

DECLARATION OF JUDGE TOMKA

Search for an equitable solution in the delimitation of the exclusive economic zone and the continental shelf — Need to avoid a pronounced cut-off effect of the maritime boundary line — Adjustment of the provisional equidistance line — Appropriate balancing of the entitlements of the Parties.

1. Although I have voted in favour of all of the findings of the Court, I am not fully satisfied with the way in which the Court has determined the maritime boundary between the Parties in the Caribbean Sea. In my view, the first segment of the maritime boundary as determined by the Court produces a cut-off effect for a non-negligible — indeed a substantial — part of the Nicaraguan concave coast in the Bahía de San Juan del Norte.

2. The applicable law for the delimitation of the exclusive economic zone and the continental shelf between Costa Rica and Nicaragua, both States being Party to the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”), is to be found in its Articles 74 and 83 respectively. These almost identical provisions (the only difference being that Article 74 refers to the exclusive economic zone while Article 83 refers to the continental shelf) stipulate that:

“1. The delimitation of the [exclusive economic zone/continental shelf] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

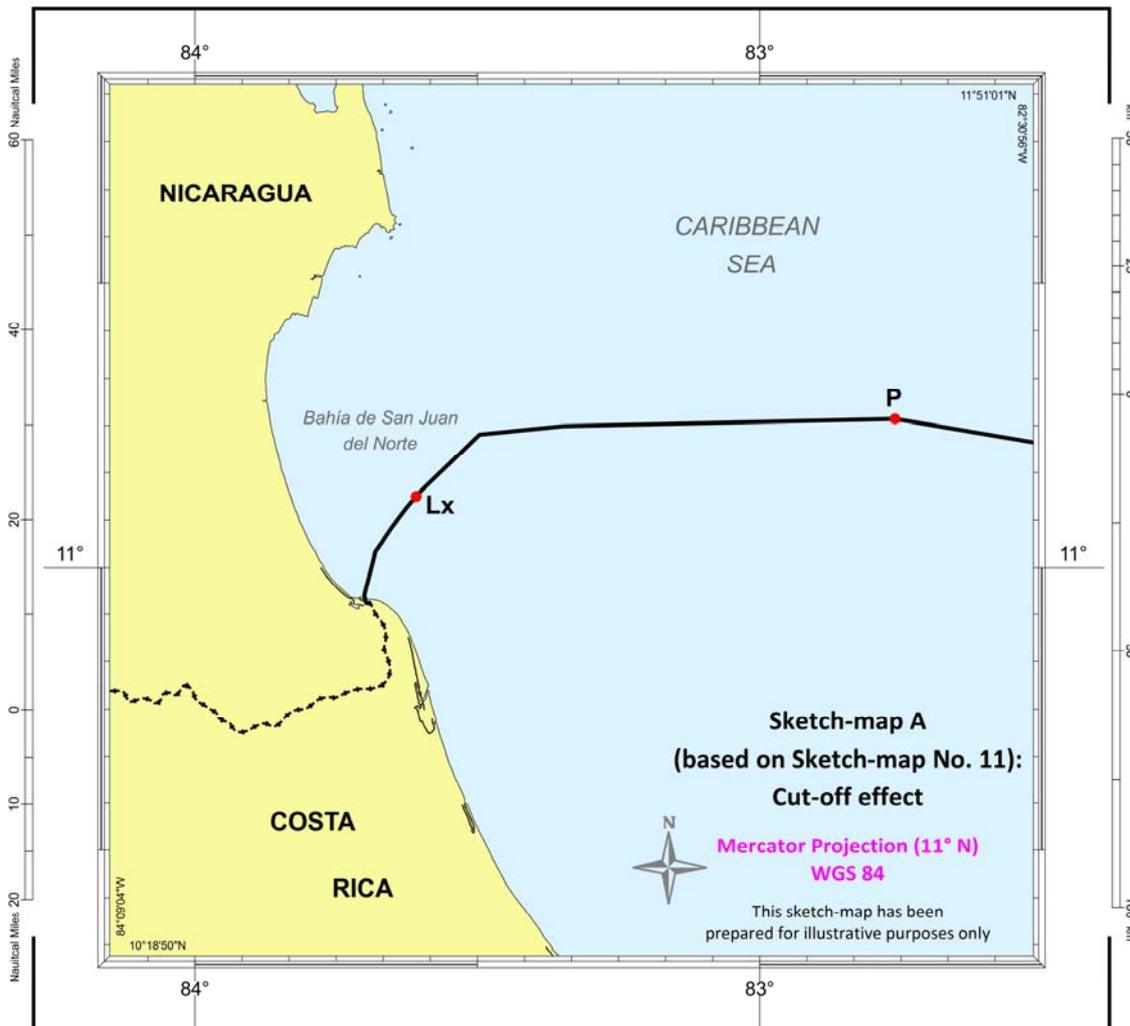
2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV . . .”.

3. Being of a very general nature, these provisions do not provide clear guidance. States are expected to negotiate with the aim of agreeing on a delimitation of the exclusive economic zone and the continental shelf which achieves “an equitable solution”. What is “equitable” is a matter of their perception. But once they reach agreement, they are deemed to be satisfied that they have achieved such “an equitable solution”. Should they, however, be unable to agree, they are to refer the unresolved issue of their maritime boundary to dispute settlement procedures. Where the Court is chosen as the forum for the settlement of that dispute, its function in fact substitutes for that which originally appertained to the States concerned, namely the reaching of “an equitable solution”. In practical terms, the outcome will be a delimitation line upon which a majority of the Judges sitting are able to agree.

4. That exercise could lead to a result which, although binding on the parties, may be more or less convincing. The Court has elaborated its jurisprudence in order to provide guidance on how maritime delimitation should be undertaken, always with the aim of reaching “an equitable solution”. According to that jurisprudence, a boundary line should not lead to a cut-off of the maritime projections of the coast of one of the parties (see *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012 (II), pp. 703-704, paras. 215-216). As the Court stated in *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, the line drawn by it should allow “the adjacent coasts of the Parties to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way” (Judgment, I.C.J. Reports 2009, p. 127, para. 201). When required in order to achieve “an equitable solution”, the Court has considered that

a provisional equidistance line which produces a cut-off is to be adjusted (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012 (II)*, pp. 703-704, para. 215). Similarly, the International Tribunal for the Law of the Sea, considering the coast of one of the parties “decidedly concave” and causing the provisional equidistance line to produce “a pronounced cut-off effect on the southward maritime projection of [its] coast”, qualified this as “a relevant circumstance, requiring an adjustment of the provisional equidistance line” (*Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh /Myanmar)*, Judgment, *ITLOS Reports 2012*, p. 87, paras. 323-324).

5. In my view, the Court, in the present case, has not fully succeeded in avoiding the cut-off effect generated by the first part of the delimitation line in the Caribbean Sea. As illustrated on the following sketch-map No. A, which is an enlargement based on sketch-map No. 11 in the Court’s Judgment, the delimitation line runs as follows:



6. This sketch-map reveals that the initial part of the delimitation line has the effect of cutting off Nicaragua’s coastal projections (not only employing radial projections, but also employing frontal projections) as they relate to almost half of its significant concave coast in the Bahía de San Juan del Norte. I do not consider this solution as fully equitable. The Court should have undertaken some adjustment of the line relating to the exclusive economic zone and the continental shelf to alleviate this cut-off. In my view, an appropriate adjustment of the boundary line would have been to join point Lx (the endpoint of the maritime boundary line in the territorial sea) to point P (marked on sketch-map No. A) by a straight line.

7. This adjustment would have better served the purpose of balancing more appropriately the entitlements of both Parties and reaching a more equitable overall solution, particularly since the Court decided “not [to] take into account any entitlement which might result from” the sandbar separating Harbor Head Lagoon from the Caribbean Sea (Judgment, para. 105). Sovereignty over that sandbar and lagoon appertain to Nicaragua (*ibid.*, para. 205, subpara. (2)). The Court, without making any finding as to whether the sandbar generates any maritime entitlement for Nicaragua, simply observes that “[s]hould territorial waters be attributed to the enclave, they would be of little use to Nicaragua, while breaking the continuity of Costa Rica’s territorial sea” (*ibid.*, para. 105). While one can perhaps understand this pragmatic approach, one could also have expected a more balanced approach by the Court when it dealt with the impact of the pronounced concave Nicaraguan coast in the Bahía de San Juan del Norte, in combination with the short convex Costa Rican coast immediately adjacent thereto.

(Signed) Peter TOMKA.
