



INTERNATIONAL COURT OF JUSTICE

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Summary

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4 May 2011

Territorial and Maritime Dispute (Nicaragua v. Colombia)

Application by Costa Rica for permission to intervene

Summary of the Judgment of 4 May 2011

History of the proceedings (paras. 1-18)

The Court begins by recalling that, 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.

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

On 26 May 2010, within the time-limit fixed for that purpose by the Court, the Governments of Nicaragua and Colombia submitted written observations on Costa Rica’s Application for permission to intervene. In its observations, Nicaragua set forth the grounds on which, in particular, it considered that this Application failed to comply with the Statute and the Rules of Court. For its part, Colombia indicated in its observations the reasons for which it had no objection to the said Application. The Court having considered that Nicaragua had objected to the Application, the Parties and the Government of Costa Rica were notified by letters from the Registrar dated 16 June 2010 that the Court would hold hearings, in accordance with Article 84,

paragraph 2, of the Rules of Court, to hear the observations of Costa Rica, the State applying to intervene, and those of the Parties to the case.

At the public hearings on whether to grant Costa Rica’s Application for permission to intervene, the following submissions were presented:

On behalf of the Government of Costa Rica,

“[The Court is] respectfully request[ed] . . . to grant the Republic of Costa Rica the right to intervene, in order to inform the Court of its interests of a legal nature which might be affected by the decision in this case, according to Article 62 of the Statute.

.....

[Costa Rica] seek[s] the application of the provisions of Article 85 of the Rules of Court, namely:

- Paragraph 1: ‘the intervening State shall be supplied with copies of the pleadings and documents annexed and shall be entitled to submit a written statement within a time-limit to be fixed by the Court’, and
- Paragraph 3: ‘The intervening State shall be entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention.’”

On behalf of the Government of Nicaragua,

“In accordance with Article 60 of the Rules of Court and having regard to the application for permission to intervene filed by the Republic of Costa Rica and oral pleadings, the Republic of Nicaragua respectfully submits that:

The application filed by the Republic of Costa Rica fails to comply with the requirements established by the Statute and the Rules of Court, namely, Article 62, and paragraph 2, (a) and (b) of Article 81 respectively.”

On behalf of the Government of Colombia,

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

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* *

Reasoning of the Court

The Court recalls that in its Application for permission to intervene Costa Rica specified that it wished to intervene in the case as a non-party State for the “purpose of informing the Court of the nature of Costa Rica’s legal rights and interests and of seeking to ensure that the Court’s decision regarding the maritime boundary between Nicaragua and Colombia does not affect those rights and interests”.

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

I. THE LEGAL FRAMEWORK (paras. 21-51)

The Court first addresses the legal framework set out in Article 62 of the Statute and Article 81 of the Rules of Court and indicates that intervention being a procedure incidental to the main proceedings before the Court, it is, according to the Statute and the Rules of Court, for the State seeking to intervene to set out the interest of a legal nature which it considers may be affected by the decision in that dispute, the precise object it is pursuing by means of the request, as well as any basis of jurisdiction which is claimed to exist as between it and the parties.

The Court then examines in turn these constituent elements of the request for permission to intervene, as well as the evidence in support of that request.

* *

1. The interest of a legal nature which may be affected (paras. 23-28)

The Court observes that 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).

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

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

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

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 therefore does not have to establish that one of its rights may be affected; it is sufficient for that State to establish that its interest of a legal nature may be affected. Article 62 requires the interest relied upon by the State seeking to intervene to be of a legal nature, in the sense that this interest has to be the object of a real and concrete claim of that State, based on law, as opposed to a claim of a purely political, economic or strategic nature. But this is not just any kind of interest of a legal nature; it must in addition be possible for it to be affected, in its content and scope, by the Court's future decision in the main proceedings.

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

The Court further notes that its decision 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 recalls that it 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."

The Court also recalls that 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".

2. The precise object of the intervention (paras. 29-36)

The Court notes that under the terms of 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".

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

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

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

In the opinion of the Court, the precise object of the request to intervene certainly consists in informing the Court of the interest of a legal nature which may be affected by its decision in the dispute between Nicaragua and Colombia, but the request is also aimed at protecting that interest.

Indeed, if the Court acknowledges the existence of a Costa Rican interest of a legal nature which may be affected and allows that State to intervene, Costa Rica will be able to contribute to the protection of such an interest throughout the main proceedings.

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

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

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

3. The basis and extent of the Court’s jurisdiction (paras. 37-43)

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

In this respect the Court observes that its Statute does not require, as a condition for intervention, the existence of a basis of jurisdiction between the parties to the proceedings and the State which is seeking to intervene as a non-party. By contrast, such a basis of jurisdiction is required if the State seeking to intervene intends to become itself a party to the case.

4. The evidence in support of the request to intervene (paras. 44-51)

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

In its written observations on Costa Rica’s Application for permission to intervene, Nicaragua points out that Costa Rica “did not attach documents or any clear elements of proof of its contentions. This lack of supporting documentation, or even illustrations, makes it even more difficult to determine exactly what are the legal interests claimed by Costa Rica.”

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

The Court recalls that, since the State seeking to intervene bears the burden of proving the interest of a legal nature which it considers may be affected, it is for that State to decide which documents, including illustrations, are to be attached to its application. Article 81, paragraph 3, of the Rules of Court only obliges the State in question, should it decide to attach documents to its application, to provide a list thereof.

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

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

This does not prevent the Court, if it rejects the application for permission to intervene, from taking note of the information provided to it at this stage of the proceedings. As the Court has already stated, “[it] will, in its future judgment in the case, take account, as a fact, of the existence of other States having claims in the region” (Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984, p. 26, para. 43).

II. EXAMINATION OF COSTA RICA’S APPLICATION FOR PERMISSION TO INTERVENE (paras. 52-90)

The interest of a legal nature claimed by Costa Rica (paras. 53-90)

The Court then turns to consider whether Costa Rica has sufficiently set out an “interest of a legal nature” which may be affected by the decision of the Court in the main proceedings. The Court examines both of the elements, namely the existence of an interest of a legal nature on the part of Costa Rica and the effects that the Court’s eventual decision on the merits might have on this interest, in order for the request for intervention to succeed.

In its Application, Costa Rica states that its:

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

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

For its part, Nicaragua asserts that Costa Rica “has not . . . managed to show the existence of a direct, concrete and present legal interest of its own, which is a necessary premise of any

intervention. It has not managed to show that this exists in the context of the dispute between Nicaragua and Colombia”, but has rather shown that it has “legal interests in the delimitation with its neighbour Nicaragua . . . [and] that it is presenting itself as a party — not to the dispute between Nicaragua and Colombia — but to a dispute between itself and Nicaragua regarding the maritime delimitation between the two countries”.

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

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

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

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

In the present case, by contrast, Costa Rica has indicated the maritime area in which it considers it has an interest of a legal nature which may be affected by the decision of the Court in the main proceedings.

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

Costa Rica contends that it need only show that a delimitation decision could affect its legal interest, and that such would be the case if it is shown that there is any “overlap whatsoever between the area in which Costa Rica has a legal interest . . . and the area in dispute between the Parties to this case” It also contends that Nicaragua has failed to clarify where the line representing the southern limit of its claims would be located, thus leaving Costa Rica in uncertainty. Specifically, Costa Rica asserts that even the most northerly southern limit of the areas claimed by Nicaragua in its written pleadings would encroach on Costa Rica’s entitlements.

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

Finally, Costa Rica asserts that its interests could be affected even if the Court places a directional arrow at the end of the boundary line between Nicaragua and Colombia that does not

actually touch Costa Rica's potential interests. Costa Rica contends that the Court cannot be sure to place such a directional arrow a safe distance away from Costa Rica's area of interests without it providing "full information about the extent of [its] interests" to the Court by way of intervention.

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

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

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

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

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

The Court, in its above-mentioned Judgment, had occasion to indicate the existence of a certain relationship between Articles 62 and 59 of the Statute. Accordingly, to succeed with its request, Costa Rica must show that its interest of a legal nature in the maritime area bordering the area in dispute between Nicaragua and Colombia needs a protection that is not provided by the relative effect of decisions of the Court under Article 59 of the Statute, i.e., Costa Rica must fulfil the requirement of Article 62, paragraph 1, by showing that an interest of a legal nature which it has in the area "may be affected" by the decision in the case.

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

The Court notes that, in the present case, Costa Rica's interest of a legal nature may only be affected if the maritime boundary that the Court has been asked to draw between Nicaragua and Colombia were to be extended beyond a certain latitude southwards. The Court, following its jurisprudence, when drawing a line delimiting the maritime areas between the Parties to the main

proceedings, will, if necessary, end the line in question before it reaches an area in which the interests of a legal nature of third States may be involved (see Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 100, para. 112).

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

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Dispositif (para. 91)

“For these reasons,

THE COURT,

By nine votes to seven,

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

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

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

Judges Al-Khasawneh and Abraham append dissenting opinions to the Judgment of the Court; Judge Keith appends a declaration to the Judgment of the Court; Judges Cançado Trindade and Yusuf append a joint dissenting opinion to the Judgment of the Court; Judge Donoghue appends a dissenting opinion to the Judgment of the Court; Judge ad hoc Gaja appends a declaration to the Judgment of the Court.

Dissenting opinion of Judge Al-Khasawneh

In his dissenting opinion, Judge Al-Khasawneh explains the reasons for his disagreement with the Court's decision to reject Costa Rica's request to intervene in the main proceedings. He also takes issue with the majority's attempt to define and clarify the concept of "an interest of a legal nature".

At the outset, Judge Al-Khasawneh draws attention to the Court's persistently restrictive approach to intervention. In his view, the Court's unwillingness to grant permission to intervene cannot be explained in terms of the statutory requirements because the standard of "an interest of a legal nature which may be affected by the decision in the case" under Article 62 of the Statute of the Court is a liberal one. While there may well be cases where rejection is warranted because the interest asserted by the would-be intervener is not sufficiently specified or is merely an interest in the Court's pronouncement on the applicable general principles and rules of international law, or because the permission to intervene would have involved the Court in pronouncing, rather than only protecting, the intervener's rights, the main factor diminishing the role of intervention in the Court's proceedings appears to be the Court's reliance on the argument that the rights of third States will in any case be protected by the relative effect of Article 59 of the Statute. Judge Al-Khasawneh rejects this approach as insufficient because the purpose and scope of protection of third State interests under Article 62 are wider than that under Article 59, providing the intervener with a chance to be fully heard in order to protect its legal interests before the merits.

With respect to Costa Rica's Application in the present case, Judge Al-Khasawneh expresses his disappointment with the Court's decision to decline permission to intervene notwithstanding that all the requirements of Article 62 are met. In particular, he rejects the Court's argument that Costa Rica should have demonstrated that its interest of a legal nature needs protection beyond and above that provided under Article 59. Judge Al-Khasawneh finds it ironic that the Court begins with proposing a low threshold by requiring the requesting State to demonstrate only that it has legal interests as opposed to established rights, only to later impose a higher threshold based on the adequacy of protection under Article 59. Whilst he commends the Court's policy to always take third State interests into account, whether or not there was a request for intervention, he emphasizes that such protection will inevitably be speculative, particularly where requests for intervention do not relate to maritime or spatial delimitation.

Judge Al-Khasawneh also takes issue with the Court's attempt to clarify the elusive concept of "an interest of a legal nature" by distinguishing between legal interests and rights and stating that these two concepts are not subject to the same protection or to the same burden of proof. First, he notes that it is unnecessary for the Court to draw such distinction as the issue of the relationship between interests and rights does not arise in the present case. Second, the Court's attempt to lower the threshold for intervention makes no difference in the present case, as Costa Rica's request is still rejected on the basis of the (ironically less stringent) Article 59 test. Third, Judge Al-Khasawneh disagrees altogether with the Court's view that the concepts of a legal interest and a right in the context of intervention are distinct. He notes that the concept of "an interest of a legal nature" was born out of a compromise struck by the drafters of Article 62, intended to exclude intervention for purely political, economic and other non-legal reasons, and not to create a hybrid concept that is neither an interest nor a right. Furthermore, he points out that the terms "legal interests", "rights" and "entitlements" have been used interchangeably in the Court's jurisprudence, thus not supporting the conclusion that they carry different meanings. Even the present Judgment appears to acknowledge that when it defines, in paragraph 26, the interest of a legal nature as a "real and concrete claim . . . based on law", which, according to Judge Al-Khasawneh, can only mean a right. Accordingly, he finds the Court's conclusion that an interest of a legal nature in terms 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" (Judgment, paragraph 26), illogical and unsubstantiated. In light of the above, Judge Al-Khasawneh concludes that the Court's attempt to

clarify the phrase “an interest of a legal nature” is out of context and fails to bring us any closer to its understanding.

Dissenting opinion of Judge Abraham

In his dissenting opinion, Judge Abraham sets out the reasons why he believes the Court should have allowed Costa Rica’s intervention.

Referring initially to the general considerations relating to intervention contained in his dissenting opinion in respect of Honduras’s Application for permission to intervene, Judge Abraham briefly restates his view that intervention by a third State under Article 62 of the Statute of the Court is a right, in the sense that intervention is not an option whose exercise is subject to an authorization to be granted or refused at the discretion of the Court, but a right dependent on the existence of conditions whose satisfaction is to be determined by the Court.

Judge Abraham then explains that, although he agrees with most of the arguments in the first part of the Judgment relating to the legal framework, and in particular with the distinction made therein between the “rights” of third States and their “interests”, he disagrees with the Court’s application to the present case of the principles identified in that first part.

Judge Abraham considers that Costa Rica’s interests may be affected by a future Judgment in the principal case for two reasons. Firstly, were the Court to accept the delimitation line suggested by Colombia, or even a line slightly further to the east, the adopted line would extend southwards in such a way that it could enter the area of Costa Rica’s interests. The use of a “directional arrow” is not sufficient to offset that risk, because the Court still needs to know where to put the arrow. In that respect, the information provided by a third State during the proceedings on the Application to intervene is no substitute for the comprehensive information and observations which that State could submit once allowed to intervene. Secondly, were the Court to accept Nicaragua’s claims, or even to fix a delimitation line to the east of the most easterly point of the line established by the 1977 bilateral treaty between Colombia and Costa Rica, the effect would be to deny that treaty any possibility of taking effect, and to render its ratification without purpose, since the area situated immediately to the Colombian side of the line fixed by the bilateral treaty would lie within the ambit of Nicaragua’s sovereign rights.

Lastly, Judge Abraham disagrees with the restrictive position adopted by the Court in the Judgment, which he believes is contrary to the Court’s most recent decisions on the subject of intervention. Moreover, Judge Abraham considers that the Court’s Judgment is based on the erroneous reasoning that the delimitation line drawn by the Court will terminate before it reaches an area in which the interests of third States are at stake. Judge Abraham recalls that it is the Court’s practice to place an arrow at the end of the delimitation line it draws, and to explain that the line continues beyond that point until it reaches an area in which the rights of a third State would be affected, and not the “interests” of that State. Judge Abraham concludes by pointing out that it is difficult to see from the Court’s reasoning in the Judgment under what circumstances the Court would authorize intervention by a third State in a maritime delimitation case in the future.

Declaration of Judge Keith

In his declaration, Judge Keith states that he agrees with the conclusions the Court reaches, essentially for the reasons it gives. He does, however, disagree with one aspect of the reasoning.

Judge Keith expresses 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.

Joint dissenting opinion of Judges Cançado Trindade and Yusuf

1. Judges Cançado Trindade and Yusuf append a joint dissenting opinion in which they outline their reasons for dissenting from the present Judgment of the Court. It is their belief that Costa Rica has met the conditions for intervention under Article 62 of the Statute. In their joint dissenting opinion, composed of six parts, they present the foundations of their position on (a) the scope and object of Article 62 of the Statute; (b) the need to identify an “interest of a legal nature”; (c) the need to demonstrate that such interest “may be affected by the decision in the case”; and (d) the purported special “relationship” between Articles 62 and 59 of the Court’s Statute.

2. Judges Cançado Trindade and Yusuf begin their joint dissenting opinion by arguing that the Court’s decision is based on policy grounds rather than on the assessment of whether the requisites of Article 62 have been fulfilled since the Court decides to reject Costa Rica’s Application on the simple policy ground that “a third party’s interest will, as a matter of principle, be protected by the Court, without it defining with specificity the geographical limits of an area where that interest may come into play”.

3. Furthermore, they do not agree with the position of the Court that the objectives which Article 62 was established to achieve can be attained through the exercise of some kind of “judicial due diligence” concerning third-party interests of a legal nature without affording the would-be intervenor a hearing in the proceedings on the merits. On the issue of the scope and object of non-party intervention under Article 62 (part II), the two Judges note that the opportunity given to a non-party intervenor to alert the Court of the manner in which its decision could affect the Applicant’s legal interest is meant to have an effect in the main proceedings through the substantive information provided by the intervenor to the Court. They express concern with the reasoning of the Court that “[t]he Court, following its jurisprudence, when drawing a line delimiting the maritime areas between the Parties to the main proceedings, will, if necessary, end the line in question before it reaches an area in which the interests of a legal nature of third States may be involved” (paragraph 89 of the Judgment). In their view, this reasoning is based on the flawed assumption that the delimitation of all maritime areas in contention between two parties can be somewhat mechanically effected without taking into account all the circumstances or facts of a particular case.

4. Judges Cançado Trindade and Yusuf also disagree with the Court for portraying itself as a potential substitute to would-be non-party intervenors in the main proceedings. If this were the case, then the object of intervention of any State applying to intervene would lose all significance. Though the Court might be able to delimit certain maritime areas until it reaches the area where the rights of third States may be affected, it is not clear how it would know about areas where third State interests of a legal nature may exist, without affording a hearing to such States in the main proceedings.

5. Judges Cançado Trindade and Yusuf then address the need to identify an “interest of a legal nature” (part III). They commend the Court for its efforts in clarifying, for the first time in its history, the concept of an “interest of a legal nature”. Though this is a welcome development, they believe that the Court does not make a full assessment of the fulfilment of the requirements of Article 62 in the *cas d’espèce*. Laying out the history behind the expression “interest of a legal nature”, they observe that an “interest of a legal nature” constitutes a legitimate means whereby a

third party may request permission to seek protection from a future judgment which may, in the absence of such intervention, affect its claims. Thus, the standard of proof applied in the assessment of such requirements should not be as demanding as that applicable to the establishment of the existence of a right.

6. Judges Cançado Trindade and Yusuf then focus on the need to demonstrate that such an interest “may be affected by the decision in the case” (part IV). They note that the Court (a) mischaracterized Costa Rica’s interest of a legal nature; (b) introduced a new standard of proof; and (c) based its decision solely on policy considerations.

7. First, the two Judges point out that the Court, in paragraphs 71-72 of the Judgment, sets aside Costa Rica’s arguments aimed at demonstrating how its interest of a legal nature may be affected by a decision of the Court on the factually erroneous ground that Costa Rica had initially claimed its 1977 Facio-Fernandez Treaty with Colombia, and the assumptions underlying it, as an “interest of a legal nature”, but later retracted that claim. It is their view that Costa Rica’s aim in presenting arguments on the 1977 Treaty was to demonstrate the manner in which its interest of a legal nature, as specified in its application, may be affected by a decision of the Court. An unwarranted link appears to have been established between the requirement that Costa Rica’s request has to satisfy in terms of demonstrating the manner in which its interest of a legal nature may be affected by a decision and the fact that the 1977 Treaty is not its legal interest per se.

8. Secondly, the Judges express surprise at the Court’s introduction of a new and hitherto unknown standard of proof which required Costa Rica to demonstrate that “its interest of a legal nature (...) needs a protection that is not provided by the relative effect of decisions of the Court under Article 59 of the Statute”. A standard of proof based on the adequacy of the protection provided by Article 59 of the Statute cannot be founded in the wording of Article 62 (1) of the Statute and does not have a direct bearing on the procedure of intervention under Article 62. Judges Cançado Trindade and Yusuf draw the conclusion that by introducing this standard of proof, the Court’s decision was based on policy grounds which were not articulated in the Judgment. They emphasize that Article 62 does not confer general discretionary powers on the Court “to accept or reject a request for permission to intervene for reasons simply of policy” (see Tunisia/Libya, Application to Intervene, Judgment, I.C.J. Reports 1981, p. 12, paragraph 17). In determining whether or not the conditions for intervention established under Article 62 (1) have been met by the Applicant, the Court has to assess whether the grounds invoked by the Applicant are sufficiently convincing. However, in their view, the Court failed to do so, and appears to have taken a short cut and opted for a policy based decision.

9. The penultimate part of the joint dissenting opinion is devoted to the purported special relationship between Articles 62 and 59 of the Statute. The judges reiterate that the institution of intervention was conceived in a broader perspective, unrelated to Article 59, which limits the binding force of a Court’s decision to the contending parties in the concrete case. Article 59 has a specific and narrow focus and applies to all decisions of the Court. On the contrary, intervention under Article 62 was conceived, for the purposes of the sound administration of justice, to operate prior to the issuance of a final decision by the Court, and thus before Article 59 comes into operation. It is thus their regret that the Court chose to focus on an unproven special “relationship” between Article 59 and Article 62, ignoring these important characteristics of the institution of intervention.

10. In their concluding remarks, Judges Cançado Trindade and Yusuf observe that the Court’s practice appears reminiscent of traditional bilateral arbitral proceedings where a

barrier against third party intervention may be considered desirable. Nevertheless, Judges Cançado Trindade and Yusuf stress that this practice does not respond to the contemporary demands of the judicial settlement of disputes, and does not meet the challenges faced by present-day international law.

Dissenting opinion of Judge Donoghue

Judge Donoghue dissents from the Court's decision to reject Costa Rica's Application to intervene as a non-party. She also sets forth her disagreement with the Court's approach to Article 62 of the Statute of the Court.

With respect to the factors relevant to consideration of an application to intervene under Article 62 of the Statute and to the Court's practice of protecting third States that "may be affected" in maritime delimitation cases, Judge Donoghue refers the reader to Part I of her dissenting opinion relating to the Application to intervene by Honduras in this case. Judge Donoghue notes that in her Honduras opinion, she explains her conclusion that in delimitation cases in which the area to be delimited overlaps an area subject to the claim of a third State, the Court's decision may affect "the interest of a legal nature" of that third State.

Judge Donoghue then turns to Costa Rica's Application to intervene. She notes that Costa Rica has described a "minimum area of interest" that overlaps the area at issue in the dispute between Nicaragua and Colombia. This is made clear by the sketch-map attached to the Court's Judgment. In Judge Donoghue's view, the Court appears to have decided that it can protect Costa Rica's interests by delimiting the boundary between Nicaragua and Colombia in a manner that stops short of the area claimed by Costa Rica. This leads the Court to reject Costa Rica's Application. However, Judge Donoghue takes the position that the possibility that the Court may use directional arrows to protect Costa Rica's interests does not counsel against intervention, but instead supports the conclusion that Costa Rica has an interest of a legal nature that may be affected by the Court's decision. Moreover, Judge Donoghue notes that the Court inevitably must assess or estimate the point at which a third State may have an interest of a legal nature in order to avoid placing a directional arrow within the area subject to the claim of that third State. In this light, Judge Donoghue concludes that the object of Costa Rica's request to intervene as a non-party — to inform the Court of its legal rights and interests and to seek to ensure that the Court's decision does not affect those interests — is appropriate and that Costa Rica has met its burden under Article 62.

In her conclusion, Judge Donoghue again refers the reader to her Honduras opinion, in which she makes some general observations about the Court's current approach to intervention requests and offers some thoughts on how the approach might be improved.

Declaration of Judge ad hoc Gaja

In his declaration Judge ad hoc Gaja maintains that the Court should have admitted Costa Rica's Application to intervene if it had followed its more recent precedents in cases of maritime delimitation. That would have allowed the State wishing to intervene to contribute to the determination of the nature and scope of its legal interest at stake. While the Court says that it would at any event take note of the information provided by that State in its application, it seems paradoxical that, in a case of maritime delimitation, the only way for a third State to submit information about its interest of a legal nature which may be affected by a decision of the Court would be to make an application that the Court considers inadmissible.
