# DISSENTING OPINION OF JUDGE ABRAHAM

*[Translation]*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## II. Honduras's Request to Intervene as a Party

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

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

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

In that Judgment, the Chamber stated:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*(Signed)* Ronny ABRAHAM.