DISSENTING OPINION OF JUDGE DONOGHUE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Signed) Joan E. DONOGHUE.