DISSENTING OPINION OF JUDGE ABRAHAM

[Translation]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and that

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(*Signed*) Ronny Abraham.