

DECLARATION OF JUDGE SEBUTINDE

Application of the principle of res judicata as reflected in Articles 59 and 60 of the Statute of the Court — Neither the precise course of the land boundary in the northern part of Isla Portillos, nor the issue of sovereignty over the beach of Isla Portillos, were definitively settled with the force of res judicata in the Court’s Judgment of 16 December 2015 — In determining the present course of the land boundary in the northern part of Isla Portillos, the Court should do so in reference to the 1858 Treaty of Limits as interpreted by the Cleveland and Alexander Awards and taking account of the geomorphic changes that have since occurred in the area — The resultant land boundary comprises two distinct sectors with three termini.

I. INTRODUCTION

1. I have voted with the majority in favour of all aspects of the operative clause (para. 205) of the present Judgment. However, there are aspects of the Court’s reasoning that in my view, do not adequately or fully reflect all the issues involved in reaching the Court’s decision particularly in the case concerning the *Land Boundary in the Northern Part of Isla Portillos* (Part III of the Judgment). First, whilst I agree with the Court’s conclusion in para. 69 that the issue of sovereignty over the coast of Isla Portillos was not a question definitively decided with the force of *res judicata* in the Court’s Judgment of 16 December 2015 (“2015 Judgment”) in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*¹, the present Judgment (paras. 59-69) omits to mention another important and related issue between the Parties, namely, whether or not the Court determined with the force of *res judicata*, the course of the land boundary in the northern part of Isla Portillos in the Court’s Judgment of 2015. In my view, this latter aspect, which is one of the issues that divide the Parties, should clearly have been addressed in the present Judgment. I endeavour to do so in this declaration.

2. Secondly, whilst I agree with the Court’s depiction of the course of the land boundary in the northern part of Isla Portillos shown in sketch-map No. 2 of the Judgment, the Court’s reasoning contained in paragraphs 70-73 of the present Judgment does not, in my view, adequately explain the geomorphic changes that have occurred in the area or their effect upon the original land boundary in the said area, as described in the 1858 Treaty of Limits and interpreted by President Cleveland and General Alexander. I endeavour to do so in greater detail in this declaration.

II. EFFECT OF THE *CERTAIN ACTIVITIES* JUDGMENT OF 16 DECEMBER 2015 AND *RES JUDICATA*

3. Presently, both Parties claim sovereignty over the three-kilometre-long beach/coast of Isla Portillos abutting the Caribbean Sea, between Harbor Head Lagoon and the mouth of the San Juan River, including the location on that beach where Nicaragua’s military post is currently stationed. Costa Rica’s claim to sovereignty over that beach is premised on the argument that the Court, in its 2015 Judgment in the *Certain Activities* case², already adjudged territorial sovereignty over the said beach to belong to Costa Rica. Consequently, according to Costa Rica, the matter is *res judicata* and all that remains is for the Court (a) to determine the precise location of the land boundary separating each end of the Harbor Head Lagoon sandbar from Isla Portillos; (b) to

¹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), p. 665.

² *Ibid.*

enclave the Nicaraguan lagoon and sandbar and (c) to declare the presence of Nicaragua's military presence on the beach a violation of Costa Rica's territorial sovereignty³.

4. Nicaragua's claim to sovereignty over the beach of Isla Portillos is premised on its interpretation of the 1858 Treaty of Limits (as interpreted by the Alexander and Cleveland Awards), which it claims granted sovereignty over the said beach, including the current location of its military camp, to Nicaragua. Furthermore, the Respondent disagrees that the issue of the course of the land boundary in the northern part of Isla Portillos is *res judicata*, arguing that the Court in its 2015 Judgment, deliberately excluded the beach in the northern part of Isla Portillos from its definition of "the disputed area, which question remains open for determination in the present proceedings"⁴.

5. The case concerning the *Land Boundary in the Northern Part of Isla Portillos* raises three interrelated issues, namely, (a) whether the Court in its 2015 Judgment determined with *res judicata* effect the question of sovereignty over the stretch of beach north of Isla Portillos located between Harbor Head Lagoon and the mouth of the San Juan River and if so, whether by consequence it also determined the course of the land boundary between the Parties in that area; (b) if not, what is the course of the land boundary between the Parties in the northern part of Isla Portillos taking into account the 1858 Treaty, the relevant Cleveland and Alexander Awards and the geomorphic changes that have since occurred in the area; and (c) whether by stationing its military observation post on the beach of Isla Portillos, Nicaragua is in violation of Costa Rica's territorial sovereignty.

6. The principle that a matter which has been adjudicated and settled by a competent court may not be pursued further by the same parties (*res judicata*) is embodied in the language and structure of Articles 59 and 60 of the Statute of the Court which provide, respectively, that "the decision of the Court has no binding force except between the parties and in respect of that particular case" and that the Court's judgments are "final and without appeal"⁵. The Court has maintained that although the binding element of a judgment is contained in the operative part (*dispositif*) and not the legal reasoning (*motif*), it may be necessary, in order to ascertain what is covered by *res judicata*, to determine the meaning and scope of the operative clause by reference to the reasoning set out in that judgment⁶. The Court further stated that

"in respect of a particular judgment it may be necessary to distinguish between, first, the issues which have been decided with the force of *res judicata*, or which are necessarily entailed in the decision of those issues; secondly any peripheral or subsidiary matters, or *obiter dicta*; and finally matters which have not been ruled upon at all . . . If a matter has not in fact been determined expressly or by necessary implication, then no force of *res judicata* attaches to it; and a general finding may

³ See Final Submissions of Costa Rica.

⁴ Counter-Memorial of Nicaragua (CMN), para. 2.3 and Nicaragua's Final Submissions.

⁵ *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections (*Nigeria v. Cameroon*), Judgment, I.C.J. Reports 1999 (I), p. 36, para. 12; *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion*, I.C.J. Reports 1954, p. 53; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), p. 90, para. 116.

⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), p. 95, para. 125.

have to be read in context in order to ascertain whether a particular matter is or is not contained in it.”⁷

7. In order for a plea of *res judicata* to succeed in the present case, the following elements must be proven to exist, namely, (a) that the parties in the *Certain Activities* case (the “former case”)⁸ are identical to those in the case concerning the *Land Boundary in the Northern Part of Isla Portillos* (“the latter case”)⁹ (*eadem personae*); (b) that the dispute or claim in both cases is the same (*eadem petitum*); (c) the legal grounds underlying the dispute or claim in both cases are the same (*eadem causa petendi*); and (d) that the dispute or claim raised in the latter case was, in fact, finally and definitively settled by the Court in the former case¹⁰.

8. The disputed paragraphs (69, 70 and 229) of the 2015 Judgment read as follows:

“69. Since it is uncontested that Nicaragua conducted certain activities in the disputed territory, it is necessary, in order to establish whether there was a breach of Costa Rica’s territorial sovereignty, to determine which State has sovereignty over that territory. The ‘disputed territory’ was defined by the Court in its Order of 8 March 2011 on provisional measures as ‘the northern part of Isla Portillos, that is to say, the area of wetland of some 3 square kilometres between the right bank of the disputed *caño*, the right bank of the San Juan River up to its mouth at the Caribbean Sea and the Harbor Head Lagoon’ (*I.C.J. Reports 2011 (I)*, p. 19, para. 55). The *caño* referred to is the one that was dredged by Nicaragua in 2010. Nicaragua did not contest this definition of the ‘disputed territory’, while Costa Rica expressly endorsed it in its final submissions (para. 2 (a)). The Court will maintain the definition of “disputed territory” given in the 2011 Order. It recalls that its Order of 22 November 2013 indicating provisional measures specified that a Nicaraguan military encampment ‘located on the beach and close to the line of vegetation’ near one of the *caños* dredged in 2013 was ‘situated in the disputed territory as defined by the Court in its Order of 8 March 2011’ (*I.C.J. Reports 2013*, p. 365, para. 46).

70. The above definition of the ‘disputed territory’ *does not specifically refer to the stretch of coast abutting the Caribbean Sea which lies between the Harbor Head Lagoon, which lagoon both Parties agree is Nicaraguan, and the mouth of the San Juan River*. In their oral arguments the Parties expressed different views on this issue. However, they did not address the question of the precise location of the mouth of the river nor did they provide detailed information concerning the coast. Neither Party requested the Court to define the boundary more precisely with regard to this coast. Accordingly, the Court will refrain from doing so.”¹¹ (Emphasis added.)

⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro, Judgment, I.C.J. Reports 2007 (I)*, p. 95, para. 126.

⁸ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015 (II)*.

⁹ *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*.

¹⁰ *Questions of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 126, para. 59.

¹¹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, pp. 696-697, paras. 69-70.

“229. [. . .] THE COURT,

(1) By fourteen votes to two,

Finds that Costa Rica has sovereignty over the ‘disputed territory’, as defined by the Court in paragraphs 69-70 of the present Judgment”¹².

9. While the Parties involved in the *Certain Activities* case (the former case) are identical to those in the present proceedings (the latter case), none of the other elements required for a plea of *res judicata* to succeed are fulfilled. First, the claim or dispute in the former case (*petitum*) pertained to territorial sovereignty over a particular area of Isla Portillos clearly identified in that case as “the disputed territory” where Nicaragua had carried out the activities complained; while that in the latter case pertains to demarcation of the land boundary between the Parties in a slightly different area and sovereignty over the beach of Isla Portillos. Although the Court discussed the issue of the land boundary between the Parties in the former case, this was only for the purpose of identifying and/or defining the “disputed territory” upon which the activities complained upon were taking place, and not for the purpose of demarcating that land boundary finally or definitively.

10. Second, and more importantly, the Court in paragraph 70 of the 2015 Judgment cited above, deliberately excluded from its definition of the “disputed territory” *the stretch of coast abutting the Caribbean Sea which lies between the Harbor Head Lagoon, which lagoon both Parties agree is Nicaraguan, and the mouth of the San Juan River*, the area now in dispute in the present proceedings, and expressly declined to define the land boundary more precisely with regard to that coast. This was because the parties in the former case did not provide the Court with detailed information concerning the geographic configuration of the coast, nor did they request the Court to define the land boundary more precisely with regard to that coast¹³. Thus, when the Court adjudged in the operative clause (para. 229) that “Costa Rica has sovereignty over the ‘disputed territory’, as defined by the Court in paragraphs 69-70 of the present Judgment” that area did not include the stretch of coast abutting the Caribbean Sea which lies between the Harbor Head Lagoon and the mouth of the San Juan River, the area now in dispute in the present proceedings, nor did the Court determine the course of the land boundary between the Parties in that area.

11. In conclusion, neither the issue of the precise course of the land boundary in the northern part of Isla Portillos, nor the issue of who has sovereignty over the stretch of coast abutting the Caribbean Sea which lies between the Harbor Head Lagoon and the mouth of the San Juan River, were finally or definitively settled in the 2015 Judgment. Accordingly, Costa Rica’s plea of *res judicata* on both counts fails and Nicaragua’s claim concerning sovereignty over the northern coast of Isla Portillos is admissible.

¹² *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), p. 740, para. 229 (1).

¹³ *Ibid.*, p. 697, para. 70.

III. THE COURSE OF THE LAND BOUNDARY IN THE NORTHERN PART OF ISLA PORTILLOS

12. The Parties agree that in the 1858 Treaty of Limits, they agreed on a “shifting boundary” whose course would change with the geography of the area¹⁴. Accordingly, they also agree that the Court should, in determining the present course of the land boundary along the disputed stretch of coast, do so in accordance with the 1858 Treaty of Limits as interpreted by the Alexander and Cleveland Awards, taking into account any relevant geographical changes that may warrant adjustment of the historical boundary¹⁵. The Parties do, however, disagree regarding the extent and effect of those geographical changes on the course of the historical boundary.

13. According to Nicaragua, the Court should maintain the starting-point of the land boundary where it was historically fixed, namely, “at the extremity of Punta de Castilla at the mouth of the San Juan de Nicaragua River, as they both existed on the 15th day of April 1858”¹⁶. Nicaragua further maintains that the boundary then cuts the sandbar across Harbor Head Lagoon and follows the water’s edge around the lagoon until it meets the channel connecting Harbor Head Lagoon to the lower San Juan (Alexander’s “first channel met”). Nicaragua argues that the land boundary should separate Isla Portillos, which belongs to Costa Rica, and the coast or sandy beach of that promontory directly abutting the Caribbean Sea, which entire coast belongs to Nicaragua¹⁷.

14. On its part, Costa Rica contends that the northern part of Isla Portillos has undergone significant geomorphic changes which have affected the course of the historical land boundary, the most significant of which is that the channel that once connected Harbor Head Lagoon to the lower San Juan has now disappeared and what once formed the left or northern bank of that channel (and consequently the border with Nicaragua) is totally eroded, leaving no feature capable of constituting territory appertaining to a State immediately in front of the beach of Isla Portillos. Costa Rica argues that Isla Portillos has consequently emerged as a coastal territory with an unobstructed front on the Caribbean Sea and the land boundary between the Parties now meets the Caribbean Sea in three points, namely, on the right bank the San Juan River at its mouth, and at each end of the sandbar seaward of the lagoon¹⁸. In Costa Rica’s view, the land boundary should run from the north-eastern corner of Harbor Head Lagoon by the shortest line to the Caribbean Sea and from the north-western corner of the lagoon by the shortest line to the Caribbean Sea. Costa Rica thus claims sovereignty over the beach of Isla Portillos, and argues that the only Nicaraguan territory in the area is Harbor Head Lagoon and the sandbar in front of it (in so far as this sandbar remains above water at all times and is capable of appropriation) which lagoon and sandbar the Court should enclave¹⁹. Accordingly, Costa Rica requests the Court to

“determine the precise location of the land boundary separating both ends of the Los Portillos/Harbor Head Lagoon sandbar from Isla Portillos, and in so doing to determine that the only Nicaraguan territory existing today in the area of Isla Portillos is limited to the enclave consisting of Los Portillos/Harbor Head Lagoon and the sandbar separating the

¹⁴ Memorial of Costa Rica (MCR), paras. 2.2, 2.55 and 2.57; and CMN, paras. 2.21-2.25.

¹⁵ MCR, paras. 2.2, 2.55 and 2.57; and CMN, paras. 2.21-2.25.

¹⁶ CMN, paras 2.4, 2.21, 2.23, 3.10-3.23.

¹⁷ CMN, paras. 4.9-4.19; CMN, para. 4.20; CMN, fig. 4.16.

¹⁸ MCR, paras. 2.5-2.10, 2.36 and 2.52-2.53.

¹⁹ MCR, paras. 2.1-2.2 and 2.54.

Lagoon from the Caribbean Sea, insofar as this sand bar remains above water at all times and thus this enclave is capable of constituting territory appertaining to a State²⁰.

Costa Rica adds that, considering that the coastal geography in this area is likely to continue undergoing changes, it is not appropriate to describe the boundary using specific co-ordinates. Instead, a verbal description of the boundary would be sufficiently precise and would allow the line to change with the geography, as envisaged in the Second Alexander Award²¹.

(a) *Original course of the land boundary under the 1858 Treaty, Alexander and Cleveland Awards*

15. In determining the course of the land boundary in the disputed coastal area the Court should, in my view, begin by examining the 1858 Treaty of Limits and relevant Awards before taking into account any relevant geographical changes to the area. According to Article II of the 1858 Treaty:

“The dividing line between the two Republics, starting from the Northern Sea, shall begin at the end of Punta de Castilla, at the mouth of the San Juan de Nicaragua River, and shall run along the right bank of the said river up to a point three English miles distant from Castillo Viejo . . .”²²

However, in interpreting this provision in his First Award, General Alexander observed:

“The exact spot which was the extremity of the headland of Punta de Castillo [on] April 15, 1858, has long been swept over by the Caribbean Sea, and there is too little concurrence in the shore outline of the old maps to permit any certainty of statement of distance or exact direction to it from the present headland. It was somewhere to the northeastward, and probably between 600 and 1,600 feet distant, but it can not now be certainly located. Under these circumstances it best fulfills the demands of the treaty and of President Cleveland’s award to adopt what is practically the headland of to-day, or the northwestern extremity of what seems to be the solid land, on the east side of Harbor Head Lagoon.

I have accordingly made personal inspection of this ground, and declare the initial line of the boundary to run as follows, to wit:

Its direction shall be due northeast and southwest, across the bank of sand, from the Caribbean Sea into the waters of Harbor Head Lagoon. It shall pass, at its nearest point, 300 feet on the northwest side from the small hut now standing in that vicinity. On reaching the waters of Harbor Head Lagoon the boundary line shall turn to the left, or southeastward, and shall follow the water’s edge around the harbor until it reaches the river proper by the first channel met. Up this channel, and up the river proper, the line shall continue to ascend as directed in the treaty.”

²⁰ Application instituting proceedings of Costa Rica (ACR), para. 22; MCR, p. 59 and Final Submissions of Costa Rica.

²¹ MCR, paras. 2.56-2.58.

²² *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), p. 697, para. 71.

16. As observed in paragraph 74 of the Court's 2015 Judgment, the Second Alexander Award envisaged the possibility that the banks of the San Juan River would "not only gradually expand or contract but that there would be wholesale changes in its channels". He further observed that:

"Today's boundary line must necessarily be affected in future by all these gradual or sudden changes. But the impact in each case can only be determined by the circumstances of the case itself, on a case-by-case basis in accordance with such principles of international law as may be applicable.

The proposed measurement and demarcation of the boundary line will not have any effect on the application of those principles."²³

17. In his Third Award, General Alexander concluded thus:

"Let me sum up briefly and provide a clearer understanding of the entire question in accordance with the principles set out in my first award, to wit, that in the practical interpretation of the 1858 Treaty, the San Juan River must be considered a navigable river. I therefore rule that *the exact dividing line between the jurisdictions of the two countries is the right bank of the river, with the water at ordinary stage and navigable by ships and general-purpose boats*. At that stage, every portion of the waters of the river is under Nicaraguan jurisdiction. Every portion of land on the right bank is under Costa Rican jurisdiction."²⁴ (Emphasis added.)

It is clear from the foregoing that by the time General Alexander rendered his five Awards defining the land boundary between the Parties in 1897, significant geomorphic changes had already occurred around the mouth of the lower San Juan River. He anticipated that further geomorphic changes were in future likely to occur to the banks of the San Juan River and its channels and to affect the course of the historical boundary.

18. Centuries later, in the 2015 Judgment, the Court when interpreting the 1858 Treaty, in light of the Cleveland and Alexander Awards held:

"[T]he 1858 Treaty and the awards by President Cleveland and General Alexander lead to the conclusion that Article II of the 1858 Treaty, which places the boundary on the 'right bank of the . . . river', must be interpreted in the context of Article VI (quoted in full at paragraph 133 below), which provides that 'the Republic of Costa Rica shall . . . have a perpetual right of free navigation on the . . . waters [of the river] between [its] mouth . . . and a point located three English miles below Castillo Viejo'. As General Alexander observed in demarcating the boundary, the 1858 Treaty regards the river, 'in average condition of water', as an 'outlet of commerce' (see paragraph 73 above). *In the view of the Court, Articles II and VI, taken together, provide that the right bank of a channel of the river forms the boundary on the assumption that this channel is a navigable 'outlet of commerce'. Thus, Costa Rica's rights of navigation are linked with sovereignty over the right*

²³ United Nations, *Reports of International Arbitral Awards*, Vol. XXVIII, p. 224, cited in the *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), p. 699, para. 74.

²⁴ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), p. 700, para. 75.

bank, which has clearly been attributed to Costa Rica as far as the mouth of the river."²⁵ (Emphasis added.)

19. It is clear from the foregoing that, in determining the course of the boundary line in the disputed coastal area today, including any necessary adjustments, the Court must as far as is possible, be faithful to the 1858 Treaty in ensuring that (a) the San Juan River continues to be a "navigable outlet of commerce" and (b) that Costa Rica's rights of navigation as envisaged under the 1858 Treaty²⁶, which rights the Court held, are inextricably linked with its sovereignty over the right bank of the San Juan River as far as the mouth of the river²⁷ are guaranteed.

(b) Geomorphic changes in the northern part of Isla Portillos

20. For purposes of ascertaining the current geographical situation in the northern part of Isla Portillos, the Court commissioned a group of experts who made two site visits to the area in question (December 2016 and March 2017). The experts submitted to the Court and Parties their Report²⁸ in which they identified a number of geographical or geomorphic changes that have, over the years, occurred in the northern part of Isla Portillos, the most significant of which include the following:

- the point identified by Alexander and the Parties' Demarcation Commissions as the starting-point of the land boundary in 1897 is now submerged in the Caribbean Sea due to coastal erosion²⁹. However, the headland of Punta de Castilla still exists today as a geomorphic and geographical feature in the landscape, notwithstanding that it has experienced significant retreat due to coastal erosion it³⁰.
- The channel connecting Harbor Head Lagoon to the lower San Juan (referred to by General Alexander as the "first channel met") once navigable, has almost completely disappeared, leaving in its place, a series of "elongated discontinuous coast-parallel lagoons" that are not navigable³¹.
- What once formed the left or northern bank of that channel (formerly comprising Nicaraguan territory) is totally eroded and there is no feature capable of constituting territory appertaining to a State, immediately in front of the beach of Isla Portillos³².
- Consequently, Isla Portillos has emerged as a coastal territory with a "broad and continuous sandy beach" that directly abuts the Caribbean Sea, and that is covered by tree vegetation³³.

²⁵ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), p. 700, para. 76.

²⁶ In particular Articles II and VI of the 1858 Treaty.

²⁷ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), p. 700, para. 76.

²⁸ Report of the Court-appointed experts dated 30 April 2017.

²⁹ *Ibid.*, para. 132.

³⁰ *Ibid.*, para. 131.

³¹ *Ibid.*, p. 33, para. 106 and figs. 41-42.

³² *Ibid.*, p. 33, paras. 105-106.

³³ *Ibid.*, pp. 34-36.

- The lower San Juan River no longer flows eastwards via a channel, into Harbor Head Lagoon but rather flows north-westwards, directly into the Caribbean Sea³⁴.
- Harbor Head Lagoon has significantly reduced in size and no longer opens out to the Caribbean Sea but is closed off by “a ribbon-shaped and coast-parallel” sand barrier with no vegetation³⁵.

21. It is clear from the above findings of the experts, that the original course of the land boundary as envisaged in the 1858 Treaty of Limits and relevant Awards, inevitably has to be adjusted, taking into account the above geomorphic changes. The result is a land boundary comprising two distinct segments or sectors with three termini as shown in sketch-map No. 2 of the Judgment.

(c) *The three termini of the land boundary in the northern part of Isla Portillos*

22. When interpreting the 1858 Treaty, General Alexander envisaged that the starting-point of the land boundary would be based on solid, stable land on what was at that time “the headland of Punta de Castilla, or the northwestern extremity of what seems to be the solid land, on the east side of Harbor Head Lagoon”. Given the geomorphic changes referred to above, it would not be practicable or appropriate today to use either Punta de Castilla or the Initial Marker (both of which are currently submerged at sea) as the starting-point of the land boundary today. However, the experts pointed out that although the “headland of Punta de Castilla” has experienced significant retreat due to coastal erosion, it still exists today as a geomorphic and geographical feature in the landscape³⁶. In my view the Court should adopt as the starting-point of the first segment of the land boundary, what is the north-western extremity of what seems to be solid land, on the east side of Harbor Head Lagoon as it exists in 2017. That point is identified in sketch-map No. 2 as Ple2. The second terminus or endpoint of the first segment is the point identified on sketch-map No. 2 as PLw2, to the west of the sandbar³⁷. What the Court refers to in the present Judgment as “the starting-point of the land boundary” currently located at the end of the sandspit bordering the San Juan River where “the right bank of the San Juan River reaches the low-water mark of the coast of the Caribbean Sea” (paragraph 71) is in my view, more appropriately described as the starting-point of the second sector of the land boundary. For the reasons given in the Judgment, I do agree with the majority that the start of the maritime delimitation in the Caribbean should in principle, coincide with this point.

(d) *Tracing the first sector of the land boundary*

23. In my view, the first sector of the land boundary should run as follows. Its direction shall be due north-east and south-west, across the bank of sand, from the Caribbean Sea into the waters of Harbor Head Lagoon. It shall pass at its nearest point at Point Ple2 (with the co-ordinates described in paragraph 73 of the Judgment). On reaching the waters of Harbor Head Lagoon the boundary line shall follow the water’s edge around Harbor Head Lagoon until it meets the north-western extremity of the Lagoon where it cuts across the sandbank into the Caribbean Sea, at Point Plw2 (with the co-ordinates described in paragraph 73 of the Judgment). This first sector of

³⁴ Report of the Court-appointed experts dated 30 April 2017, p. 33, para. 103 and fig. 21.

³⁵ *Ibid.*, p. 25, para. 99 and fig. 21.

³⁶ Report of the Court-appointed experts dated 30 April 2017, para. 131.

³⁷ See the co-ordinates of these two termini referred to in para. 73 of the present Judgment.

the land boundary enclaves the waters of Harbor Head Lagoon and ensures that the Lagoon, as well as the sandbar in front of it, remain Nicaraguan as stipulated in the 1858 Treaty.

(e) *Tracing the second sector of the land boundary*

24. Since Alexander's "first channel met" no longer exists, the second sector of the land boundary is disconnected and separated from the first by the beach of Isla Portillos. The second sector must start at the north-western extremity of Isla Portillos at the mouth of the San Juan River proper, on solid ground at the base of the sandspit where the right bank of the San Juan River reaches the low-water mark of the coast of the Caribbean Sea. Up the river proper, the line shall continue to ascend as directed in the 1858 Treaty.

(Signed) Julia SEBUTINDE.
