relations in that context for the reason that it was itself a party to the proceedings. So long as there are no third-State claims, the boundary is to run indisputably on the course defined by the Court.

65. The Court observes that the boundary might have conceivably deviated from the straight-line established by the 2007 Judgment only if Honduras had presented further maritime features to be taken into account for the boundary delimitation. Neither in the case concerning the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* nor in the present proceedings did Honduras make such a suggestion or produce any evidence to that effect. Of course, even if it had done so in the present proceedings, the matter still would not have fallen under Article 62 of the Statute with respect to intervention, but under Article 61 thereof concerning revision. In other words, Honduras does not suggest that there still exists any unresolved dispute or evidence that would prove that the bisector line is not the complete and final maritime boundary between Honduras and Nicaragua.

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2. The Application of the Principle of Res Judicata

66. Honduras's claims are primarily based on the ground that the reasoning stated in paragraphs 306-319 of the 2007 Judgment does not have the force of *res judicata*. Honduras contends that, therefore, the principle of *res judicata* does not prevent it from raising issues relating to the reasoning of that Judgment.

67. It is a well-established and generally recognized principle of law that a judgment rendered by a judicial body has binding force between the parties to the dispute (*Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, p. 53).

The Court notes that in ascertaining the scope of *res judicata* of the 2007 Judgment, it must consider Honduras's request in the specific context of the case.

68. The rights of Honduras over the area north of the bisector line have not been contested either by Nicaragua or by Colombia. With regard to that area, there thus cannot be an interest of a legal nature of Honduras which may be affected by the decision of the Court in the main proceedings.

In order to assess whether Honduras has an interest of a legal nature in the area south of the bisector line, the essential issue for the Court to ascertain is to what extent the 2007 Judgment has determined the course of the single maritime boundary between the areas of territorial sea, continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Honduras.

69. The Court is of the view that the course of the bisector line as determined in point (3) of the operative clause of its 2007 Judgment (paragraph 321) is clear. In point (3) of its operative clause, which indisputably has the force of *res judicata*, the Court held that "[f]rom point F, [the boundary line] shall continue along the line having the azimuth of 70° 14′ 41.25″ until it reaches the area where the rights of third States may be affected".

70. The Court observes that the reasoning contained in paragraphs 306-319 of the 2007 Judgment, which was an essential step leading to the *dispositif* of that Judgment, is also unequivocal on this point. The Court made a clear determination in these paragraphs that the bisector line would extend beyond the 82nd meridian until it reached the area where the rights of a third State may be affected. Before the rights of such third State were ascertained, the endpoint of the bisector line would be left open. Without such reasoning, it may be difficult to understand why the Court did not fix an endpoint in its decision. With this reasoning, the decision made by the Court in its 2007 Judgment leaves no room for any alternative interpretation.

3. Honduras's Request in relation to the 1986 Treaty

71. With regard to the 1986 Treaty, the Court observes that Honduras and Colombia have different positions. Honduras asserts that given the

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"conflicting bilateral obligations", stemming from the 1986 Treaty with Colombia and the 2007 Judgment vis-à-vis Nicaragua respectively, Honduras has an interest of a legal nature in determining if and how the 2007 Judgment has affected the status and application of the 1986 Treaty. Colombia, on the other hand, asks the Court to leave the 1986 Treaty aside, because the task of the Court at the merits phase is to delimit the maritime boundary between Colombia and Nicaragua, not to determine the status of the treaty relations between Colombia and Honduras. Thus, in the view of Colombia, the status and substance of the 1986 Treaty are not issues at stake in the main proceedings.

72. In the perceived rectangle now under consideration (see sketch-map, p. 441), there are three States involved: Honduras, Colombia and Nicaragua. These States may conclude maritime delimitation treaties on a bilateral basis. Such bilateral treaties, under the principle *res inter alios acta*, neither confer any rights upon a third State, nor impose any duties on it. Whatever concessions one State party has made to the other shall remain bilateral and bilateral only, and will not affect the entitlements of the third State. In conformity with the principle of *res inter alios acta*, the Court in the 2007 Judgment did not rely on the 1986 Treaty.

73. Between Colombia and Nicaragua, the maritime boundary will be determined pursuant to the coastline and maritime features of the two Parties. In so doing, the Court will place no reliance on the 1986 Treaty in determining the maritime boundary between Nicaragua and Colombia.

74. Finally, the Court does not consider any need to address the remaining issue of the "tripoint" that Honduras claims to be on the boundary line in the 1986 Treaty. Having clarified the above matters pertaining to the 2007 Judgment and the 1986 Treaty, the Court does not see any link between the issue of the "tripoint" raised by Honduras and the current proceedings.

75. In light of the above considerations, the Court concludes that Honduras has failed to satisfy the Court that it has an interest of a legal nature that may be affected by the decision of the Court in the main proceedings. Consequently, there is no need for the Court to consider any further questions that have been put before it in the present proceedings.

* * *

76. For these reasons,

The Court,

By thirteen votes to two,

Finds that the Application for permission to intervene in the proceedings, either as a party or as a non-party, filed by the Republic of Honduras under Article 62 of the Statute of the Court cannot be granted.

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Al-Khasawneh, Simma, Keith, Sepúlveda-Amor, Bennouna, Cançado Trindade, Yusuf, Xue; *Judges* ad hoc Cot, Gaja;

AGAINST: *Judges* Abraham, Donoghue.

Done in French and in English, the French 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 Honduras, respectively.

(Signed) Hisashi OWADA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge AL-KHASAWNEH appends a declaration to the Judgment of the Court; Judge ABRAHAM appends a dissenting opinion 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 declaration to the Judgment of the Court; Judge DONOGHUE appends a dissenting opinion to the Judgment of the Court.

(Initialled) H.O.

(Initialled) Ph.C.

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DECLARATION OF JUDGE AL-KHASAWNEH

I concur in finding that the Application filed by Honduras to intervene in the proceedings, either as a party or a non-party, cannot be granted (Judgment, para. 76). I am likewise in basic agreement with the reasoning on which this finding was reached.

Nevertheless, I feel compelled to append this brief declaration in order to express my strong doubts regarding the need, the wisdom and the practical utility of distinguishing between the concepts of a "right" and "an interest of a legal nature" (*ibid.*, para. 37).

I have already had occasion in the context of the present case, but in respect to another Application, to state my views fully on these matters (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application by Costa Rica for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*; dissenting opinion of Judge Al-Khasawneh, pp. 379-383, paras. 18-29) and no purpose would be served by repeating them in their entirety. Suffice it to say that, to my mind, an interest of a legal nature is nothing other than a right. The unfortunate expression "an interest of a legal nature" was concocted, as a compromise, in 1920 by the Advisory Committee of Jurists but has since been used interchangeably with the expression "right", legal reasoning not admitting of a hybrid concept which is neither a right nor an interest. To draw normative consequences from such an alleged distinction in terms of the requirements of proof and the degree of protection afforded by law is not justified in my opinion. Moreover, even if one were to agree *arguendo* that "an interest of a legal nature" may sometimes be different from a "right" it does not follow that this will always be the case. When the two are not different, i.e., when a State alleges — as is so often in requests for intervention — that its interests of a legal nature are its rights to exercise sovereignty, the question arises as to what standard of proof and what degree of protection should apply. This serves to demonstrate that the distinction is unfounded in logic and we have already seen that it was never followed in the practice of the Court. In the event, this attempt to define and clarify the concept of "an interest of a legal nature" has not brought us nearer to comprehending this concept. It has rather made it even more obscure.

(Signed) Awn Shawkat AL-KHASAWNEH.

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DISSENTING OPINION OF JUDGE ABRAHAM

[Translation]

Conditional right of third States to intervene in the principal proceedings — Lack of discretionary power of the Court — Agreement with the rejection of Honduras's request to intervene as a party, but disagreement with the Court's reasoning — Lack of basis of jurisdiction between Honduras and the Parties to the case — Disagreement with the rejection of the request to intervene as a non-party — Possibility of the Court's future Judgment in this case affecting Honduras's interests of a legal nature.

1. Honduras has requested permission to intervene in the case concerning the territorial and maritime dispute between Nicaragua and Colombia, in the principal proceedings as a party and, in the alternative — should that request be rejected —, as a non-party.

2. I agree with the operative part of the Judgment in so far as it rejects the request to intervene as a party. On the other hand, I disagree with that operative part in so far as it also rejects Honduras's request to intervene as a non-party. In my view, the Court should have upheld the alternative submissions in the Application, and I therefore had no choice but to vote against the operative clause.

3. In this opinion, I will briefly set out the reasoning behind my position.

4. I will begin with some general considerations on the nature of third-State intervention in a case in progress, as provided for in Article 62 of the Statute of the Court (I). I will then set out the reasons why I believe Honduras did not meet the necessary conditions to be allowed to intervene as a party to the case, reasons which are not the same as those to be found in the Judgment (II). Lastly, I will explain why, in my view, Honduras does indeed satisfy the conditions to be permitted to intervene as a non-party (III).

I. General Considerations on Intervention: Do Third States Have a Right to Intervene?

5. The question has been discussed frequently and at length in doctrine: does Article 62 of the Statute, as interpreted by the Court to date, afford third States a right to intervene in a case, and to what extent, or, on the other hand, does it merely give third States an option which it may seek to exercise, but whose exercise is subject to discretionary leave, which the Court will decide whether or not to grant?

6. This question is not purely theoretical or academic. The answer given to it inevitably has major repercussions on the way in which the Court considers each application for permission to intervene submitted to it, and on the decisions it takes on those applications — it being understood that this debate does not concern intervention under Article 63 of the Statute, which is indisputably a right, according to the very terms of its second paragraph.

7. The debate is obscured, however, by the fact that the notion of a "right" (to intervene) is ambiguous and, according to how that notion is understood, it is possible to argue both in favour of and, on the contrary, against the existence of such a right, without those arguments necessarily contradicting one another. The same is true of the notion of (the Court's) "discretionary" power: it can be interpreted in several different ways (with no one interpretation necessarily better than the other), and it is possible to conclude both that the Court has a discretionary power — or a "margin of discretion" — when it is ruling on an application for permission to intervene, and that it does not, without those conclusions necessarily being mutually contradictory.

8. Therefore, it is important to first clarify the terms of the debate, in order, as far as possible, to avoid any misunderstandings.

Leaving intervention as a party to one side for the moment (I will return to it later in Part II), and concentrating solely on what could be termed "ordinary" intervention, it is my view that third States do in fact have a right to intervene — and that, in this sense, the Court's power to allow or refuse the intervention is not discretionary —, but that this right is not unconditional: it is subject to certain conditions, whose existence must be demonstrated by the State seeking to intervene and whose satisfaction is to be determined by the Court. If these conditions are met, authorization to intervene must be granted. It is of course necessary to specify exactly what these conditions are.

9. In this respect, the text of Article 62 of the Statute is clearer and more precise in its English version than in the French one, as has been frequently observed.

The greater precision of the English text is apparent on two points.

Firstly, the essential condition for intervention is more clearly formulated in the English text than in the French. The French text states that an application for permission to intervene may be submitted when a third State considers that an interest of a legal nature is at stake for it in a dispute ("*dans un différend, un intérêt d'ordre juridique est pour lui en cause*" in French); this idea is rendered in clearer and more precise terms in the English text, which states that a third State may seek to intervene when it considers "that it has an interest of a legal nature which may be affected by the decision in the case" (literally, in French, *"qu'il possède un intérêt d'ordre juridique susceptible d'être affecté par la décision en l'espèce"*).

Secondly, in French, Article 62, paragraph 2, simply states, in a lapidary fashion, that the Court decides ("2. *La Cour décide*" in French). In

English, it reads: "2. It shall be for the Court to decide upon this request" (literally, in French, *"il appartient à la Cour de statuer sur cette requête"*). While the difference is indeed minimal, it is nonetheless possible to observe that the French text, in its conciseness, may more easily be interpreted as granting the Court a very broad discretionary power, whereas the English text makes clear that the Court's decision must concern the request as it was defined in paragraph 1, which suggests rather that the Court must decide whether — and I would add: confine itself to deciding whether — the decision pending in the case before it might affect an interest of a legal nature possessed by the State seeking to intervene.

10. The French text could be understood as allowing the Court a free hand to decide whether or not the intervention would help the principal proceedings to progress smoothly, in other words, whether it would serve the sound administration of justice to authorize it. To put it yet another way, the condition expressly mentioned in Article 62 — namely that the third State must have an interest of a legal nature which may be affected by the decision in the principal proceedings — would be necessary, but not sufficient.

According to this interpretation, even if this condition is met, the Court could refuse to allow the intervention if it considers — taking account of all the circumstances of the case — that it would not be in the interests of the sound administration of justice. If that is correct, the Court would in effect have a truly "discretionary" power, and there would certainly be no "right" to intervene for third States.

11. But this is not the interpretation of Article 62 which the Court has adopted in its jurisprudence to date, or indeed in the present Judgment.

It is true that, as stated in paragraph 35 of the Judgment — and this is in no way incompatible with earlier judgments in this respect:

> "[I]t is not sufficient for [the third] State to consider that it has an interest of a legal nature which may be affected by the Court's decision in the main proceedings in order to have, *ipso facto*, a right to intervene in those proceedings. Indeed, Article 62, paragraph 2, clearly recognizes the Court's prerogative to decide on a request for permission to intervene, on the basis of the elements which are submitted to it."

This is correct, but only means that the Statute does not afford the third State an absolute and unconditional right to intervene, i.e., a right which the latter could exercise simply because it had expressed the desire to do so, without having to satisfy any conditions. Because, if it were able to do so, then the Court's power to "decide" under Article 62, paragraph 2, would lack any substance. In the same way, to follow Honduras's argument that it is for the State wishing to intervene, and for it alone, to determine whether it has an interest of a legal nature which may be affected by the Judgment in the principal case, would be to nullify the condition laid down by Article 62: if the State wishing to exercise the right is the sole judge of whether the condition for the exercise of that

right has been met, the condition becomes purely theoretical, and the right in question is in reality unconditional. The Court has never taken such a position on third-State intervention.

12. It is one thing, however, to say that it falls to the Court to determine whether the condition is met, but it would be another thing to say that, even if it is met, the Court could still refuse to allow the intervention on a discretionary basis. Not only has the Court never accepted that proposition, but it has flatly rejected it.

In the case concerning the *Continental Shelf*, the Court stated, as recalled in paragraph 36 of the present Judgment, that it "does not consider paragraph 2 [of Article 62] to confer upon it any general discretion to accept or reject a request for permission to intervene for reasons simply of policy" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 12, para. 17).

To my mind, this means that, if the Court finds that the condition of Article 62, paragraph 1, is satisfied, on the basis of the evidence produced by the applicant, it is obliged to authorize the intervention; or, further, that the Court can only reject the application for permission to intervene if it determines that the interest of a legal nature invoked by the State seeking to intervene is not liable to be affected by the decision on the merits, and by duly stating the reasons for that determination.

13. Of course, the determination in question is often a somewhat complex one; it can give rise to discussions whose outcome is unclear; plainly, it is not purely objective or factual. In that sense — and in that sense only — the Court has a certain margin of discretion when ruling on an application for permission to intervene; the Court is not simply required to determine whether certain objective conditions are met and from this to arrive automatically at a specific conclusion (in so far as such a situation exists in judicial practice, which is seldom the case). However, the important thing is that if — having completed the determination which it must carry out and which, needless to say, must not be arbitrary — the Court finds that the condition of Article 62, paragraph 1, is satisfied, it is obliged to authorize the intervention.

From that point of view, I do not see how the Court's power can be termed "discretionary" (policy considerations do not enter into it); the third State has a right to intervene so long as it demonstrates that the conditions (or condition) for the exercise of that right are (is) met.

14. On the basis of the foregoing reasoning, I believe that it would have been better for the Court not to have stated, at the beginning of paragraph 35 of the Judgment, that "a third State does not have a right to intervene under Article 62". In this form, the statement is, at the very least, too abrupt and could be misunderstood. What the Court means

here is that it is not sufficient for a third State to ask to intervene in order to have the right to do so — which is precisely what is stated in the rest of paragraph 35. It is in this sense only that it can be said that intervention is not a "right" (it would be preferable to say: an "absolute right"). However, that does not necessarily preclude the existence of a right to intervene in a different sense, namely, in the sense of a right whose exercise is subject not to permission granted at the discretion of the Court, but simply to the fulfilment of a statutory condition.

Since I am not a supporter of purely terminological disputes, I will not dwell on the matter any longer and, while the abruptly worded first sentence of paragraph 35 is regrettable, I would say that I agree with the substance of the notion which that paragraph conveys.

15. In short, that reservation aside, I believe that the Court recalls its jurisprudence faithfully in the present Judgment. However, I fear that it departs from that jurisprudence fundamentally when it subsequently applies it to the present case, by reasoning as though it was exercising a discretionary power based on a consideration of the interests of the sound administration of justice — a consideration which, by its nature, gives it a free hand — and not on an examination solely of the condition set forth in Article 62, as I believe it should have done. I will enlarge on this further in Part III below.

II. Honduras's Request to Intervene as a Party

16. In the terms in which it is drafted, Article 62 of the Statute would indeed appear to have been conceived with a view to non-party intervention by a third State. This is what may be characterized as "ordinary" intervention. Furthermore, if a State seeks to intervene but does not specify which status it is claiming, the Court will naturally consider that it wishes to intervene as a non-party to the proceedings.

However, the jurisprudence has recognized that a State intervening under Article 62 can, if it so requests and is duly so authorized, acquire the status of party, with all its associated rights and obligations.

17. The key precedent in this respect is the Judgment delivered by the Chamber of the Court on Nicaragua's request for permission to intervene in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*.

In that Judgment, the Chamber stated:

> "It is therefore clear that a State which is allowed to intervene in a case, does not, by reason only of being an intervener, become also a party to the case. It is true, conversely, that, provided that there be the necessary consent by the parties to the case, the intervener is not prevented by reason of that status from itself becoming a party to the case." (*Judgment, I.C.J. Reports 1990*, pp. 134-135, para. 99.)

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18. In reality, it follows from that Judgment and from the Judgment on the merits delivered by the same Chamber in the same case (*I.C.J. Reports 1992*, p. 610, para. 424) — as I understand them — that a third State which is allowed to intervene as a party does not acquire the status of intervener on receiving that authorization, but purely and simply that of a party. From that moment, the proceedings are no longer between two parties, but between three, and there is no intervener. In short, the third State uses the application for permission to intervene as a way to join the proceedings, not as an intervener — which is the usual object of such an application —, but as a party. Paradoxically, it thus seeks to intervene under circumstances such that it is apparent in advance that it will not be an intervener (unless, as in the present case, it asks in the alternative to be allowed to intervene as a non-party), because either its request will be rejected and it will not be involved in the proceedings, or its request will be granted and it will become a party.

19. Because it does not have its source directly in the Statute, this jurisprudential construct may appear somewhat surprising, but it offers a pragmatic solution to practical concerns, and I do not believe that it needs to be revisited. The Judgment does not do so, and I agree with it on that point.

20. Moreover, a third State which submits such a request must fulfil not only the general conditions of Article 62, but certain additional conditions, or rather one or two additional conditions, according to the current reading of the Court's jurisprudence.

The first additional condition is undoubtedly required: the third State must demonstrate that there is a basis of jurisdiction between itself and the two States parties to the proceedings already instituted in regard to the rights which it is seeking to assert against them.

This is logical because, unlike the "ordinary" intervener, who does not seek to establish rights but to protect interests (and who, for that reason, is not obliged to demonstrate the existence of a basis of jurisdiction: see the case cited above concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* (*Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 135, para. 100), a State seeking to join the proceedings as a party intends to present its own submissions to the Court and wishes to have the validity of those submissions recognized with the authority of *res judicata*.

The second condition, on the other hand, is a point of controversy: in order for a third State to join the proceedings not simply as an intervener, but as a party, is it also necessary to have the consent of both original parties? The above-mentioned 1990 Judgment in the *El Salvador/Honduras* case might indicate that this is so; that rendered in the same case in 1992 appears to suggest otherwise, but it is not free of ambiguity — far from it (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 610, para. 424).

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21. It is not necessary to resolve this latter question in the present case, because one of the requisite conditions for the granting of Honduras's intervention as a party is clearly lacking.

According to the Judgment, Honduras does not have an interest of a legal nature which might be affected by the decision to be rendered in the principal proceedings. If correct, this would be sufficient basis for the rejection of Honduras's Application in its entirety, because that condition — the fundamental condition expressed by Article 62 — applies to both forms of intervention.

However, for reasons which I will set out shortly, it is my view that this condition is in fact met.

22. On the other hand, I believe that the condition relating to the basis of jurisdiction — upon which the Judgment does not pronounce, because it does not need to do so — is not met.

Honduras had to demonstrate that between itself and Nicaragua, on the one hand, and itself and Colombia, on the other, there was a legal basis on which to found the Court's jurisdiction to entertain its claims on the subject of maritime delimitation in respect of those two countries.

To that end, it invoked Article XXXI of the Pact of Bogotá.

But Article VI of the Pact of Bogotá precludes from judicial settlement — under the compromissory clause in Article XXXI — "matters already settled by arrangement between the parties", those settled by "decision of an international court" and those "governed by agreements, or treaties in force on the date of the conclusion of the present Treaty".

23. However, the maritime delimitation between Honduras and Nicaragua was settled by the Court's Judgment of 8 October 2007. And it was settled completely, as the present Judgment rightly notes in paragraphs 69 and 70, and not simply, as Honduras claimed, up until the point where the bisector line adopted in the Judgment is supposed to stop, to the west of the 82nd meridian. It is therefore a "matter . . . settled . . . by decision of an international court", in the sense of Article VI of the Pact of Bogotá. Consequently, Honduras has no basis of jurisdiction on which to submit to the Court its maritime claims against Nicaragua. Even supposing that such a basis of jurisdiction exists between Honduras and Colombia, which is debatable in light of the provisions of the Pact of Bogotá, the lack of a basis of jurisdiction between Honduras and one of the two States parties to the principal proceedings is a sufficient ground to reject Honduras's request to intervene as a party.

III. Honduras's Request to Intervene as a Non-Party

24. In this respect, I disagree with both the reasoning and the conclusion in the Judgment.

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25. Honduras has delimited a rectangular area (which can be seen on the map appended to the Judgment), in which it claims to have rights which might be affected by the future decision in the main proceedings.

The rectangle's southern side follows the line of the 15th parallel. Its western and eastern sides are located along meridians 82 and 79° 56′, respectively. Its northern side is situated between the 16th and 17th parallels.

This rectangle is divided in two by a broken red line on the map, which roughly follows a south-westerly/north-easterly direction. This broken line is nothing more than the extension of the bisector line which the Court established in its Judgment of 8 October 2007 (which has the authority of *res judicata* for Honduras and Nicaragua), and which it declared, in the said Judgment, would continue along the line having the same azimuth until it reaches the area where the rights of third States may be affected. Since it could not rule on the rights of third States, the Court did not fix the endpoint of the line in 2007: this is why it appears as a broken line on the map appended to the present Judgment, because its endpoint — that is, the exact endpoint of the maritime boundary between Honduras and Nicaragua — is as yet unknown.

26. I agree with the statement in the Judgment that Honduras's interests in the area of the rectangle to the north of the broken red line are not liable to be affected by the Judgment in the main proceedings (Judgment, para. 68). In effect, Honduras's sovereign rights are uncontested in that area. They are not disputed by Nicaragua — and cannot be, because of the authority of *res judicata* attached to the 8 October 2007 Judgment. They are not disputed by Colombia either, and nor can they be — not because of the 2007 Judgment, which is not binding on Colombia, but because of the bilateral treaty concluded between Colombia and Honduras in 1986, which attributes the maritime areas to the north of the 15th parallel and to the west of meridian 79° 56′ to the latter.

Accordingly, Honduras's rights and interests in the area to the north of the red line are protected from any prejudicial effects resulting from the Judgment which the Court will deliver in the dispute between Nicaragua and Colombia.

27. On the other hand, I disagree entirely with the statement in the Judgment that Honduras does not have an interest of a legal nature in the area to the south of the red line which might be affected by the decision.

In fact, in this area, Honduras currently has rights which derive from the 1986 bilateral treaty, but which can of course, in accordance with the relative effects of treaties, only be asserted against Colombia. Clearly, Nicaragua formally disputes the delimitation established by the 1986 Treaty, because it lays claim to the maritime areas which that Treaty seeks to share between Honduras and Colombia. As one of its Counsel said at the hearings, Nicaragua "has always considered this Treaty to be

invalid" and, even if it were valid between the parties which had concluded it, it would be without effect "because, in entering into this agreement, the parties dealt with sovereign rights belonging to Nicaragua".

28. To my mind, the Court should have asked itself whether the line it is called upon to establish in order to delimit the maritime areas of Nicaragua and Colombia is likely to enter the area in question, that is to say, the area within the blue rectangle to the south of the red line, and whether, in this event, Honduras's legal interests might be affected as a result.

29. The answer to both of these questions is clearly yes.

30. Of course, the first question is not intended to anticipate, and even less so to decide in advance, what solution the Court will adopt in the principal proceedings. When considering an application for permission to intervene, the Court has only to ask itself whether there is simply a possibility (and not a certainty, or even a likelihood) of the future Judgment affecting the interests of the third State. Therefore, it cannot dismiss any possibilities which lie within the limits assigned to it by the submissions of the parties to the principal proceedings. Since it cannot give preference to any hypothesis in respect of its decision in the principal proceedings, it has to accept them all, subject solely to the limit imposed by the principle which precludes it from ruling *ultra petita*.

31. On this basis, there is no doubt that there is a possibility — whose degree of probability I am not going to assess — that the Court will establish a line of delimitation — which will have to follow a more or less northerly/southerly direction — in an area between the 80th and 82nd meridian. Such a solution would be situated between the boundary claimed by Colombia — which is situated approximately along the 82nd meridian — and the boundary claimed by Nicaragua — which is located much farther east, close to the 77th meridian.

If such a solution was adopted — and it is, I repeat, a mere possibility, but one which must be contemplated at this stage — the line established would continue northwards until it reaches the area where the rights of third States (that is, States other than Nicaragua and Colombia) might be affected. Thus, it would enter the "blue rectangle" and would stop when it intersected the red line, that is to say, the bisector drawn by the Court in its 2007 Judgment, which delimits the respective areas of Honduras and Nicaragua.

32. If the future Judgment were to be as I have hypothesized, would it affect Honduras's "interests of a legal nature"? It is clear to me that the answer is yes.

33. Honduras's interests would be affected in two ways.

34. Firstly, the Judgment rendered by the Court in the dispute between Nicaragua and Colombia would finally fix the endpoint of the bisector line established by the Court in its 2007 Judgment in the case between Nicaragua and Honduras, even though this was not done, and could not have been done, in the 2007 Judgment. Thus, the future Judgment would

have the effect of clarifying, on an essential point, the delimitation carried out some years earlier by a Judgment which has the authority of *res judicata* for Honduras. From that, I conclude that the latter has an interest which might be affected by the future Judgment — even if this is nothing more than a mere possibility.

35. Secondly and more importantly, if the Judgment to be rendered by the Court were to be as I have hypothetically assumed it to be, it would have direct consequences on the effective scope of the 1986 bilateral treaty concluded between Honduras and Colombia.

As long as the Court has not ruled on the respective rights of Nicaragua and Colombia, Honduras may lay claim to the area within the "blue rectangle". With regard to the area to the north of the red line (the bisector line), it derives its rights in respect of Nicaragua from the 2007 Judgment, and in respect of Colombia from the 1986 Treaty. However, with regard to the area to the south of that line, it can only assert the rights it holds under the 1986 Treaty, and only vis-à-vis Colombia. Moreover, in order for Honduras to be able to assert those treaty rights, it is essential that the Judgment which the Court will deliver should not award to Nicaragua all or part of the areas attributed to it by the Treaty. It is not certain that the Court will make such an award: if the Court adopts the line of delimitation proposed by Colombia, Honduras will still be able to lay claim, on the basis of the Treaty, to most of the areas which the latter attributes to it. However, there is a possibility that it might happen: if the Court adopts a line further to the east than that suggested by Colombia, it will divide the area in the southern part of the "blue rectangle" in such a way that the entire area to the west of that line will belong to Nicaragua, and Honduras will no longer be able to lay claim to it, because there is no treaty basis between it and Nicaragua on which to found such a claim.

To my mind, there is clearly a possibility that Honduras's interests will be affected in this way, and this is sufficient to make its intervention admissible.

36. The Court was not convinced of this, yet the reasons it gives for its conclusion appear to me to be misconceived.

I agree with the statement that the 2007 Judgment completely settled the boundary separating the respective maritime areas of Honduras and Nicaragua, in the sense that it did not intend that the bisector line should stop at a point to the west of the 82nd parallel, as Honduras has contended, but rather the intention was that that line should continue in a north-easterly direction until it reached an area where the rights of a third State might be affected, and in this respect the 2007 Judgment is clear. I also agree that the 2007 Judgment is binding on Honduras, in so far as it intends to continue the bisector line to the east — still until that as yet undetermined point — by virtue of the authority of *res judicata*. I also fully endorse — because it is patently obvious — the statement in paragraph 73 of the Judgment that "the Court will place no reliance on

the 1986 Treaty in determining the maritime boundary between Nicaragua and Colombia". How could it, since that Treaty was concluded by one of the two Parties to the present proceedings with a third State?

37. In short, I do not really disagree with anything of what is said by the Court in paragraphs 57 to 74 of the Judgment. But I do not understand how what is said there can justify the conclusion which the Court arrives at, namely that Honduras does not have an interest of a legal nature which might be affected by the future Judgment. Quite simply, I fail to see a coherent line of reasoning responding to the issues raised by Honduras's Application. It is as if the Court had reached its decision more on the basis of policy considerations than of the legal criteria, which the Court itself was at pains to recall in the first part of the Judgment.

38. That is why — since I am unable to follow the reasoning or subscribe to the conclusion — I have been obliged, much to my regret, to disagree with the majority of my colleagues.

(Signed) Ronny ABRAHAM.

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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:

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— 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.

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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

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> 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*

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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 régime 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

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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.

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JOINT DECLARATION OF JUDGES CANÇADO TRINDADE AND YUSUF

International litigation and dispute-settlement: relevance of intervention in contemporary international litigation — Requisites for intervention under the Court's Statute — Interest of a legal nature which may be affected by a decision of the Court — Requests for permission to intervene: irrelevance of State consent — Incidental proceedings: Court as master of its own jurisdiction — Court's jurisprudential construction.

I. The Starting Point: the Relevance of Intervention in International Litigation and Dispute-Settlement

1. Not unlike the other Judgment of the Court also delivered today, in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* (Application by Costa Rica for Permission to Intervene), the Court has not found, in the present Judgment in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* (Application by Honduras for Permission to Intervene), that an interest of a legal nature has been established by the Applicant. Even though this finding has led the Court not to grant permission to intervene, the possibility cannot be excluded that the Court's conclusion has been to some extent influenced by its tendency to avoid the application of Article 62 of its Statute, as examined in our joint dissenting opinion in the other case concerning the *Territorial and Maritime Dispute* between Nicaragua and Colombia (Application by Costa Rica for Permission to Intervene).

2. This does not mean that we dissent from the Court's finding in the present case concerning the Application by Honduras for permission to intervene. Yet, our concern is to put on record our position regarding the continued propensity of the Court, disclosed in its inconclusive jurisprudence on the matter to date, to decide on policy grounds against the concrete application of the institution of intervention, which we consider to have an important role to play in contemporary international litigation and dispute-settlement. In order to clarify our position in the present case, we deem it appropriate to explain our position with regard to Honduras's Application for permission to intervene, and the reason why we joined the decision of the Court's majority in not granting it.

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II. The Requisites for Intervention

3. It should be here recalled that the requisites for intervention in the proceedings before the Court are laid down in Article 62 of the Statute of the ICJ. 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."

4. In the *cas d'espèce*, the applicant State has not demonstrated that it has an "interest of a legal nature" that may be affected by the decision in the case. As we noted in our joint dissenting opinion in the other case concerning Costa Rica's Application for permission to intervene, a State seeking to intervene needs to demonstrate that it has an "interest of a legal nature that may be affected by the decision in the case". In this regard, it seems irrelevant at this stage, for the purpose of assessing the criteria for intervention laid down in Article 62 of the Statute, whether the applicant third-State wishes to intervene as a party or a non-party in the main proceedings.

5. In any event, the applicant third-State ought to demonstrate that it has "an interest of a legal nature" which "may be affected" by the decision of the Court on the merits of the case. This is precisely where Honduras's Application fell short of meeting the requisites for intervention, not fulfilling these criteria, which led the Court to its decision not to grant the requested intervention. Honduras's situation is very specific: the 2007 Judgment of the Court in the case of the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* bears the status of *res judicata* and has thus settled the maritime delimitation between Honduras and Nicaragua in the Caribbean Sea.

6. Moreover, Honduras has not presented any further maritime features to be considered in the assessment of its Application for permission to intervene. Likewise, Honduras's arguments in relation to the 1986 Treaty have been rightly dismissed by the Court. The 1986 Maritime Delimitation Treaty between Honduras and Colombia has no incidence on the delimitation between Nicaragua and Colombia and is thus not to have any bearing in the assessment of Honduras's Application for permission to intervene in the present case. In our view, Honduras has thus not demonstrated an interest of a legal nature which may be affected by a decision of the Court in the present case. Accordingly, its Application has not prospered.

7. We further note that the Court has devoted some attention to the distinction between "rights" and "legal interests" of third States seeking to intervene. This is, in our view, a positive development in the pursuit of more clarity concerning the foundational bases of the institution of intervention: we herein refer to the treatment of this point in our joint dissent-

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ing opinion[1] in the other case resolved by the Court today. Having pointed this out, we turn to the question of the consent of the parties to the main case in relation to an application for permission to intervene.

III. The Irrelevance of State Consent for the Consideration by the Court of Requests for Permission to Intervene

8. We are of the view that Honduras has not fulfilled the criteria for intervention under Article 62 of the Statute, irrespective of whether the Parties to the main case have or have not consented to the application at issue for permission to intervene. In the present joint declaration, we wish to stress the non-existence of a "requirement" of consent by the parties in the main case, in relation to the requisites for applications for permission to intervene set forth in Article 62 of the ICJ Statute. In our view, such consent by the main parties to the proceedings is irrelevant to the assessment of an application for permission to intervene, and cannot be perceived as a requirement under Article 62 of the Statute of the Court.

9. In effect, in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, the Court's Chamber, having found that Nicaragua had "an interest of a legal nature", permitted Nicaragua to intervene; it further made a precision as to consent which should not pass unnoticed here. The Court's Chamber clarified therein that the competence of the Court is not, like its competence to hear and determine the dispute referred to it, derived from the consent of the parties to the case. The consent required is the consent originally given by them in becoming parties to the Court's Statute, or in recognizing its jurisdiction through other instrumentalities, such as compromissory clauses. The Court does not need to seek for State consent in a recurring way, in the course of the proceedings of a case.

10. State consent also has its limits, in respect of applications for permission to intervene. The Court's Chamber thus upheld the view that the Court was endowed with competence to permit an intervention even though it may be opposed by one or even both of the parties to the case. In the aforementioned case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Honduras considered that Nicaragua had demonstrated a legal interest, but El Salvador had denied that Nicaragua had a case for intervention (paras. 69-70). Yet, the Court's

[1] Cf., on this particular point, our joint dissenting opinion in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, *Application by Costa Rica for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, pp. 405-407, paras. 9-14).

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Chamber, as already indicated, permitted Nicaragua to intervene on the basis of Article 62 of the Statute. It did so, correctly, in our view.

11. Paragraph 28 of the present Judgment in the case concerning the *Territorial and Maritime Dispute* between Nicaragua and Colombia (Application by Honduras for Permission to Intervene) brings clarification to the existence of a common basis of jurisdiction as between the States concerned only for intervention as a party, but this does not apply to non-party intervention. In the same paragraph 28 of the present Judgment, the Court has found that a jurisdictional link between the State seeking to intervene and the parties to the main case "is not a condition for intervention as a non-party".

12. We agree with this conclusion of the Court, and, in this respect, we further recall that, in their respective dissenting opinions in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application by Italy for Permission to Intervene, Judgment, I.C.J. Reports 1984*, Judges Sette-Câmara and Oda found that the Italian Application fulfilled the conditions for intervention under Article 62, and questioned the need of a "jurisdictional link" with the parties in the main legal proceedings. Likewise, in his dissenting opinion, Judge Ago discarded the need for the Court to be provided with a title of jurisdiction, and found in favour of the Italian Application as a "typical" example of intervention as an incidental proceeding.

13. In any case, the reasoning of the Court on the aforementioned point — pertaining to intervention in international legal proceedings — sets clearly aside the issue of State consent, a position which we fully share. Our understanding is in the sense that the consent of the parties to the main case is not, in any way, a condition for intervention as a non-party. The Court is, anyway, the master of its own jurisdiction, and does not need to concern itself with the search for State consent in deciding on an application for permission to intervene in international legal proceedings.

14. In effect, third party intervention under the Statute of the Court transcends individual State consent. What matters is the consent originally expressed by States in becoming parties to the Court's Statute, or in recognizing the Court's jurisdiction by other instrumentalities, such as compromissory clauses. The Court's Chamber itself rightly pointed out, in the Judgment of 1990 in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application by Nicaragua for Permission to Intervene*, that the competence of the Court, in the particular matter of intervention, "is not, like its competence to hear and determine the dispute referred to it, derived from the consent of the parties to the case"[2].

[2] Case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application by Nicaragua for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 133, para. 96).

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15. There is no need for the Court to keep on searching instinctively for individual State consent *in the course* of the international legal proceedings. After all, the consent of contending States is alien to the institution of intervention under Article 62 of the ICJ Statute. We trust that the point we make here, in the present joint declaration, regarding the irrelevance of State consent in the consideration by the Court of applications for permission to intervene, under Article 62 of the Court's Statute, may be helpful to elucidate the positions that the Court may take on the matter in its jurisprudential construction.

(Signed) Antônio Augusto Cançado Trindade.
(Signed) Abdulqawi Ahmed Yusuf.

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DISSENTING OPINION OF JUDGE DONOGHUE

Disagreement with outcome and approach of the Court in rejecting Honduras's Application to intervene — Maritime claims overlapping area at issue sufficient to show an interest of a legal nature that may be affected — Court's practice of using a directional arrow demonstrates its appreciation that its decisions "may affect" the legal interests of third States — Prospect that the Court can protect third-State interests by other means not a reason to deny intervention — No jurisdictional link required in case of non-party intervention — Parties' opposition to intervention not dispositive when Article 62 criteria are met — Substantive effects in case of party intervention greater than in case of non-party intervention.

Honduras should be permitted to intervene as a non-party — Agreement with Court that Honduras misreads res judicata *effect of 2007 Judgment — No precise endpoint of bisector line established in 2007 Judgment — Agreement with Court that treaty between Colombia and Honduras not determinative of Parties' rights in this case — Overlap of Honduras's claims with area at issue between the Parties shows that Honduras has an interest of a legal nature that may be affected — Possible impact on interpretation of 2007 Judgment also shows interest of a legal nature that may be affected — Agreement with Court's decision to deny Honduras's intervention as a party — Court's practice of rejecting intervention but considering information submitted by third States gives rise to* de facto *means of third-State participation to the potential disadvantage of parties.*

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*

1. I have dissented from the decision to reject Honduras'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. Article 62 of the Statute of the Court provides for intervention of a third State that demonstrates that it has an "interest of a legal nature that may be affected" by a decision in the case. It also requires the third State to specify the object of its intervention. I conclude that the proposed intervention meets this standard. First, Honduras asserts claims to maritime areas that overlap the area at issue in this case. The Court's practice in such situations has been to describe boundaries in a manner that recognizes that its decisions "may affect" third States. As it did in the most recent case in which a 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*), I believe that the Court should grant the Application here. Second, under one possible outcome (the line proposed by Colombia), the decision of this Court inevitably would affect the way that Honduras (and Nicaragua) would interpret and apply the 2007 decision of this Court in the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*. That decision determined the maritime boundary between Honduras and Nicaragua, without an endpoint, by deciding only that the boundary line shall continue from a specified geographic point "along the line having the azimuth of 70° 14′ 41,25″ until it reaches the area where the rights of third States may be affected" (*ibid.*, pp. 760-763, para. 321). A decision in this case to set a boundary based on that proposed by Colombia would specify the point at which a third State (Colombia) "may be affected" by the

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line drawn in 2007 and would appear to create the *de facto* endpoint of that line. While I believe that Honduras should be permitted to intervene as a non-party, I agree with the Court's decision to deny intervention as a party.

3. In Part I of this opinion, I discuss the factors that are relevant to the Court's consideration of an application for intervention, which also provide a foundation for my dissenting opinion with respect to the Application of Costa Rica. In Part II, I turn to the specific circumstances of Honduras.

I. Intervention under Article 62 of the Statute of the Court

A. The Statute and Rules of Court

4. Two Articles of the Statute of the Court address intervention. This Application is submitted under Article 62, which provides:

> "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. Intervention is also addressed in Article 63, which gives a State a right to intervene in a case if it is a party to a "convention" that is "in question" in the case. If it exercises this right, "the judgment will be equally binding upon it".

6. Article 81 (2) of the Rules of Court requires an application for intervention under Article 62 of the Statute of the Court to 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."

7. In addition, Article 84 of the Rules states that the Court shall decide on applications to intervene "as a matter of priority unless in view of the circumstances of the case the Court shall otherwise determine". Article 84 also requires the Court to hold a hearing on intervention if a party files a timely objection to intervention, at which the Court hears from the parties and the would-be intervenor.

8. The Rules address the procedural implications of a decision to permit intervention, by specifying in Article 85 that the intervenor is allowed

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access to the pleadings and an opportunity to submit a written statement and to participate in oral proceedings.

9. The Statute and Rules do not specify the legal consequences of intervention under Article 62 (in contrast to Article 63, which provides that the resulting judgment binds the intervenor). Article 62 makes no distinction between intervention as a party and intervention as a non-party, nor do the Rules of Court. This apparently was deliberate (see Shabtai Rosenne, *The Law and Practice of the International Court (1920-2005)*, Vol. III, Sect. 356, pp. 1443-1444). The two types of intervention are potentially quite different in their implications for the parties and for an intervenor, however, so the lack of differentiation in the Statute and Rules can lead to some confusion.

B. Factors Relevant to Consideration of an Application to Intervene

10. In considering applications to intervene, the Court has examined a range of factors (without necessarily focusing equally on each factor in each case). I summarize those here, with particular attention to considerations relevant to maritime boundaries and to the distinction between intervention as a party and intervention as a non-party.

1. *Whether the Applicant to intervene has an "interest of a legal nature" that "may be affected" by the decision*

(a) *The meaning of Article 62*

(i) *Paragraph 1 of Article 62*

11. It is clear from the Statute that an interest "of a legal nature" is required. Such an interest may be animated by political, economic or other policy interests, but these non-legal interests, taken alone, do not meet the requirements of Article 62. This limitation could be significant in certain cases, but is unlikely to be a major hurdle when an application for intervention is based on overlapping maritime claims. An assertion of a claim to a maritime area under international law can easily be understood as an assertion of an interest "of a legal nature". (I note, however, that the Court today does not state clearly whether it finds an "interest of a legal nature" in these proceedings, instead treating that question jointly with the question whether such interest "may be affected".)

12. The applicant must also prove that its interest of a legal nature "may be affected" by the decision in the case. The phrase "may be affected" must be read in light of Article 59 of the Statute, which states quite clearly that a "decision of the Court has no binding force except

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between the parties and in respect of that particular case". Because Article 59 clearly limits the way in which a judgment can "affect" a third State, Article 62 must extend to an effect that falls short of imposing binding legal obligations on the third State. As Judge Sir Robert Jennings noted, Article 59 "does by no manner of means exclude the force of persuasive precedent" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, I.C.J. Reports 1984*, dissenting opinion of Judge Jennings, p. 157, para. 27). For example, a maritime delimitation decision by the Court may affect the interest of a third State — positively or negatively — if the Court, in the *dispositif* or in its reasoning, appears to prejudge a claim of the third State.

13. In addition, under Article 62, the intervenor need not show that its interest "will . . . be affected" (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 117, para. 61) or that its interest is "likely" to be affected. The Statute only requires proof that the interest of a legal nature "may be affected". This standard is sensible at the stage in the proceedings at which the Court has not assessed the merits, because neither the third State nor the Court is equipped at that stage to determine the probability of a particular substantive outcome. Thus it is not possible at the intervention stage to assess the likelihood of an effect on the interest of a legal nature of the third State. This requirement of Article 62 — that the interest of a legal nature "may be affected" — has particular importance in proposed intervention in maritime boundary cases, which I shall discuss below.

14. The would-be intervenor bears the burden of proving that its interest "may be affected" and must "demonstrate convincingly what it asserts" *(ibid.)*. However, there is no requirement in Article 62 that the applicant establish that intervention as the *only* means to protect its "interest of a legal nature" that "may be affected". Today, the Court expresses confidence in its ability to protect third States without granting intervention. Even if that conclusion is well-founded, I see no reason that it would defeat intervention if the criteria of Article 62 are otherwise met, as I believe to be the case here.

15. The Court has also made clear that a would-be intervenor may be "affected" not only by the dispositive portion of the Court's decision in a case, but also by "the reasons which constitute the necessary steps to the *dispositif*" (*Sovereignty over Pulau Ligitan and Pulau Sipidan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, p. 596, para. 47). However, there must be more than a mere preoccupation with "the general legal rules and principles likely to be applied" by the Court in its decision (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 124, para. 76). In order to demonstrate that the interest asserted may be affected by the reasoning or interpretations of the Court, that interest must not be "too remote" from the legal considerations

at issue in the main proceedings (*Sovereignty over Pulau Ligitan and Pulau Sipidan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, p. 604, para. 83)[1].

16. Thus, the requirement that the third State's interest of a legal nature "may be affected" does not require the applicant to predict the decision of the Court on the merits, but necessarily requires the would-be intervenor "to show in what way that interest may be affected" (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 118, para. 61). This suggests that it must persuade the Court of a sufficient connection between the interest that it asserts and an eventual decision relating to the subject-matter of the case. What remains unclear, however, is precisely what sort of nexus is required to satisfy the requirement that the interest of a legal nature "may be affected"[2]. Because the assessment of such a nexus is likely to be very fact-dependent, a generalized standard may not be workable. In the case of maritime boundary delimitation, however, the Court's own practice supports a conclusion that an applicant can meet its burden of showing that its "interest of a legal nature may be affected" if it demonstrates to the Court that it has maritime claims that overlap the area in dispute in the case [3]. I shall turn to this jurisprudence after commenting briefly on the meaning of paragraph 2 of Article 62.

(ii) *Paragraph 2 of Article 62*

17. Article 62 of the Statute of the Court specifies the criteria for intervention in paragraph (1) and then, in paragraph (2), states that "[i]t shall be for the Court to decide upon this request". It has been suggested that

[1] The Court today appears to suggest that an "interest of a legal nature" must be framed as a "claim" of a legal right. The focus on claims may flow from a body of jurisprudence derived from maritime claims. Nonetheless, although a generalized interest in the content of international law has been found to be insufficient to comprise an "interest of a legal nature", I do not rule out the possibility of a third State demonstrating an "interest of a legal nature" without framing it as a "claim" of a legal right.

[2] The Court has suggested, for example, that there may not be a sufficient link between the interest of a legal nature asserted by a third State and the subject-matter of the dispute in the main proceedings where the third State's interest is "somewhat more specific and direct than that of States outside that region", but is also "of the same kind as the interests of other States within the region" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 19, para. 33).

[3] I do not suggest here that the Court should protect maritime claims of a third State that appear baseless, but that has not been at issue in past cases, nor is it a factor today. In judgments in which the Court has protected the interests of third States with respect to maritime boundary delimitation, it sometimes has framed the issue with reference to the area "where the *rights* of third States may be affected". The use of the word "rights" in this context does not mean that the Court is passing judgment on the merits of those third-State claims.

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paragraph (1) leaves the Court no discretion, because it begins with the phrase "[s]hould a State consider" (see Judgment, paragraph 31). I do not find this interpretation persuasive, in light of the express statement in paragraph (2) of Article 62 that it is for the Court to decide, and given the juxtaposition of Article 62 and Article 63 (which, unlike Article 62, expressly provides a right to intervene). Instead, I understand Article 62 (1) to specify criteria that the Court is to apply in considering an application for intervention. At the same time, I agree that Article 62 (2) does not confer upon the Court "any general discretion to accept or reject a request for permission to intervene for reasons simply of policy" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 12, para. 17).

(b) *The Court's practice of protecting third States that "may be affected" by judgments regarding maritime boundaries*

18. The Court has confronted the interests of third States in a number of cases in which it has delimited maritime boundaries, including several in which there was no request by a third State to intervene. For the reasons discussed here, I believe that those cases support the conclusion that the interest of a legal nature of a third State "may be affected" in such a case if that third State has a claim to a maritime area that overlaps the area in dispute in the main proceedings.

19. In each of the cases that I discuss here, the area at issue in the case is also subject (at least in part) to one or more overlapping third-State claims. Such claims may be predicated on a bilateral agreement of the third State, a decision of an international court or tribunal, an assertion of a claim by the third State or an observation by the parties and/or the Court that the geography may give rise to a claim by a particular third State. Thus, these legal interests of third States vary as to their precision and as to the degree of certainty that the third-State claim would be recognized by the Court, or by one or both parties to the case. In general, and despite this variation, the Court has addressed the interests of third States by declining to set a final endpoint of the maritime boundary. Instead, the Court has decided, after setting a final turning point outside the area subject to the claim of a third State (whether or not that claim has been asserted), that the boundary line continues until the point at which it reaches the area in which the rights of a third State may be affected. The following cases take such an approach:

— In the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Honduras)*, the Court defined the boundary to "Point F" and thereafter along a specified azimuth "until it reaches the area where the rights of third States may be affected" (*Territorial and Maritime Dispute*

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between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 763, para. 321). The Court noted that neither Party had specified "a precise seaward end to the boundary between them" and that it "will not rule on an issue when in order to do so the rights of a third party that is not before it, have first to be determined" (*ibid.*, p. 756, para. 312). No third State sought to intervene. (I discuss this Judgment in greater detail in Part II.)

— In the case concerning *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)*, the Court delimited the boundary between the two Parties, but took note of the interests of two third States and thus specified that, after the last turning point, the boundary continues "until it reaches the area where the rights of third States may be affected" (*Judgment, I.C.J. Reports 2009*, p. 131, para. 219). Neither of the third States identified by the Court sought to intervene, but the Court made clear that the delimitation would occur "north of any area where third party interests could become involved" (*ibid.*, p. 100, para. 112).

— In the case concerning *Land and Maritime Boundary between Cameron and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)*, the Court took account of the interests of Equatorial Guinea (which, as previously noted, had intervened in the case) and Sao Tome and Principe (which had not sought to intervene) (*Judgment, I.C.J. Reports 2002*, p. 421, para. 238 and p. 424, para. 245); in order to avoid affecting the rights of a third State, the Court, after the last turning point, defined a boundary proceeding along an equidistance line, without specifying an endpoint (*ibid.*, p. 448, para. 307).

— In the case concerning *Maritime Delimitation and Territorial Questions (Qatar* v. *Bahrain)*, the Court did not specify the precise location of either endpoint of the maritime boundary, instead deciding that, at each end, the boundary line would continue "until it meets the delimitation line between the respective maritime zones" of a specified third State (Iran to the north and Saudi Arabia to the south) and the two Parties (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 116, para. 250). Neither Iran nor Saudi Arabia sought to intervene.

— In the case concerning *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, the Court used a different formulation to take account of the interest of a third State. There, the Court had previously denied Italy's request to intervene. In its Judgment, the Court concluded that its decision "must be confined to the area in which . . . [Italy] has no claims to continental shelf rights" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 26, para. 21). To that end, it defined the outer limit of the continental shelf delimitation between the Parties with reference to the specific limits

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that Italy had asserted as its claim during the incidental proceedings on intervention (*I.C.J. Reports 1985*, pp. 26-28, paras. 21-22).

— In the case concerning *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, after setting the final turning point, the Court did not define an endpoint, instead stating that the "extension of this line northeastwards is a matter falling outside the jurisdiction of the Court in the present case, as it will depend on the delimitation to be agreed with third States" (*Judgment, I.C.J. Reports 1982*, p. 94, para. 133). In that case, the third State in question was Malta, which had made an unsuccessful attempt to intervene under Article 62.

20. The formulation used in the Court's most recent Judgments defines a boundary line that proceeds "until it reaches the area where the rights of third States may be affected". The Court has used an approach of this sort in three circumstances: (1) when there was no application for intervention; (2) when the Court had granted an application for intervention; and (3) when the Court had rejected an application for non-party intervention. The use of this approach in all three situations must be understood in light of Article 59. Because Article 59 makes clear that third States cannot be bound by a judgment of the Court, the effect from which the Court has sought to insulate the third States must necessarily be a lesser one. In addition, the formulation that the Court has used to protect the interests of third States with respect to maritime boundaries — i.e., that the prolongation of a boundary line extends only to the area in which the rights of third States may be affected — bears striking similarity to the language of Article 62, which provides for intervention based on "interest of a legal nature" that "may be affected". In safeguarding the interests of third States as to maritime delimitation, the Court has not insisted on proof of the existence or content of the "rights of third States", but rather has protected potential third-State "rights", whether or not raised in intervention proceedings, if those rights "may" be affected.

21. In light of the Court's practice in maritime boundary cases in which the claims of third States overlap the area at issue in the case, it may be suggested that intervention in such cases is unnecessary, because the Court has the means, absent intervention, to address the interests of third States. My conclusion is not that the Court's practice means that intervention should be denied in situations of overlapping third-State claims, but rather that its practice demonstrates that its Judgments in such cases "may affect" the legal rights and interests of the third States. It is *because* the Court recognizes that its delimitation may affect the third State that it proceeds with such caution. If a third State asserts claims that overlap those of the parties, then we can expect the Court, when it reaches the merits, to delimit a boundary line that continues only "until it reaches the area where the rights of third States may be affected". If it is faced with an application for intervention in such a case, the Court cannot assess the

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merits of the parties' claims and thus cannot be certain that the area of its ultimate delimitation *will*, or even is likely to, overlap claims of the third State. Article 62 does not require certainty of overlap, however, only that the third State has an interest of a legal nature that *may* be affected. In a situation of an overlapping claim, the Court — looking ahead to the way that it will address the case on the merits — has the information it needs to grant an intervention request, because the third State has an interest of a legal nature (an assertion of a claim that overlaps the area that is the subject of the case) and, as demonstrated by the Court's practice in delimiting boundaries where there is overlap with a third State's claim, such a claim "may be affected" by the Judgment. The criteria in Article 62 do not preclude intervention simply because such a technique is available even absent intervention.

22. The situation in *Land and Maritime Boundary between Cameroon and Nigeria* illustrates a circumstance in which the Court took account of overlapping third-State claims, both at the intervention phase and in its decision on the merits. There, Equatorial Guinea based its Application to intervene as a non-party on its assertion of claims to maritime areas that overlapped the area subject to delimitation of the maritime boundary between Cameroon and Nigeria. In the preliminary objections phase, Nigeria had pointed out to the Court that the prolongation of the proposed maritime boundary between Cameroon and Nigeria would "eventually run into maritime zones where the rights and interests of Cameroon and Nigeria will overlap those of third States" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, I.C.J. Reports 1998*, p. 324, para. 116). According to the Court, this meant that it appeared that "rights and interests of third States" would "become involved" if the boundary was extended, as Cameroon proposed *(ibid.)*.

23. Equatorial Guinea, one of the third States to which the Court had expressly referred in its 1998 Judgment, then submitted a request to intervene. It explained that because it had legal claims to maritime zones that overlapped those of Cameroon and Nigeria in the area subject to delimitation, it had an interest of a legal nature that would potentially be affected by the Court's decision: "If the Court were to determine a Cameroon-Nigeria maritime boundary that extended into Equatorial Guinea waters . . . Equatorial Guinea's rights and interests would be prejudiced" (*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. 1032, para. 3). The Court granted Equatorial Guinea's request to intervene. In doing so, it found that Equatorial Guinea had "sufficiently established that it has 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" (*I.C.J. Reports 1999 (II)*, p. 1034,

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para. 13). The Court thus confirmed that the existence of overlapping claims can be sufficient to establish an interest of a legal nature that may be affected for purposes of Article 62, notwithstanding the bilateral nature of maritime delimitation, the principle of *res inter alios acta*, and the protections provided to Equatorial Guinea by Article 59 of the Statute. It was willing to limit the scope of the boundary that it delimited between Cameroon and Nigeria on the basis of Equatorial Guinea's interest.

24. As discussed in Part II, it is difficult to distinguish the situation underlying the Application to intervene by Equatorial Guinea from that of Honduras, which also asserts claims that overlap the claims of the Parties in this case and asserts that those claims may be prejudiced by a delimitation of the maritime boundary between Nicaragua and Colombia if that boundary extends into the area to which it asserts a claim.

2. *The object of the intervention*

25. Article 81 (2) *(b)* of the Rules of Court requires the would-be intervenor to specify the precise object of the intervention. The Court's consideration of the "object" has been closely tied to the question whether the applicant has established an interest of a legal nature that may be affected, so it is not clear how the "object" alone might be dispositive of a particular request to intervene. This may explain why the question of the precise object of the intervention seems to have become one in which applications have taken on a standard formulation. The formulation that was accepted in Equatorial Guinea's intervention in the case between Cameroon and Nigeria, derived in large part from the earlier decision on Nicaragua's Application to intervene, appeared in a similar format in the Application by the Philippines that was rejected in 2001, and in the Applications that the Court considers today (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)*, p. 1032, para. 4; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 108, para. 38 (Application by Nicaragua for Permission to Intervene); *Sovereignty over Pulau Ligitan and Pulau Sipidan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, p. 580, para. 7).

26. The object of intervention is worthy of some additional discussion, however, because the object of non-party intervention may differ significantly from that of proposed intervention as a party. As the cases above illustrate, the object of intervention as a non-party may be to *insulate* the interest of a legal nature of the third State, that is, to prevent the Court from "affecting" such interest. In a case of maritime delimitation, for example, the object of the application of a non-party intervenor might be

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to provide the Court with complete information that would enable the Court to ensure that the claims of the intervenor are not prejudiced, which the Court might do inadvertently if it does not have access to the views of the third State. Such prejudice would not result from binding the third State — which Article 59 would preclude — but rather from the potential implication that the Court has made an assessment of the merits of a third State's claims in rendering its judgment. Information about an intervenor's claims could help the Court, when it establishes the co-ordinates of a boundary, to set a final turning point and/or endpoint in a way that avoids prejudice to the claims of the intervenor. Thus, the decision to permit Equatorial Guinea to intervene as a non-party did not cause Equatorial Guinea to become a party to the main case or to be bound by the result there. Instead, it permitted Equatorial Guinea to advise the Court on how the claims of the parties "may or may not" affect the legal rights and interests of Equatorial Guinea (*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. 1032, para. 3).

27. The object of such non-party intervention is in sharp contrast to intervention as a party, in which an object of the would-be intervenor must instead be to bind itself to the decision in the main case and to bind the original parties to it and thus to *affect its interest of a legal nature* quite directly.

28. One object of intervention that is unacceptable is that of introducing a new dispute into the case. A request to intervene is an "incidental proceeding", and "[a]n incidental proceeding cannot be one which transforms that case into a different case with different parties" (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 134, para. 98). If a third State considers that it has a dispute that is closely related to the case in chief, it can file a separate case, which could then potentially be joined to the original case as a matter of procedure, pursuant to Article 47 of the Rules of Court.

29. The bar on the introduction of a new dispute would seem to have little bearing on an application for intervention as a non-party. Even if an applicant for non-party intervention seeks to apprise the Court of interests that may not otherwise be before the Court, the non-party intervenor is not in a position to ask the Court to *decide* on its related but distinct interest and thus is not adding a new dispute to a case. By contrast, an applicant to intervene as a party would be bound by the resulting Judgment (at least as to some parts of it), so there is more reason in the context of proposed intervention as a party to look closely at whether the would-be intervenor seeks to introduce a new dispute.

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3. *The jurisdictional link*

30. The Court has stated that a jurisdictional link is required in the case of intervention as a party and not in the case of non-party intervention (see *Sovereignty over Pulau Ligitan and Pulau Sipidan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, p. 589, para. 35). This result is sensible, given the very different ways in which the two forms of intervention affect the legal rights and obligations of the original parties. A non-party intervenor is not bound by the decision, nor are the parties bound vis-à-vis the intervenor. By contrast, a party-intervenor is bound by the decision (as there has been no successful intervention as a party, it is not clear to what extent the intervenor would be bound, that is, whether to the entire decision or only to a part thereof that pertains especially to its interests).

4. *The views of the parties*

31. Article 84 of the Rules of Court provides for a hearing only if the parties object and, in this way, signals that the Court will give weight to the parties' views. Consideration of party views is only appropriate, given the impact that intervention has on the parties. Intervention (even proposed intervention) leads inevitably to delay, whether the proposal is to intervene as a party or as a non-party. In addition, the Rules give a successful intervenor certain procedural rights. In the case of intervention as a party, the consequences of intervention are more significant and more substantive.

32. The views of the parties may help the Court decide whether the applicant has met its burden under Article 62. That does not mean, however, that Article 84 of the Rules of Court add a new substantive criterion to Article 62 of the Statute. Put another way, if the criteria in Article 62 are met, I do not see a basis for the Court to reject an application for intervention simply because one or both of the parties oppose it. The criteria of Article 62 govern.

33. I note one particular situation that illustrates that intervention may be warranted even when it is opposed by one or both parties. In a case in which the would-be intervenor's interest of a legal nature "would form the very subject-matter of the decision" in the main case (*Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 32), intervention might avoid a decision by the Court to dismiss a case due to the absence of an indispensable party from the proceedings. More generally, if the Court concludes that the interest of a legal nature of a third State may be affected by the decision in the case before it, the oppor-

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tunity to consider the views of that third State *and* to permit the parties to address them protects all of the affected States and enhances the soundness and legitimacy of the decision in the case.

5. *Non-party versus party intervention*

34. Throughout the discussion of factors that the Court has considered in weighing applications to intervene, I have noted situations in which the analysis applicable to the proposed intervention as a party differs from the analysis suited to consideration of non-party intervention. In light of these distinctions, I believe that it is unfortunate that the Rules of Court treat non-party intervention and party intervention in the same way. Substantively, the effects of the two kinds of intervention are not the same, so it is regrettable that there is not more flexibility to adjust the procedures to account for the differences.

35. Because a proposal to intervene as a party has significant substantive effects on the original parties, it is appropriate for the Court to inquire especially closely into the application, including through a hearing, if one or both of the original parties objects to the intervention. Delay is an unfortunate consequence of such a procedure, but one that is warranted by the implications of successful intervention. For non-party intervention, however, the substantive implications of successful intervention are fewer. The original parties acquire no additional substantive rights or obligations vis-à-vis the intervenor. In that case, an examination of an intervention application that includes a hearing not only leads to delay, but also creates the risk that the States appearing in the proceedings will seek to use the hearing to press the substantive case. A more flexible procedure, one that does not always require a hearing in such a case, might be appropriate. Equally, if an application to intervene is granted, it may be appropriate to give the non-party intervenor more limited opportunities to convey its views than are given to the party-intervenor, for example, to make a written submission, without automatically having an opportunity to participate in oral proceedings.

* * *

36. In respect of several of the factors that I have discussed above, I have noted the potential flexibility inherent in Article 62. For example:

— a third State may be "affected" even when not legally bound by the outcome;
— an applicant need only show that its interest of a legal nature "may" be affected, not that its interests "will" be affected;

- the applicant need not demonstrate that it may be affected by the *disposif*, but instead may show that its interest of a legal nature may be affected by the reasoning;
- the requirement to specify the object of an intervention has not proven to be a significant obstacle to intervention;
- Article 62 does not require the applicant to show that intervention is the *only* means to protect its interest of a legal nature; and
- the Court has made clear that no jurisdictional link is required in the case of non-party intervention.

37. This summary might suggest that there has been a permissive attitude towards intervention. The weight of the jurisprudence, however, is to the contrary. Only one application for intervention under Article 62 has been granted in its entirety (*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. 1028). That case stands apart from others because the parties did not object to the intervention. In one other case, a Chamber of the Court accepted an intervention request in part but rejected it in part (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 137, para. 105).

38. With the exception of the Application of Equatorial Guinea, the Court has denied every request to intervene with respect to a question of maritime delimitation (see *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*, p. 28, para. 47; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 137, para. 105). The Court's Judgments today continue that trend.

II. The Application of Honduras

A. Honduras Should Be Permitted to Intervene as a Non-Party

39. The Judgment characterizes Honduras's asserted interest of a legal nature as relating largely to two issues: whether the 2007 Judgment in the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* (*Judgment, I.C.J. Reports 2007 (II)*, p. 659) settled the entire maritime boundary between Honduras and Nicaragua in the Caribbean Sea and what effect, if any, the decision of the Court in the pending proceeding would have on

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Honduras's rights under the 1986 Maritime Delimitation Treaty between Colombia and Honduras (Judgment, para. 59).

40. As to the first of these issues, the Judgment examines the Honduran challenge to the *res judicata* effect of the 2007 Judgment. In its 2007 Judgment, the Court determined that from Point F (located at the co-ordinates 15° 16′ 08″ N and 82° 21′ 56″ W), the line of delimitation between Honduras and Nicaragua "shall continue along the line having the azimuth of 70°14′ 41.25″ until it reaches the area where the rights of third States may be affected" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, pp. 760-763, para. 321). Honduras interprets this language to mean that the 2007 Judgment did not delimit any boundary between itself and Nicaragua to the east of the 82nd meridian, because it is at that point that a third State (Colombia) "may be affected", as demonstrated by the position taken by Colombia in its response to Nicaragua in this case (see CR 2010/18, p. 37 (Wood); CR 2010/20, p. 31 (Kohen)). In other words, Honduras takes the position that Colombia's *assertions* in this case establish the endpoint of the boundary set by the 2007 Judgment — an endpoint that the Court itself was not willing to fix.

41. I agree with the Court that Honduras misreads the *res judicata* effect of the 2007 Judgment. As today's Judgment explains, the course of the bisector line drawn by the Court in 2007 is clear and that line potentially extends beyond the 82nd meridian. It is also clear — and is *res judicata* for Honduras and Nicaragua — that the line ends when it "reaches the area where the rights of third States may be affected". All that is left open is the precise endpoint, an issue to which I return below.

42. I also accept the Court's statement that it will place "no reliance" on the 1986 Treaty in establishing a maritime boundary between Colombia and Nicaragua, in so far as that statement is intended to mean that a treaty between one Party (Colombia) and a third State (Honduras) cannot determine the rights of the Parties to this case.

43. I dissent, however, because I nonetheless believe that Honduras has an "interest of a legal nature" that "may be affected" by the decision in this case. The interest of Honduras results from the fact that its claim to maritime areas overlaps the area at issue in this case. Colombia has asked the Court to establish a single maritime boundary (depicted on the sketch-map attached to the Judgment) without an endpoint in the north. As Colombia correctly points out (CR 2010/20, p. 26, para. 46 (Bundy)), its 1986 Treaty with Honduras does not preclude it from asserting claims *against Nicaragua* north of the 15th parallel. Thus, the area that Colombia claims vis-à-vis Nicaragua in this case overlaps the area located north

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of the 15th parallel and west of the 80th meridian that Honduras claims vis-à-vis Colombia by virtue of the 1986 Treaty. Nicaragua's claims vis-à-vis Colombia in the present case encompass those same areas (see Written Observations of Nicaragua on Application for Permission to Intervene by Honduras, 2 September 2010)[4].

44. I have stated above that I believe that situations of overlapping claims are suggestive of circumstances that would provide a basis for non-party intervention under Article 62. While there is no way to determine at this point whether the Court would adopt a line that is identical or close to the line proposed by Colombia, its practice makes clear that, if it were to do so, it would define the northern end of that boundary in a manner that takes account of the rights that Honduras could assert based on its treaty with one Party (Colombia) and the decision of the Court with respect to Honduras and the other Party (Nicaragua). For the same reasons that the Court would follow this approach in its future judgment, I believe that Honduras's overlapping claims provide a basis to grant its Application to intervene as a non-party.

45. Apart from the situation of overlapping claims, there is a more specific reason that Honduras has an "interest of a legal nature" that "may be affected" by the Judgment in this case. This interest is triggered by the maritime boundary proposed by Colombia, shown on the sketch-map attached to the Judgment. As can be seen, the maritime boundary claimed by Colombia proceeds in a largely north-south direction. This line (shown on the map with a directional arrow) would, if it continued north, intersect with the dashed line that depicts the course of the Honduras-Nicaragua maritime boundary, as determined by this Court in 2007, which proceeds largely in an east-west direction, without a fixed endpoint. At this stage of the proceedings, the Court has not considered the merits of the Parties' claims nor has it made any decision as to the northern endpoint of any boundary that it will delimit in this case.

[4] In this regard, the Court's 2007 analysis of Colombia's interest in relation to the Court's 2007 Judgment in the *Nicaragua* v. *Honduras* case appears to be incomplete. There, the Court stated that

> "any delimitation between Honduras and Nicaragua extending east beyond the 82nd meridian and north of the 15th parallel (as the bisector adopted by the Court would do) would not actually prejudice Colombia's rights because Colombia's rights under this Treaty do not extend north of the 15th parallel" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, pp. 758-759, para. 316).

It is true that Colombia's rights vis-à-vis Honduras under the 1986 Treaty do not extend north of the 15th parallel, but this does not preclude Colombia from asserting a claim against Nicaragua that extends north of the 15th parallel.

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46. A decision of this Court that accepts the line proposed by Colombia would have a significant impact on the precise meaning of the 2007 decision that binds Honduras and Nicaragua and thus "may affect" the "interest of a legal nature" of Honduras. Before turning to the reasons that I reach this conclusion, I recall that the question before the Court is whether Honduras's interest of a legal nature "may" be affected. In the discussion that follows, I focus on the line proposed by Colombia, which potentially intersects with the 2007 Nicaragua-Honduras boundary line[5].

47. When the Court delimited the Honduras-Nicaragua boundary in 2007, it decided that, from the last turning point, which it called "Point F", the line "shall continue along the line having the azimuth of 70° 14′ 41.25″ until it reaches the area where the rights of third States may be affected" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 763, para. 321). Thus, the Court did not fix a precise end-point, consistent with its general approach to the interests of third States with respect to the delimitation of a boundary on a bilateral basis — the preservation of third-State rights.

48. At present, therefore, the line emanating from Point F is *res judicata* for Honduras and Nicaragua, but is subject to uncertainty about the point at which the boundary ends because it is unclear exactly where the line reaches an area to which a third State may have rights. This situation would change significantly if the Court adopted the line proposed by Colombia. If that were to occur, we can expect the Court to follow its usual practice with respect to third-State interests. Thus, the Court, after setting the final turning point in the north, would describe a line proceeding from that turning point largely in a northerly direction that continues until it meets the area where the rights of a third State may be affected. At some point, the prolongation of that line would intersect the line drawn by the Court in the 2007 Judgment.

49. Thus, a decision that adopts the line proposed by Colombia — which, again, is merely one possible outcome of the main proceedings — would reflect, in essence, a conclusion by this Court about the exact point on the line that it drew in 2007 at which the rights of a third State — Colombia — "may be affected". This new clarity from the Court about the rights of a third State inevitably would affect the way that Honduras (and Nicaragua) would interpret and apply the 2007 Judgment to which they are bound. In particular, it would appear that the 2007 line would be without effect east of the point at which the two lines intersect, giving rise

[5] I address here the claim of Colombia, and not the claim of Nicaragua, because the line claimed by Colombia would cross into the area in which Honduras claims an interest, whereas the line claimed by Nicaragua lies well to the east of that area. My focus on the line claimed by Colombia does not suggest any conclusion about the merits of the claims asserted by the two Parties, which I have not examined.

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to a *de facto* endpoint to the 2007 line. The Court's decision in this case between Nicaragua and Colombia would not bind Honduras (due to the operation of Article 59 of the Statute), but the Court's decision as to Colombia's rights would provide new and specific content to the meaning of the 2007 *dispositif* and would therefore, "affect the interest of a legal nature" of Honduras. In the words of Judge Sir Robert Jennings cited earlier, such a decision by this Court would surely serve as "persuasive precedent".

50. It is entirely possible that the Court will not accept the line proposed by Colombia. Uncertainty about the outcome, however, does not counsel against intervention, but rather underscores the prudence of permitting non-party intervention in delimitation cases in which the claims of a third State overlap the claims of the parties. It is precisely because the Court is *not* able to assess the merits of such overlapping claims that intervention is warranted, given the practice of the Court of taking into account third-State claims in delimitation cases.

51. Honduras has met its burden of establishing that it has an interest of a legal nature that may be affected by the Court's future judgment. It has an object that is consistent with non-party intervention, that of ensuring that the Court has Honduras's views about its interest of a legal nature, such that the Court, in crafting its judgment, may avoid an outcome that "may affect" Honduras's interest of a legal nature (see Application for Permission to Intervene by Honduras, p. 11, para. 33).

52. As previously noted, Honduras need not establish an independent basis for jurisdiction in order to support its Application for non-party intervention.

53. In concluding that Honduras should be permitted to intervene as a non-party, I have taken into account the Parties' arguments on the law and have considered the views of the Parties, which were divided (at least as to non-party intervention). Nicaragua opposed intervention and made clear its concerns about the procedural consequences of intervention. I have an appreciation for those concerns, but they do not alter my conclusion that the Applicant has met its burden under Article 62 and that its Application to intervene should be granted.

B. The Court Was Correct in Deciding not to Grant the Application to Intervene as a Party

54. While I would grant Honduras's Application to intervene as a non-party, I do not reach the same conclusion as to its proposed intervention as a party. Article 62 of the Statute makes no distinction between the two kinds of intervention, so, at first blush, it might appear odd to find a basis for only one kind of intervention. In its request to intervene as a party, however, Honduras expressly seeks *to join* to these proceedings the issue of the location of a "tripoint" among itself, Colombia and Nicaragua (see Judgment, paragraph 41; see also Application for Permission to

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Intervene by Honduras (p. 7), paragraph 22). Moreover, it asks the Court to locate that tripoint along the boundary line established by the 1986 Treaty between Colombia and Honduras. In other words, the object of Honduras's proposed intervention as a party is not to avoid an effect on its interest of a legal nature, but rather to cause such an effect, by binding itself, as well as Costa Rica and Nicaragua, with respect to a legal determination not otherwise before the Court — the location of a tripoint among those three States along the boundary line established in the 1986 Colombia-Honduras Treaty. The intervention by Honduras as a party, on the terms requested by Honduras in its Application, would therefore add a new dispute — albeit one closely related to the dispute between the Parties — to the case. For this reason, I agree with the decision to reject that form of intervention by Honduras in this case.

Conclusion

55. In the present case, I conclude that the Applicant has met its burden of proof and has established that it meets the requirements of Article 62. Honduras has claims that overlap the area that is in dispute in this case. Consistent with its established practice, the Court can be expected to take account of those claims in its Judgment. Thus, Honduras has an "interest of a legal nature" that "may be affected" by the Court's Judgment. In addition to the overlapping claims, there is an additional and more specific reason that Honduras's interest of a legal nature "may be affected" by the Judgment. If the Court adopts a line that is based on the one proposed by Colombia, that line will have a significant impact on the concrete meaning of the Court's earlier Judgment in *Nicaragua* v. *Honduras*, a Judgment to which Honduras is bound under Article 59.

56. Because the substantive criteria in Article 62 are sparsely worded, they invite a range of interpretations. As discussed above, however, Article 62 cannot be read to require an applicant to demonstrate that the Judgment "may affect" it in the sense of Article 59. In its jurisprudence on maritime boundaries, the Court repeatedly has recognized that its judgments "may affect" third States with overlapping claims and has crafted its judgments to stay clear of areas in which the judgment "may affect" the rights of third States. Taking into account these considerations, I have suggested here that situations of overlapping maritime claims generally would appear to be circumstances in which the interest of a legal nature of a third State "may be affected" by a judgment. While one of the Court's most recent relevant decisions (allowing the intervention of Equatorial Guinea in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)*) is consistent with this approach, it must be said that other intervention cases — and the Judgments of the Court today — suggest instead that an applicant for non-party intervention in a situation of overlapping claims or intersecting boundaries will fail unless the appli-

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cant can demonstrate that the judgment "may affect" it in some way that is additional to the prospect that the Court will take account of that claim in its judgment. The additional element(s) that would be sufficient for the Court are unclear to me. Given that this Application, like that of Equatorial Guinea, arises in a situation of overlapping maritime claims, it is also tempting to conclude that an objection by a single party can defeat intervention, although the Court has not so stated, nor would such an approach fit within Article 62. As previously noted, the Court has the discretion to decide whether a particular situation is one in which the third State's interest of a legal nature "may be affected" by its judgment, but that discretion is bounded by Article 62.

57. The Court today has reaffirmed that, even when it rejects an application for intervention, it may take account of the information submitted by the failed intervenor when it renders its judgment. I agree that the Court is not barred from considering that information, but find this to be a very unsatisfactory outcome. If the Court takes account of the third State's submissions in delimiting the boundary, then it seems inescapable that the Court perceives that the third State's interest of a legal nature "may be affected" by its decision. A decision to reject an application but nonetheless to use the information submitted by the third State gives rise to a *de facto* means of third-State participation that is not currently a feature of the Statute or the Rules of Court. In the case concerning the delimitation of the continental shelf between Libya and Malta *(Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985)*, for example, Italy's request to intervene was rejected, but the claims that it asserted in its request were expressly relied upon by the Court to limit the scope of its decision in order to protect Italy's interests (*ibid.*, pp. 25-26, paras. 21-22).

58. The current situation is problematic. It provides a mechanism for the submission of third-State views that is attractive to third States (because it appears that the Court will consider their views whether or not the application is granted), but that mechanism inevitably causes significant delays in the proceedings, to the disadvantage of one or both parties. Paradoxically, therefore, the Court's skeptical attitude towards intervention appears to give insufficient weight to party interests and instead to protect the interests of third States.

59. Having been trained in a legal system that permits *amicus curiae* briefs through which non-parties provide views to a court without becoming party to a case, I am not troubled by the prospect that the Court would consider the views of non-party third States. Nonetheless, I believe that it would be better to do so in a more transparent and efficient manner. By streamlining the procedures for considering applications for

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non-party intervention and by limiting the procedural rights given to non-party intervenors, for example, the Court could take account of a third State's "interest of a legal nature" in situations in which the third State would not be bound by the judgment, reserving the more onerous procedures for applications for intervention as a party (which, to date, have been rare). Alternatively, it might be possible to develop another mechanism for the submission of third-State views.

(Signed) Joan E. Donoghue.

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