

DISSENTING OPINION OF JUDGE *AD HOC* AL-KHASAWNEH

Dissent is confined to land delimitation — Importance of putting to rest a long running dispute — Ambiguity of 1858 Treaty — Producing no less than six arbitrations — And bilateral commissions — And negotiations — Court dealing with various aspects of dispute since 2005 — 2015 Judgment and present Judgments are res judicata — In conflict with earlier res judicata decisions — Caribbean shore in general retreat — New point chosen by Court ephemeral — And unjustified — Alexander Point submerged by sea but still identifiable — Mouth of river was not crucial for territorial delimitation — Discontinuous, elongated lagoons suggest a recently disappeared caño — Represent border between Parties — Harbor Head Lagoon and land barrier under Nicaraguan sovereignty — But no maritime entitlements — Lack of reasoning and based on hope — Clarification as to voting on dispositif.

I am essentially in agreement with my learned colleagues with regard to the maritime delimitation effected in the Caribbean Sea and the Pacific Ocean. A difference of opinion with the majority with respect to the scope of the concept of equity on delimitation in the Pacific warrants a separate declaration and will be enunciated therein.

It is on land that I regrettably part company with my colleagues, as I am unconvinced of their findings and remain unpersuaded by the reasoning underlying those findings. I must therefore dissent.

Before explaining in detail the reasons that led me to take this position, I wish to make some general introductory remarks.

It is incontestable that the aim of any judicial settlement is to put to rest, on the basis of law, an existing dispute before a judicial body. In the case of the Court, the principal judicial organ of the United Nations, a solution of an extant dispute on the basis of international law helps also in the preservation of international peace — which is one of the highest aims of the Organization — and in preventing or at least minimizing conflict between its Member States.

This consideration assumes a special pertinence in the present case(s) given a long history of conflict, centring mainly on territorial disputes between the Parties, that started even before the conclusion of the Treaty of Limits of 1858 between them. It says much about the “creative” ambiguity of that Treaty that it has since generated no less than six Awards on its interpretation and application, a number of bilateral commissions, and stalled bilateral negotiations right up to the first recourse to the Court in 2005¹. The Court itself has had to deal with various aspects of this ongoing territorial dispute, in the course of which it effected, in its 2015 Judgment, a partial and imprecise delimitation of the area in question, the Northern Part of Isla Portillos. That partial delimitation, curiously made in the context of a case on State responsibility, has undoubtedly the force of *res judicata*. Moreover, the findings in the present Judgment are largely predicated on those of the 2015 Judgment where, as a primary example, the Court chose the mouth of the San Juan River, as it stood then, as the boundary between the two States rather than the original starting-point of the land boundary fixed by General Alexander, which is now long submerged at sea. The latter is nevertheless still identifiable and capable of providing a starting-point for territorial delimitation by linking it to the nearest point on shore (see figures 84 and 85 of the Report of the Court-appointed experts, reproduced below).

¹ *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Application instituting proceedings filed by Costa Rica on 29 September 2005.

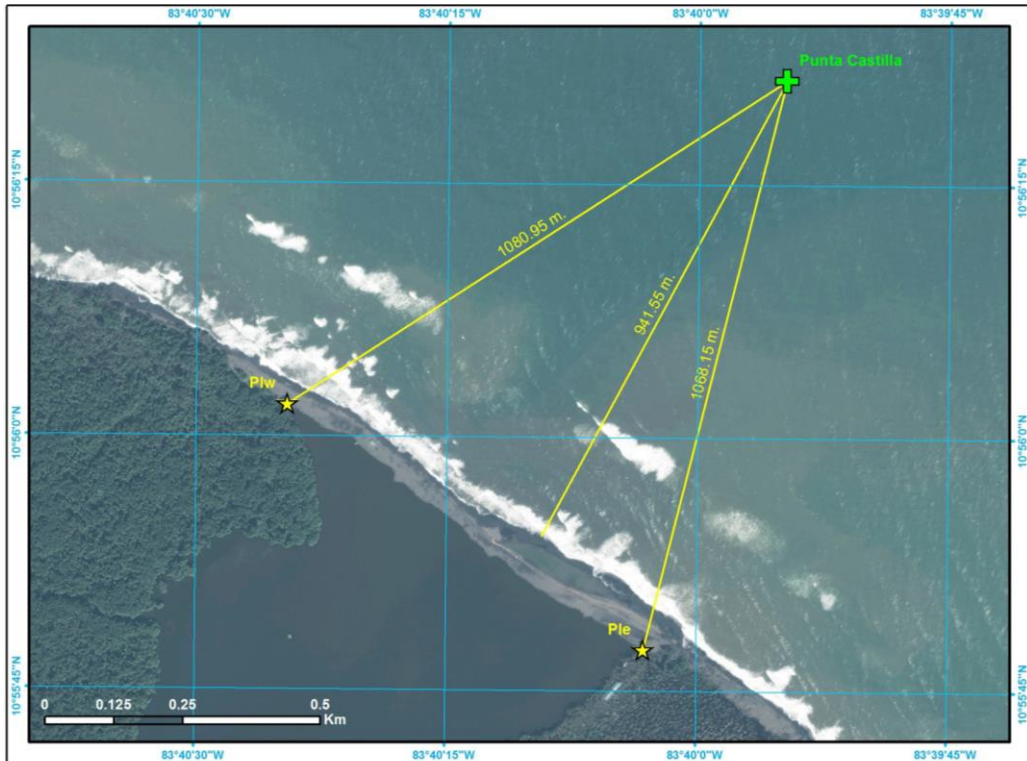


Figure 84. Distances between the location estimated for Punta de Castilla to the closest land point on a satellite image from 22 January 2016 and points Plw and Ple measured during the first site visit.

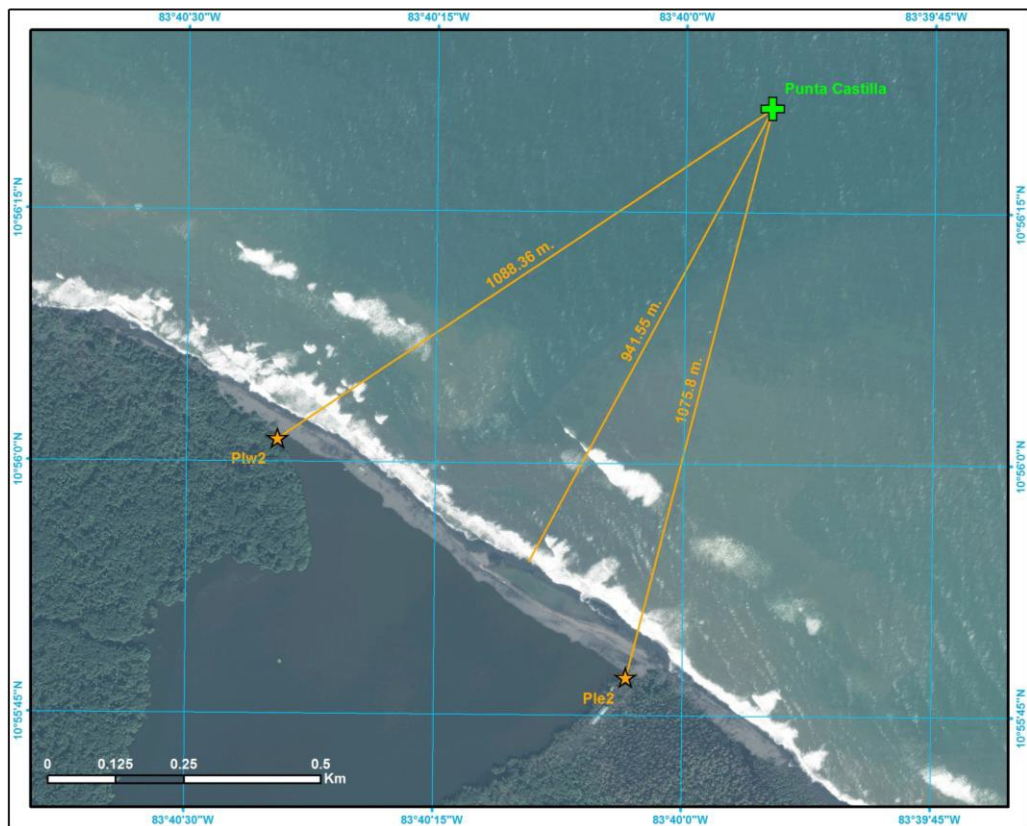


Figure 85. Distances between the location estimated for Punta de Castilla to the closest land point on a satellite image from 22 January 2016 and points Plw2 and Ple2 measured during the second site visit.

Thus, in effect, we are faced with two sets of conflicting decisions, each possessing the force of *res judicata*: on the one hand, the Cleveland Award of 1888 and the First and Second Alexander Awards of 1897 and, on the other hand, the 2015 Judgment, in which the Court, at paragraph 92, concluded that “the territory under Costa Rica’s sovereignty extends to the right bank of the Lower San Juan River as far as its mouth in the Caribbean Sea” and the present Judgment, which fixes the starting-point for territorial delimitation at the sandspit at the mouth of the river (para. 71).

Had the shore as it stands today displayed any inclination to stability, there could have been some justification to choose the new point(s), but the geographical and geomorphic realities of the shore of the Caribbean in question attest that there has been an ongoing coastal retreat over the last 160 years since the conclusion of the 1858 Treaty. How literally true is Shakespeare’s sonnet:

“ . . . I have seen the hungry ocean gain
Advantage on the kingdom of the shore”².

This general coastal retreat will most probably continue. Both the Court-appointed experts acknowledged this much and the Court concurred, resorting to a fixed hinge point at sea to ensure against medium and long-term changes to the mouth of the river. Thus — and this is not without irony — a point at sea possessing a long pedigree, which is described precisely in the 1858 Treaty, the Cleveland Award, and the First and Second Alexander Awards, has been replaced by another point linked to a hinge point at sea, the location of which varies according to where the mouth of the river is presently situated. But we can safely predict that the mouth of the river is ephemeral and may revert to empty again into Harbor Head Lagoon³. Would not the cause of the stability and permanence of boundaries, a concept of paramount importance to an international society made of sovereign States, have been better served, had the Court not abandoned the original delimitation fortified by the force of *res judicata* in favour of a shifting river and an ongoing general coastal retreat? And, should the existence of a lagoon enclosed from the sea by a sandbar and recognized by both Parties to be under Nicaraguan sovereignty not have alerted the Court to the fact that the area in dispute *had* been under Nicaraguan sovereignty before the river shifted to the north-west and that *a priori* the sea-abutting shore between it and the location of the mouth of the river must be under Nicaraguan sovereignty?

It is to these issues that I shall now turn. I start by acknowledging that, had the Court in its 2015 Judgment, and consequently in the present one, opted to commence the land boundary at the original Alexander Point, this would not coincide with the mouth of the river at its right bank. It would have left Nicaragua in possession of land on both sides of the river, but this is neither a calamitous occurrence nor one not contemplated by the two Arbitrators, President Cleveland and General Alexander. Thus, when President Cleveland was called upon to decide on “various points of doubtful interpretation communicated by Nicaragua”, he decided, in point 3 (I) of his 1888 Award that:

“The boundary line between the Republics of Costa Rica and Nicaragua, on the Atlantic Side, begins 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*. The ownership of any accretion to said Punta de Castilla is to be governed by the laws applicable to that subject.” (*Award in regard to the validity of the Treaty of Limits between Costa Rica and Nicaragua of 15 July 1858 (22 March 1888)*, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVIII, p. 209; emphasis added.)

² William Shakespeare, *Sonnet 64* (1609).

³ Report of the Court-appointed experts, CRNIC-CRNIP 2017/18, p. 77, para. 195.

Almost ten years later, when, in 1897, it had become clear that Punta de Castilla was already submerged under the sea, General Alexander fixed the starting-point of the land boundary by reference to that point. As Nicaragua points out in its written pleadings⁴, he was not looking for the mouth of the River, which would have been a much easier task than trying to find out where Punta de Castilla was located, because he recognized the latter to be where the fixed starting-point for the border was to be found.

Any lingering doubt that General Alexander was looking for the mouth of the river is dispelled by the operative part of his First Award. He expressly determined that the coast of the eastern extremity of Harbor Head Lagoon was Punta de Castilla, and that from there “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”⁵ (emphasis added). It is abundantly clear that the starting-point was not the river mouth.

There is also ample evidence that, in the bilateral commissions that met after the rendering of the Award, both Parties viewed the original Alexander Point as the starting-point of land delimitation and strove to identify and repair the first marker placed by General Alexander, which had been submerged by the sea, by linking the Alexander Point to points further in land.

Indeed, when one assesses the position of the Parties over the past 120 years since the Alexander Award was rendered, one cannot but notice that there had been long-term acceptance by the Parties of the original starting-point of boundary delimitation and that this state of affairs remained so until recently when the Court started to be seized by the disputes between the Parties.

Turning to the question of whether there is a water channel connecting the river and Harbor Head Lagoon, I differ with my learned colleagues in drawing firm conclusions from the existence of “elongated . . . coast-parallel lagoons.”



Figure 41: Report of the Court-appointed experts, CRNIC-CRNIP 2017/18, p. 35.

⁴ *Dispute concerning the Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, Counter-Memorial of the Republic of Nicaragua, 18 April 2017, p. 25, para. 3.22.

⁵ *First Award of the Engineer-Umpire, under the Convention between Costa Rica and Nicaragua of 8 April 1896 for the Demarcation of the Boundary between the two Republics* (30 September 1897), RIAA, Vol. XXVIII, p. 220.

While there is no continuous water channel connecting the lagoon and the river at present, the experts indicated that “in the *recent past*” (emphasis added), there was a “channel-like water gap between the spit and firm land, and that the Los Portillos/Harbor Head Lagoon was connected to the sea via the San Juan River”⁶. Given this, I respectfully believe that the firm inference my colleagues made somewhat hastily from the fact that, at the time of their visit, the experts found this channel to be disconnected, does not lead to the conclusion that the shore abutting the Caribbean and the partly dried channel is under Costa Rican sovereignty.

It is worth recalling that in arid parts of the world it is common to delineate boundaries by reference to dried or partly dried river beds. I am strongly inclined to the view that those elongated but discontinuous lagoons running parallel to the Caribbean shore were what was meant by the experts when they spoke of a channel-like water gap between the spit and the firm land that existed “in the recent past”⁷.

This I believe is the boundary between the Parties. The majority however dismissed this evidence and chose to believe that such a *caño* had been submerged by the sea. But this conclusion is not supported by any evidence and remains pure conjecture.

Turning to the sand barrier separating the water of the lagoon from the sea, which is recognized by Costa Rica to be under Nicaraguan sovereignty “in so far as [it] remains above [sea level]”⁸, the Judgment came to the conclusion that it does not generate maritime entitlements.

This conclusion is totally unreasoned. No analysis is offered as to why a piece of *terra firma* abutting the shore should not have maritime entitlement, not even in the territorial sea where judicial discretion is expressly constrained. It is self-evident that this conclusion has no basis in law and is no more than a necessary consequence of the wrong decision on the appurtenance of the shore from the end of the sand barrier till the mouth of the river to Costa Rica.

Not knowing what to do with this inconvenient fact, the Court decided to do nothing in the hope that the hungry waves and the sands would rectify what the Court did not do, thus giving a new and literal meaning to a line by Hafez of Shiraz: “The house of hope is built on sand”⁹.

It is equally possible that the early demise of the sand barrier will not meet the Court’s expectations and that through sedimentation or human actions the lagoon itself will transform into *terra firma* enclosed in Costa Rica’s territory, but not entitled to a maritime space. The Court’s decision carries the seed of a future dispute.

Before ending this dissenting opinion, I wish to make two clarifications:

First, paragraph 2 of the *dispositif* amalgamates two proposals that are in reality eminently separable, namely Costa Rican sovereignty over the whole northern part of Isla Portillos, including its coast and, as an exception, Nicaraguan sovereignty over the Harbor Head Lagoon and the sandbar separating it from the Caribbean. I had no choice but to vote against the paragraph as a whole. This vote in no way detracts from my opinion that the lagoon and sandbar appertain to Nicaragua.

⁶ Report of the Court-appointed experts, CRNIC-CRNIP 2017/18, p. 26, para. 100.

⁷ *Ibid.*

⁸ CR 2017/14, p. 27, para. 10 (2) (a) (Ugalde Álvarez, Final submissions in the *Land Boundary* case).

⁹ Shams-ud-din Mohammed, better known as Hafez of Shiraz (born circa 1320 CE) is one the greatest poets not only of Iran and Islam but of humanity at large. The full quotation is:

“The house of hope is built on sand,
And life’s foundations rest on air”.

Secondly, I voted in favour of paragraph 3 (b) of the *dispositif* which finds that Nicaragua must remove its military camp from Costa Rican territory. This vote reflects my view that notwithstanding my continued opinion that the area in question is not Costa Rican, in view of the earlier finding of the Court in paragraph 2 of the *dispositif*, the withdrawal of the military camp is a necessary consequence of that finding.

(Signed) Awn AL-KHASAWNEH.
