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

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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;

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— 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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