

CR 2017/10

International Court  
of Justice

THE HAGUE

Cour internationale  
de Justice

LA HAYE

YEAR 2017

*Public sitting*

*held on Thursday 6 July 2017, at 3 p.m., at the Peace Palace,*

*President Abraham presiding,*

*in the cases concerning 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)*

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VERBATIM RECORD

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ANNÉE 2017

*Audience publique*

*tenue le jeudi 6 juillet 2017, à 15 heures, au Palais de la Paix,*

*sous la présidence de M. Abraham, président,*

*dans les affaires relatives à la Délimitation maritime dans la mer des Caraïbes et l'océan  
Pacifique (Costa Rica c. Nicaragua) et à la Frontière terrestre dans la partie  
septentrionale d'Isla Portillos (Costa Rica c. Nicaragua)*

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COMPTE RENDU

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*Present:* President Abraham  
Judges Owada  
Tomka  
Bennouna  
Caçado Trindade  
Greenwood  
Xue  
Donoghue  
Gaja  
Sebutinde  
Bhandari  
Robinson  
Gevorgian  
Judges *ad hoc* Simma  
Al-Khasawneh  
Registrar Couvreur

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*Présents :* M. Abraham, président  
MM. Owada  
Tomka  
Bennouna  
Caçado Trindade  
Greenwood  
Mmes Xue  
Donoghue  
M. Gaja  
Mme Sebutinde  
MM. Bhandari  
Robinson  
Gevorgian, juges  
MM. Simma  
Al-Khasawneh, juges *ad hoc*  
  
M. Couvreur, greffier

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***The Government of Costa Rica is represented by:***

H.E. Mr. Manuel A. González Sanz, Minister for Foreign Affairs and Worship;

H.E. Mr. Edgar Ugalde Alvarez, Ambassador on Special Mission,

*as Agent;*

H.E. Mr. Sergio Ugalde, Ambassador of Costa Rica to the Kingdom of the Netherlands, Member of the Permanent Court of Arbitration,

*as Co-Agent, Counsel and Advocate;*

Mr. Marcelo Kohen, Professor of International Law at the Graduate Institute of International and Development Studies, Geneva, member and Secretary-General of the Institut de droit international,

Mr. Samuel Wordsworth, Q.C., member of the English Bar, member of the Paris Bar, Essex Court Chambers,

Mr. Coalter G. Lathrop, member of the North Carolina Bar, Sovereign Geographic,

Mr. Arnaldo Brenes, member of the Costa Rican Bar, Senior Adviser to the Ministry of Foreign Affairs and Worship,

Ms Kate Parlett, member of the English Bar, 20 Essex Street Chambers,

Ms Katherine Del Mar, member of the English Bar, 4 New Square, Lincoln's Inn,

*as Counsel and Advocates;*

Mr. Simon Olleson, member of the English Bar, Three Stone,

*as Counsel;*

Mr. Ricardo Otarola, Adviser to the Ministry of Foreign Affairs and Worship,

Ms Ana Patricia Villalobos, chargé d'affaires, Embassy of Costa Rica to Venezuela,

Ms Alejandra González, Minister Counsellor and Consul General of Costa Rica to the Kingdom of the Netherlands,

Mr. Christian Kandler, Minister Counsellor at the Costa Rican Embassy in the Kingdom of the Netherlands,

Mr. Najib Messihi, Ph.D. candidate, Graduate Institute of International and Development Studies, Geneva,

*as Assistant Counsel;*

Ms Ericka Araya, administrative assistant at the Embassy of Costa Rica in the Kingdom of the Netherlands,

*as Assistant.*

***Le Gouvernement du Costa Rica est représenté par :***

S. Exc. M. Manuel A. González Sanz, ministre des affaires étrangères et des cultes ;

S. Exc. M. Edgar Ugalde Alvarez, ambassadeur en mission spéciale,

*comme agent ;*

S. Exc. M. Sergio Ugalde, ambassadeur du Costa Rica auprès du Royaume des Pays-Bas, membre de la Cour permanente d'arbitrage,

*comme coagent, conseil et avocat ;*

M. Marcelo Kohen, professeur de droit international à l'Institut de hautes études internationales et du développement de Genève, membre et secrétaire général de l'Institut de droit international,

M. Samuel Wordsworth, Q.C., membre des barreaux d'Angleterre et de Paris, Essex Court Chambers,

M. Coalter G. Lathrop, membre du barreau de Caroline du Nord, Sovereign Geographic,

M. Arnoldo Brenes, membre du barreau du Costa Rica, conseiller principal auprès du ministère des affaires étrangères et des cultes,

Mme Kate Parlett, membre du barreau d'Angleterre, 20 Essex Street Chambers,

Mme Katherine Del Mar, membre du barreau d'Angleterre, 4 New Square, Lincoln's Inn,

*comme conseils et avocats ;*

M. Simon Olleson, membre du barreau d'Angleterre, Three Stone,

*comme conseil ;*

M. Ricardo Otarola, conseiller auprès du ministère des affaires étrangères et des cultes,

Mme Ana Patricia Villalobos, chargé d'affaires à l'ambassade du Costa Rica au Venezuela,

Mme Alejandra González, ministre-conseiller et consul général du Costa Rica auprès du Royaume des Pays-Bas,

M. Christian Kandler, ministre-conseiller à l'ambassade du Costa Rica au Royaume des Pays-Bas,

M. Najib Messihi, doctorant à l'Institut de hautes études internationales et du développement de Genève,

*comme conseils adjoints ;*

Mme Ericka Araya, assistante administrative à l'ambassade du Costa Rica au Royaume des Pays-Bas,

*comme assistante.*

***The Government of the Republic of Nicaragua is represented by:***

H.E. Mr. Carlos José Argüello Gómez, Ambassador of Nicaragua to the Kingdom of the Netherlands, member of the International Law Commission,

*as Agent and Counsel;*

Mr. Vaughan Lowe, Q.C., member of the English Bar, Emeritus Professor of International Law, Oxford University, member of the Institut de droit international,

Mr. Lawrence H. Martin, Attorney at Law, Foley Hoag LLP, member of the Bars of the United States Supreme Court, the District of Columbia and the Commonwealth of Massachusetts,

Mr. Alex Oude Elferink, Director, Netherlands Institute for the Law of the Sea, Professor of International Law of the Sea, Utrecht University,

Mr. Paul Reichler, Attorney at Law, Foley Hoag LLP, Washington D.C., member of the Bars of the United States Supreme Court and the District of Columbia,

Mr. Antonio Remiro Brotóns, Professor of International Law, Universidad Autónoma de Madrid, member of the Institut de droit international,

Mr. Benjamin Samson, Ph.D. candidate, Centre de droit international de Nanterre (CEDIN), University Paris Nanterre, Visiting Scholar, George Washington University Law School,

*as Counsel and Advocates;*

Mr. Alain Pellet, Emeritus Professor at the University Paris Nanterre, former member and former Chairman of the International Law Commission, member of the Institut de droit international,

Mr. Walner Molina Pérez, Juridical Adviser, Ministry of Foreign Affairs,

Mr. Julio César Saborio, Juridical Adviser, Ministry of Foreign Affairs,

Ms Tania Elena Pacheco Blandino, Juridical Adviser, Ministry of Foreign Affairs,

Mr. Edgardo Sobenes Obregon, Counsellor, Embassy of Nicaragua in the Kingdom of the Netherlands,

Ms Claudia Loza Obregon, Legal Adviser, Ministry of Foreign Affairs,

Mr. Yuri Parkhomenko, Attorney at Law, Foley Hoag LLP (United States of America),

*as Counsel;*

Ms Gimena González, Researcher in public international law,

Ms Ilona Tan, Legal Intern, Foley Hoag LLP,

*as Legal Assistants;*

Mr. Robin Cleverly, M.A., DPhil, CGeol, FGS, Law of the Sea Consultant, Marbdy Consulting Ltd,

***Le Gouvernement du Nicaragua est représenté par :***

S. Exc. M. Carlos José Argüello Gómez, ambassadeur du Nicaragua auprès du Royaume des Pays-Bas, membre de la Commission du droit international,

*comme agent et conseil ;*

M. Vaughan Lowe, Q.C., membre du barreau d'Angleterre, professeur émérite de droit international à l'Université d'Oxford, membre de l'Institut de droit international,

M. Lawrence H. Martin, avocat au cabinet Foley Hoag LLP, membre des barreaux de la Cour suprême des Etats-Unis d'Amérique, du district de Columbia et du Commonwealth du Massachusetts,

M. Alex Oude Elferink, directeur de l'Institut néerlandais du droit de la mer, professeur de droit international de la mer à l'Université d'Utrecht,

M. Paul Reichler, avocat au cabinet Foley Hoag LLP, Washington D.C., membre des barreaux de la Cour suprême des Etats-Unis d'Amérique et du district de Columbia,

M. Antonio Remiro Brotóns, professeur de droit international à l'Universidad Autónoma de Madrid, membre de l'Institut de droit international,

M. Benjamin Samson, doctorant au Centre de droit international de Nanterre (CEDIN), Université Paris Nanterre, professeur invité, faculté de droit de l'Université George Washington,

*comme conseils et avocats ;*

M. Alain Pellet, professeur émérite à l'Université Paris Nanterre, ancien membre et ancien président de la Commission du droit international, membre de l'Institut de droit international,

M. Walner Molina Pérez, conseiller juridique au ministère des affaires étrangères,

M. Julio César Saborio, conseiller juridique au ministère des affaires étrangères,

Mme Tania Elena Pacheco Blandino, conseillère juridique au ministère des affaires étrangères,

M. Edgardo Sobenes Obregon, conseiller à l'ambassade du Nicaragua au Royaume des Pays-Bas,

Mme Claudia Loza Obregon, conseillère juridique au ministère des affaires étrangères,

M. Yuri Parkhomenko, avocat au cabinet Foley Hoag LLP (Etats-Unis d'Amérique),

*comme conseils ;*

Mme Gimena González, chercheuse en droit international public,

Mme Ilona Tan, stagiaire en droit au cabinet Foley Hoag LLP,

*comme assistants juridiques ;*

M. Robin Cleverly, M.A., D.Phil, C.Geol, FGS, consultant en droit de la mer, Marbdy Consulting Ltd,

Ms Victoria Leader, Geographical and Technical Consultant,

*as Scientific and Technical Advisers;*

Ms Sherly Noguera de Argüello, Consul General and Minister Counsellor of the Republic of Nicaragua,

*as Administrator.*

Mme Victoria Leader, consultante dans les domaines géographique et technique,

*comme conseillers scientifiques et techniques ;*

Mme Sherly Noguera de Argüello, consul général et ministre-conseiller de la République du Nicaragua,

*comme administrateur.*

Le PRESIDENT : Veuillez vous asseoir. The sitting is now open. This afternoon the Court will hear the opening of Nicaragua's first round of oral argument. I would begin by noting that, for reasons duly made known to me, Vice-President Yusuf is unable to be present on the Bench today.

I now give the floor to His Excellency Dr. Argüello Gómez, the Agent of the Republic of Nicaragua.

Mr. ARGUELLO GÓMEZ: Thank you, Mr. President. Mr. President, Members of the Court, as ever, it is a great honour and privilege to address you on behalf of my country.

1. The Members of the Court are well aware of the background of the two cases *sub judice* and I will avoid taxing their patience with unnecessary comments on the background of these cases and on most of the usual introductory remarks of an Agent in his opening speech.

2. The Court is so well aware of the issues involved in this case that it has taken two unusual steps: one was to appoint experts to assist on the technical and factual issues and the other is to address a question to the Parties that is to be answered during the first round of the argument. On this last point, the question formulated by the Court, it will be my honour in a later presentation to present a detailed response.

3. Mr. President, as the person who I think has most often acted as agent before this Court, I will take the liberty of venturing a personal comment on these new procedural decisions. These procedural innovations by the Court — I repeat appointing experts that can be questioned by the parties and indicating points to which it would like the parties specially to address themselves — apart from the shortening of the oral proceedings, will help to focus the oral presentation of cases. Certainly they are helpful in the present case.

4. Mr. President, of the two cases presently before the Court, one is about the delimitation of the maritime boundary on both the Pacific and Atlantic Oceans, and the other is on the question of the land boundary in the area of Harbor Head Lagoon/Isla Portillos. Both cases involve the interpretation and application of treaties and awards that have been in place for more than 100 years on the question of the boundary and the demarcation of the border of the Parties. The maritime delimitation case, apart from the determination of the starting-point, also involves the

interpretation and application of contemporary international law on matters of maritime delimitation.

5. Costa Rica filed its Application in the *Maritime Delimitation* case on 25 February 2014 and its Application in the *Land Boundary* case on 16 January of this year, almost three years after the initiation of the *Maritime* case. Nicaragua has no objection to submitting to the decision of the Court all the questions involved in both cases. Nonetheless we must point out that the procedure followed by Costa Rica has caused unnecessary inconveniences to the present proceedings.

6. Costa Rica was well aware — when it filed its *Maritime Delimitation* case — that there was also a dispute concerning the land boundary. Costa Rica has tried to create a scenario in which it supposedly became aware that there was a land dispute only when Nicaragua allegedly changed the position of a small guard post located on the sand spit in the area of Harbor Head Lagoon<sup>1</sup>. This will later be addressed more fully by Messrs. Samson and Martin, but for the moment it must be made very clear that this scenario is simply a fabrication to justify Costa Rica bringing a new case as if it had been forced to do so at the last moment by the conduct of Nicaragua.

7. There is a very quick way of demonstrating this last statement. At the meeting with the President on 28 January 2016 in which the procedure subsequent to a first round of written pleadings was discussed, Costa Rica indicated that it saw no need of a second round in order to reply to Nicaragua's Counter-Memorial that was filed on 8 December 2015. This decision was made in spite of the fact that it was evident from the written pleadings that there was a dispute on the starting-point of the maritime delimitation. Furthermore, Costa Rica indicated in that meeting that although it considered there was no need for a second round, it might be useful to have an exchange of written arguments on the question of the land boundary, specifically on the sovereignty over the spit of sand and coastline.

8. The Court ignored this request for a mini round of written arguments on the land boundary proposed by Costa Rica. If, then, Costa Rica had considered that it was essential to discuss the land boundary, why didn't it file this second case early last year after its request had been ignored?

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<sup>1</sup>MCR, paras. 1.1; 1.5-1.7; paras. 3.5-3.7.

9. In its Application filing the *Land Boundary* case a few months ago Costa Rica stated that “[i]n order to proceed to the delimitation of maritime areas of the Parties in the Caribbean Sea, the prior settlement of this dispute is necessary”<sup>2</sup>.

10. Perhaps our distinguished Costa Rican colleagues can explain to us why, if the land boundary question was a priority, why was this case brought before the Court at the very last moment, after the closure of the written proceedings on the maritime delimitation?

## I. MARITIME DELIMITATION

11. Going back to the maritime delimitation question, Mr. President, Members of the Court, this case — the *Maritime Delimitation* — involves the determination of the complete course of the maritime boundaries between all the areas appertaining, respectively, to Nicaragua and Costa Rica in the Caribbean Sea and in the Pacific Ocean.

### A. Caribbean delimitation

12. As to the Caribbean delimitation, apart from the usual questions involved in all maritime delimitations in relation to special and relevant geographical circumstances, the Caribbean delimitation presents two particular questions. One is the location of the starting-point and the other is the endpoint of the maritime delimitation.

#### (i) Starting-point

13. On the question of the starting-point — a matter which I will explain further in another presentation — Nicaragua will demonstrate that:

— the position of Costa Rica dating back to the time of the Alexander Award at the end of the nineteenth century had always been that the starting-point of any delimitation (land or maritime) was the point where the original marker was set by the Arbitrator Alexander on 2 March 1898;

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<sup>2</sup>*Dispute Concerning the Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, Application, para. 24.

- the Award of the Arbitrator provided that the point where the original marker had been placed— even though it had been washed out to sea— was the fixed, permanent and immovable starting-point of the delimitation;
- this decision was gladly received and accepted by Costa Rica for over 100 years until a few years before filing the present *Maritime Delimitation* case.

**(ii) Endpoint of Caribbean delimitation**

14. On the question of the endpoint of the Caribbean delimitation, I would note first that Costa Rica entered into an agreement with Colombia on the delimitation of their maritime areas in the Caribbean. A Treaty was signed on 17 March 1977.

15. Although Costa Rica never officially ratified this Treaty, it was in fact enforced according to its provisions. Furthermore, it evidenced what Costa Rica considered an equitable solution to its maritime borders to the east and north, and that it had no claims to areas beyond those established in the 1977 Treaty. To contradict this fact, Professor Kohen quotes one of my statements as Agent of Nicaragua during the intervention phase of Costa Rica in the *Nicaragua/Colombia* case to the effect that:

“If the Judgment of the Court is favourable to the Nicaraguan claims, the only effect of this is that Costa Rica could attempt to claim a delimitation vis-à-vis Nicaragua that would extend beyond the limits it accepted with Colombia.”<sup>3</sup>

16. Evidently, the quote is simply a statement of fact and there was no prescience on my part. The statement does not recognize any substantive rights to Costa Rica but only that there were no jurisdictional impediments for it to bring maritime claims against Nicaragua in the future — as in fact it is presently doing. But Professor Kohen has tempted me to make a stab at some real foresight, and the prediction would be that if Costa Rica is attributed in the present case any areas that the 1977 Treaty recognized as Colombian, they would be soon, not before this Court because Colombia, unlike Nicaragua, does not accept its jurisdiction, but certainly at the negotiating table.

17. Mr. President, the 1977 Treaty was one of a series of agreements negotiated by Colombia in order to reinforce its claims to the maritime areas and islands located in front of the Nicaraguan

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<sup>3</sup>*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Costa Rica for Permission to Intervene; CR 2010/13, 13 Oct. 2010, p. 16, para. 24 (Argüello). See also CR 2017/9, para. 4 (Kohen).

coast. This was the policy in particular with the treaties it signed with Costa Rica, Panama and Honduras and with other countries in the region.

18. As will be well recalled by most Members of the Court, the dispute between Nicaragua and Colombia centred on the contention of Colombia that there was a maritime delimitation with Nicaragua dating from 1928, in which the 82nd meridian west was the line of delimitation<sup>4</sup>. Nicaragua's contention — which was upheld by the Court — was that the meridian was only an indicator of sovereignty over certain islands<sup>5</sup>. During the pleadings of that case one of the arguments of Colombia was that there were treaties in place with third States that contradicted Nicaragua's claim to areas east of the 82nd meridian<sup>6</sup>. In fact, it had been one of Colombia's geopolitical strategies against the claims of Nicaragua, to sign agreements that took into account its claims and the reference to the 82nd meridian. For example, in the well-known publication edited by Charney and Alexander we read, and I quote:

“In pursuit of the objective of confirming the legal validity of meridian 82nd west as an overall maritime boundary and not as a mere sovereignty designator by its eventual consolidation through third party recognition, Colombia has succeeded in concluding three agreements with third states in which each new maritime boundary was negotiated in such a way as to fit into the course of meridian 82nd west.”<sup>7</sup>

This was published many years before the Columbia case and this present case came before the Court.

19. Now that, at present, Nicaragua has broken the maritime barrier that had been imposed by Colombia, it is at least opportunistic for Costa Rica to now claim areas where it had no claims during most of the last 40 years — the years, we might recall, since claims to more extensive maritime areas became generally accepted, including by Costa Rica itself.<sup>8</sup> These questions will be addressed by Professor Remiro on the effects of the Treaty and by Mr. Reichler as a relevant circumstance involved in the delimitation of the exclusive economic zone.

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<sup>4</sup>*Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 865, para.105.

<sup>5</sup>*Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 867, para.115.

<sup>6</sup>*Territorial and Maritime Dispute (Nicaragua v. Colombia), Rejoinder of Colombia*, pp. 192-196.

<sup>7</sup>Nweihed K., “Middle American and Caribbean Maritime Boundaries”, in *International Maritime Boundaries*, ed. Charney, Alexander, p. 274.

<sup>8</sup>Costa Rica had claimed maritime areas out to 200 m since 1972, well before its Treaty with Colombia which was entered into in 1977.

20. There is one final point that I must clarify on the delimitation in the Caribbean. It is the question of the effect that the Nicaraguan Corn Islands could have on the delimitation. This point will be thoroughly addressed by Mr. Reichler, but since Professor Kohen again quoted another statement<sup>9</sup> I made during the Costa Rican request for intervention in the *Nicaragua v. Colombia* case, it is necessary to explain the quoted statement even if its meaning and intention are clear. In the *Nicaragua v. Colombia* case, one of the main questions was the effect that the relatively small islands of San Andrés and Providencia should have in any delimitation with the immensely lengthier continental coastline of Nicaragua. Naturally, Nicaragua was emphasizing the importance of its extensive mainland coast fronting some relatively small features, and the statement quoted is to that effect. But what is surprising is that Costa Rica gives more legal importance to my statement than it does to the Judgment of the Court that *did not* ignore these islands but rather attributed very substantial maritime areas to them.

### **B. Delimitation in the Pacific**

21. Mr. President, Members of the Court, on the question of delimitation on the Pacific Ocean, it should apparently be easier and a bit more pacific than that on the Atlantic side. After all, the basic questions involved are the customary geographical questions that the Court has been very adroitly deciding since the seminal *North Sea* cases. And yet the claims of Costa Rica in the Pacific seem to ignore the teachings that the Court and international tribunals have been applying for almost 50 years. Mr. Reichler and Professor Lowe will go into these matters in more detail.

22. But permit me one short comment on the starting-point of the delimitation in the Pacific. There is no question by either Party that the starting-point of the delimitation is at Salinas Bay precisely at the mid-point of the closing line across the bay<sup>10</sup>. However, it is important to reiterate what is pointed out in Nicaragua's Counter-Memorial<sup>11</sup>, that the use of the mid-point on the closing line as a starting-point for the maritime delimitation is without prejudice to any other issues that

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<sup>9</sup>See CR 2017/9, p. 30, paras. 62-63 (Kohen).

<sup>10</sup>CMN, p. 28, para. 2.41.

<sup>11</sup>CMN, p. 28, fn. 57.

may arise in respect of areas landward of the closing line across the Bay, including sovereignty over the small island of Bolaños.

## II. LAND BOUNDARY CASE AND THE MILITARY CAMP

23. Now, going on to the *Land Boundary* case and the military camp, Mr. President, Members of the Court: from the start, it is important to state that Nicaragua considers that in accordance with international law Nicaragua's boundary with Costa Rica was settled by the delimitation treaty of 1858, the arbitral award of President Cleveland of 1888 and the five Arbitral Awards of General Alexander dating from 1897 to 1900.

24. For its part, Costa Rica's recent position suggests that the Treaty of Limits of 1858 and the Awards that followed are no longer applicable and must be set aside or at least, reinterpreted *de novo* in view of what it describes as "the modern geography at the mouth of the San Juan River"<sup>12</sup> in Costa Rica's Memorial. During these hearings, counsel for Costa Rica, and both its Agent and Co-Agent have reiterated that the starting-point must be, and I quote again, "determined on the basis of the current geography"<sup>13</sup>.

25. Although these issues will be dealt in more detail by Messrs. Samson and Martin, I will make some preliminary and general comments in particular in light of the very interesting question posed by Judge Tomka to the experts. Judge Tomka points out that the report of the experts refers to a series of "discontinuous parallel lagoons" in the vicinity of the Caribbean Sea coast and further recalls that Nicaragua in its Counter-Memorial asserted that, I quote, "the channel connecting the lower San Juan with Harbor Head Lagoon still exists today". On this basis he asks the experts if during their visit "they saw, in the close vicinity of the Caribbean Sea coast, any continuous water channel connecting the San Juan River and Harbor Head Lagoon".

26. In their reply the experts indicate that according to their observations they can assert, and I quote from the experts, "that at the present time there isn't any continuous water channel connecting the San Juan River and Harbor Head Lagoon in the close vicinity of the Caribbean

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<sup>12</sup>MCR, p. 59, para. 4.14.

<sup>13</sup>CR 2017/7, p. 30, para. 42 (Ugalde). The Agent of Costa Rica for his part stated that "(le) point de départ ... devra ... être défini sur la base de la situation géographique actuelle". CR 2017/7, p. 17, para. 9 (Ugalde Álvarez).

coast”<sup>14</sup>. And they add that, again quote, “topographic maps produced by Costa Rica and Nicaragua show that in the recent past there used to be a channel-like water gap between the spit and firm land, and that Los Portillos and Harbor Head lagoon was connected to the sea via the San Juan River”<sup>15</sup>. They finally point out that there are, again quote, “a series of discontinuous coast-parallel lagoons that are remnants of the channel-like water gap that used to exist in recent times between Isla Portillos and the spit of Los Portillos/Harbor Head Lagoon”<sup>16</sup>.

27. This reply by the experts evidences: (a) the existence in the recent past of a channel connecting Harbor Head to the San Juan River, and (b) that this channel has not completely disappeared since parts of it — the lagoons — are still present.

28. But apart from the technical response given by the experts to the specific question, there is also a legal consideration. I would point out that if there is recently a disconnection between Harbor Head Lagoon and the “river proper” — as Alexander refers to it in his Award — this disconnection cannot lead to the result of isolating this important part of the San Juan River system from the rest of the river. General Alexander, 120 years ago, and the experts of the Court a few months ago, coincide in noting the constant changes in the river system. The experts quite clearly anticipate that the present-day mouth of the river itself will change locations, and possibly even discharge into Harbor Head Lagoon and thus become the mouth of the river<sup>17</sup>. So any present-day situation with the river and the coast is temporary.

29. In this respect, it should be recalled that the awards that determined the boundary between Nicaragua and Costa Rica also provided for the activities that Nicaragua could carry out in the river. Thus the Cleveland Award gave Nicaragua the *very distinct right* as sovereign of maintaining and improving navigation in the River course<sup>18</sup>. It is evident that the area of Harbor Head Lagoon, that is, the then Caribbean port of the San Juan, was a crucial part of this river system as is clearly pointed out in the first Alexander Award. It is also clear that the Awards never

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<sup>14</sup>Answer of the Court-appointed experts in response to the question of Judge Tomka, transmitted by the letter from the Registrar dated 15 June 2017 (ref.:148823).

<sup>15</sup>*Ibid.*

<sup>16</sup>*Ibid.*

<sup>17</sup>Expert Opinion, p. 77, para. 195.

<sup>18</sup>Cleveland Award 1888: United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVIII, pp. 209-210, Sect. 3, paras. 4-6.

envisioned that an important part of the river system should become isolated and that Nicaragua would not have the sovereign right to take care of that situation by maintaining open the necessary channels, *especially*, I might say, the “first channel met”. Rather these instruments provided for this eventuality that occurs in all river systems if there is no human intervention.

30. Finally, it must be recalled that this change in the coastline and the disruption of the connection of the lagoon with the river is very recent. It has happened during the time we have been before this Court with Costa Rica. As the Court is well aware, for the past seven years — certainly since the dispute that led to the *Certain Activities* case began — Costa Rica has been very vigilant of everything happening in the area presently under consideration. Any changes in Harbor Head would certainly have been noted and taken into consideration in Costa Rica’s claims against Nicaragua. And yet, as many Members of the Court might recall, during the first three years of the *Certain Activities* case, that is, at least until mid-2013, Costa Rica claimed that there was a channel close to the coastline that connected the lagoon to the river and that the coast was part of the Nicaraguan territory. Mr. Martin will elaborate on this point tomorrow afternoon. At this moment it suffices to cite Costa Rica’s Memorial in the *Certain Activities* case, in which they acknowledged that the Nicaraguan National Institute of Territorial Studies (INETER) “clearly understood that the channel described in the First Award of Engineer Arbitrator Alexander was that running parallel to the coast, and no other”. I am quoting from six years ago. Furthermore, during the provisional measures hearings in 2011, Costa Rica recalled “that the relevant maps of the area San Juan del Norte/Punta Castilla produced and used by both countries until late last year [that is 2010] clearly depict the boundary following the true first canal as determined by Alexander and do not show at all the purported new ‘first caño’ artificially created by Nicaragua”<sup>19</sup>. You can see the image referred by Costa Rica at tab 1 of your folder.

31. And now, Mr. President, Members of the Court, less than five years later, this channel has partially dried up and Costa Rica is asking the Court to declare that the coast is not now Nicaraguan but has become part of Costa Rica during the past three or four years. If this petition is accepted, then the whole structure carefully created by the 1858 Treaty and the Awards would be

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<sup>19</sup>Comments of Costa Rica on the replies of Nicaragua to the questions put to that Party by Judges Simma, Bennouna and Greenwood, para. 14, 20 Jan. 2011.

dismantled and the Nicaragua/Costa Rica border would have to be repeatedly under review. This would create a permanent uncertainty and frequent disputes between the Parties . . . a situation none of us wishes.

32. Mr. President, before closing I would like to make some very short remarks on points that Costa Rica has mentioned in a more or less cursory manner during their presentation.

33. First, on the status of the Bay of San Juan del Norte, Professor Kohen alleged that today it constitutes an enclave (in Nicaraguan territory) common to both countries in accordance with Article IV of the Treaty of Limits<sup>20</sup>. Since in general, Nicaragua's position on this point can be read in Nicaragua's Counter-Memorial<sup>21</sup> in the *Certain Activities* case, I will limit my comments to recalling that — as the Alexander First Award confirmed — physically the Bay of San Juan del Norte no longer exists and Costa Rica has no rights west or north of the line drawn by Alexander in the said award. Indeed, for more than 100 years Costa Rica has never exercised any sort of activity<sup>22</sup> in the bay. In other words, there is no “common enclave”<sup>23</sup> as Professor Kohen suggests. Furthermore, the comparison made by Costa Rica between the non-existing Bay of San Juan del Norte and the Harbor Head Lagoon is not appropriate as Alexander never intended to enclave Harbor Head lagoon.

34. On the so called “Isla Portillos spit”<sup>24</sup>, Costa Rica itself acknowledges that “significant variations in its length and configuration as a result of natural processes”<sup>25</sup> of this feature, and indeed the experts confirm the unstable nature of the spit in their report<sup>26</sup>, the situation is *completely unlike* the sand bar in front of Harbor Head Lagoon, which has been present for more than 100 years. The said spit Costa Rica refers to is in fact an integral part of the Nicaraguan beach starting at Punta Castilla.

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<sup>20</sup>CR 2017/9, para. 52, p. 26 (Kohen).

<sup>21</sup>Counter-Memorial of Nicaragua, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, paras. 6.141-6.182; 9.34-9.45.

<sup>22</sup>*Ibid.*, paras. 6.167; 6.170.

<sup>23</sup>CR 2014/9, p. 26, para. 52 (Kohen).

<sup>24</sup>CR 2017/8, p. 45, para. 9 (Brenes).

<sup>25</sup>*Ibid.*

<sup>26</sup>Expert Opinion, p. 37, paras. 109-110.

35. Mr. President, this ends my introduction as Agent, the following is our order of presentations in the first round.

36. This afternoon: Professor Oude Elferink will begin with a short description of the geographical framework and will deliver Nicaragua's submissions on the relevant coast and the relevant areas on both the Caribbean and the Pacific Ocean sides. Professor Remiro will deal with the existing delimitations entered by Costa Rica with third States in the Caribbean Sea. Then I will address the Court on the starting-point of the delimitation in the Caribbean.

37. Tomorrow morning: Professor Lowe will speak on the territorial sea delimitation in the Caribbean, followed by Mr. Reichler with the delimitation of the exclusive economic zone (EEZ) and the continental shelf (CS).

38. Then the presentations will turn to the maritime delimitation in the Pacific Ocean with Professor Lowe addressing the territorial sea and Mr. Reichler the EEZ and CS.

39. In the afternoon of tomorrow, Nicaragua will deal with the issues of the *Land Boundary* case. Mr. Samson will address the origins of the dispute and its geographical scope, followed by Mr. Martin, who will demonstrate that the military observation post is located in Nicaraguan territory and that the barrier beach separating Isla Portillos from the Caribbean Sea has always been and remains today under the sovereignty of Nicaragua.

40. Mr. President, Members of the Court, I thank you for your kind attention and now ask you to give the floor to Professor Oude Elferink.

The PRESIDENT: Thank you, Excellency. Now I give the floor to Professor Oude.

Mr. OUDE ELFERINK:

**THE GEOGRAPHICAL FRAMEWORK AND THE RELEVANT COASTS  
AND THE RELEVANT AREA**

1. Thank you, Mr. President. Mr. President, Members of the Court, it is an honour to appear before you, and a privilege to speak on behalf of the Republic of Nicaragua.

2. Today I will be addressing two topics. First, I will set out the general geographical framework for the maritime delimitations between Nicaragua in respectively the Caribbean Sea and the Pacific Ocean. Next, I will discuss the relevant coasts and relevant areas that are pertinent to

these delimitations. As regards this second topic, I will first deal with the points concerning the applicable law raised by Dr. Parlett this Monday. I will then consider the relevant coasts and the relevant area in the Caribbean Sea and the Pacific Ocean respectively.

### **The geographical framework for the maritime delimitations**

#### **1. The Caribbean Sea**

3. [Figure AOE-1 on] Nicaragua and Costa Rica are coastal States in the western part of the Caribbean Sea. As can be appreciated from the figure that is now on screen, the mainland coast of Nicaragua runs from north to south from its land boundary with Honduras in the Rio Coco to the land boundary with Costa Rica at Punta de Castilla. Nicaragua also has coastal relationships with Jamaica, Colombia and Panama. Its boundaries with Honduras and with Colombia in the territorial sea, the exclusive economic zone and the continental shelf within 200 nautical miles have been established by Judgments of the Court, respectively on 8 October 2007<sup>27</sup> and 19 November 2012<sup>28</sup>. The delimitation of the boundary with Colombia in the continental shelf beyond 200 nautical miles is the subject of a pending case before this Court<sup>29</sup>. Nicaragua's maritime boundaries with Jamaica and Panama have not yet been delimited.

4. The views of the Parties on the relevant coasts and the relevant area imply that the maritime boundary between Nicaragua and Honduras is not of particular concern to the present case. On the other hand, the maritime boundary with Colombia, which the Court established through its 2012 Judgment, merits attention. To achieve an equitable solution, the Court determined a maritime boundary up to the 200-nautical-mile limit of Nicaragua. That boundary gives Nicaragua access to its 200-nautical-mile limit and its continental shelf beyond 200 nautical miles to the north and south of the maritime spaces the Court in its Judgment attributed to Colombia. Costa Rica's proposed delimitation would practically erase the southern corridor determined by the 2012 Judgment.

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<sup>27</sup>*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007 (II), p. 659.

<sup>28</sup>*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012 (II), p. 624.

<sup>29</sup>*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*: Application filed on 16 Sept. 2013.

5. For its part, Costa Rica delimited its maritime boundary with Panama by treaty in 1980<sup>30</sup>. In view of Costa Rica's insistence that equidistance lines in the Caribbean Sea produce an outcome that is inequitable to Costa Rica, it is worth noting that it agreed with Panama that the boundary follows [Figure AOE-2 on] "[t]he median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial sea of each State is measured"<sup>31</sup>. [Figure AOE-2 off; return to figure AOPE-2] It can moreover be noted that this equidistance line only extends for some 100 nautical miles up to the agreed tripoint between Costa Rica, Panama and Colombia.

6. Costa Rica signed a maritime delimitation treaty with Colombia in 1977<sup>32</sup>. You will hear more about this latter treaty from my colleagues Professor Remiro Brotóns and Mr. Reichler.

7. To complete the geographical framework, it is relevant to mention that Panama and Colombia concluded a treaty establishing their maritime boundary in the Caribbean Sea in 1976<sup>33</sup>. This treaty, together with the treaty between Panama and Costa Rica completely delimits the maritime boundaries of Panama in the Caribbean Sea. [Figure AOE-1 off]

8. [Figure AOE-3] The coasts of Nicaragua and Costa Rica in the Caribbean Sea are very different in terms of length and shape. Nicaragua's mainland coast measures 535 km — or 453 km when measured by means of a straight line — to which must be added about 50 km of insular coastline, while Costa Rica's mainland coast stretches over some 226 km or 193 km when measured by means of a straight line.

9. The Costa Rican coastline in the Caribbean Sea runs in a south-easterly direction from the land boundary with Nicaragua to the land boundary with Panama. It presents no marked disruption or feature. The only noticeable features are two small promontories: Puerto Limón, located about

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<sup>30</sup>Treaty concerning the Delimitation of Marine Areas and Maritime Co-operation between the Republic of Costa Rica and the Republic of Panama, 2 Feb. 1980 (entry into force on 11 Feb. 1982) (Memorial of Costa Rica (MCR), Vol. II, Ann. 2)

<sup>31</sup>*Ibid.*, Art. 1 (1).

<sup>32</sup>Treaty on the Delimitation of Marine and Submarine Areas and Maritime Cooperation between the Republic of Colombia and the Republic of Costa Rica, additional to that signed in San José on 17 March 1977 (MCR, Vol. II, Ann.3).

<sup>33</sup>Treaty on the Delimitation of Marine and Submarine Areas and Related Matters between the Republic of Panama and the Republic of Colombia signed on 20 November 1976, United Nations, *Treaty Series (UNTS)*, Vol. 1074, p. 221.

123 km from the starting-point of the maritime boundary with Nicaragua, and Punta Mona, situated a few kilometres away from the land boundary with Panama.

10. The coastal façade of Nicaragua faces east. There are a number of important features along that mainland coast. In the south, the coastline forms a concavity from the mouth of the San Juan River up to Monkey Point — also referred to as Punta del Mono. The distance between the entrance points of this concavity measured along a straight line is some 60 km. Off Punta del Mono are the cays of Paxaro Bovo and Palmenta Cays. Due to their proximity to the coast, they are an integral part of it. About 160 km north of Punta del Mono is the promontory of Punta de Perlas, very close to which lies a group of small islands, the Cayos de Perlas. This group of islands fringes the mainland coast of Nicaragua and for delimitation purposes also forms an integral part of that coast. Further seaward lie the two Corn Islands. Mr. Reichler will deal with the Corn Islands *in extenso* tomorrow.

11. The Parties are in agreement that the mainland coast north of the promontory of Punta de Perlas is not relevant to the delimitation between the Parties<sup>34</sup>. [Figure AOE-3 off]

## **2. The Pacific Ocean**

12. Mr. President, I now turn to a brief description of the geographical framework for the maritime delimitation in the Pacific Ocean.

13. [Figure AOE-4 on] On the Pacific side, the general direction of the coast can be depicted by means of a straight line running in a south-easterly direction from Punta Cosigüina in Nicaragua to Punta Burica in Costa Rica. The major geographical features, or in view of Costa Rica's critique of the use of those words in the Counter-Memorial, I should perhaps rather say, anomalies, are Costa Rica's Cabo Santa Elena in the immediate vicinity of the land boundary terminus with Nicaragua, and its Nicoya Peninsula.

14. The mainland coast of Nicaragua extends from Punta Cosigüina in the north, which marks the entrance of the Gulf of Fonseca, up to the boundary with Costa Rica in the Bay of Salinas in the south. That coastline is smooth. There are no marked protrusions or indentations. The general direction of the coast of Nicaragua can be depicted by means of a straight line running from

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<sup>34</sup>A description of that coast is provided in Counter-Memorial of Nicaragua (CMN), para. 3.7.

north-west to south-east. The total length of Nicaragua's coastline in the Pacific is 298 km using that straight line, or 345 km when following the general configuration of the coast. As I will set out later, only part of this coast is relevant for the purpose of the delimitation with Costa Rica.

15. On the Costa Rican side, on the Bay of Salinas, where the land boundary between the Parties terminates, the coast changes direction. It passes through Cabo Santa Elena, a promontory jutting out into the sea in a due westerly direction, and the Gulf of Papagayo and Punta Guiones, where the coast turns and follows the Nicoya Peninsula. The coast then runs in a south-easterly direction to Punta Burica, where the land boundary with Panama begins. Costa Rica's coast measures about 1,400 km measured along its sinuosities and 455 km measured along a straight line. As is the case for Nicaragua, only part of this coast is relevant for the purposes of the present delimitation. I will turn to that point subsequently.

16. In the Pacific Ocean there are no maritime boundary treaties or pending delimitations with third States that have a bearing on the delimitation between the Parties. [AOE-4 off]

### **The relevant coasts and the relevant area**

#### **1. The applicable law**

17. Mr. President, let me now turn to the issue of the relevant coasts and the relevant area. In this connection I will first address the applicable law and subsequently consider the definition of the relevant coasts and the relevant area in the Caribbean Sea and the Pacific Ocean respectively.

18. Dr. Parlett this Monday identified the points of agreement and disagreement between the Parties as regards the relevant coasts and the relevant area<sup>35</sup>. Agreement that the relevant coasts are those which generate overlapping projections, and that those overlapping projections are used to define the relevant area<sup>36</sup>. On the other hand, disagreement on two points. First, how to identify the relevant area<sup>37</sup>. Second, how to determine the relevant coasts of the Parties<sup>38</sup>. Nicaragua agrees that these are the main points of disagreement and I will consequently focus on those points.

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<sup>35</sup>CR 2017/7, p. 44, paras. 25-26.

<sup>36</sup>*Ibid.*, para. 25.

<sup>37</sup>*Ibid.*, para. 26.

<sup>38</sup>*Ibid.*

19. In addition, there is one other point of agreement that is relevant in relation to the determination of the relevant area that was not mentioned by Dr. Parlett. She did however mention it in two of her preliminary points this Monday: “Costa Rica has requested the Court to determine the complete course of the maritime boundaries between the two States in the Caribbean Sea and in the Pacific Ocean” and “the request is to delimit the boundaries between the territorial sea, exclusive economic zone and continental shelf out to 200 nautical miles, both in the Pacific and the Caribbean”<sup>39</sup>. Nicaragua takes note of this position of Costa Rica, which implies that for the delimitation in the Caribbean Sea between the Parties, it is not necessary to take into account Nicaragua’s entitlement to a continental shelf beyond 200 nautical miles and there can be no question of a delimitation of this area between the Parties. The outer limits of Nicaragua’s continental shelf have been submitted to the Commission on the Limits of the Continental Shelf in accordance with Nicaragua’s obligations under the United Nations Convention on the Law of the Sea<sup>40</sup>.

20. Let me now turn to the first point of disagreement. As far as the identification of the relevant area is concerned, Nicaragua considers that the case law requires that we primarily rely on frontal projections of the relevant coasts. On the other hand, Costa Rica submits that one has to look at the radial projections of these coasts.

21. Before I look at the merits of these positions, let me make one preliminary point. In the Counter-Memorial Nicaragua observed that Costa Rica in its Memorial completely ignored the fact that the Court in *Black Sea* has identified two principles for determining the relevant coasts. Apart from the “principle of overlapping projections” to which I already referred, this concerns the principle “that the ‘land dominates the sea’ in such a way that coastal projections in the seaward direction generate maritime claims”<sup>41</sup>. This Monday counsel for Costa Rica again ignored this principle in referring to the Judgment in *Black Sea*<sup>42</sup>. However, Mr. Brenes did refer to the

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<sup>39</sup>CR 2017/7, p. 35, para.2.

<sup>40</sup>See also CMN, para. 3.70.

<sup>41</sup>*Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009*, pp. 96-97, para. 99.

<sup>42</sup>CR 2017/7, p. 44, para. 25.

principle on Tuesday, but in doing so he omitted the words “seaward direction”<sup>43</sup>. These omissions are probably not unintentional. The term “seaward” has the connotation of “in the direction of the sea”. A radial projection from the coast is not in accordance with the meaning of the term seaward. A radial projection only in part projects seaward, but in large part projects in directions that are more or less parallel to the coast.

22. So what did Dr. Parlett have to say to justify Costa Rica’s position that the relevant area has to be determined by looking at the radial projections of these relevant coasts? She first of all submitted that there are two practical considerations suggesting that radial projection is appropriate for determining the relevant area<sup>44</sup>. One such consideration being that the outer limit of the territorial sea and the 200-nautical-mile continental shelf and exclusive economic zone is determined by an omnidirectional measurement of those limits<sup>45</sup>. I have no issue with that statement concerning the determination of outer limits. However, the determination of the outer limits of maritime zones and their bilateral delimitation are separate issues that are governed by different provisions of the United Nations Convention on the Law of the Sea. The determination of the relevant area needs to be done with reference to Articles 15, 74 and 83 of the Convention and the case law of this Court and other tribunals.

23. Next, Dr. Parlett showed a number of hypothetical scenarios intended to demonstrate that frontal projections supposedly may pose problems<sup>46</sup>. These hypotheticals need not concern the Court. As the Counter-Memorial amply demonstrates, there is no difficulty whatsoever involved in determining the relevant area in the Caribbean Sea and the Pacific Ocean on the basis of the frontal projections of the relevant coasts of the Parties<sup>47</sup>.

24. Having disposed of these practical considerations supposedly supporting recourse to radial projection, let me turn to the legal arguments counsel for Costa Rica invoked. It was submitted that “[u]sing a radial projection to define the relevant area is also consistent with the

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<sup>43</sup>CR 2017/8, pp. 43-44, para. 3.

<sup>44</sup>CR 2017/7, p. 45, para. 28.

<sup>45</sup>*Ibid.*, pp. 45-46, paras. 29-30.

<sup>46</sup>*Ibid.*, pp. 46-47, paras. 31-32.

<sup>47</sup>See CMN, Chaps. II B and III C.

weight of authority”<sup>48</sup>. Surprisingly, this assertion was supported by a reference to the dissenting opinion of Prosper Weil in the *Saint Pierre and Miquelon* case. However, as was also acknowledged by Dr. Parlett, the majority in this case adopted an approach that was primarily based on frontal projection<sup>49</sup>.

25. Counsel for Costa Rica also invoked *Bangladesh v. India* as a recent example endorsing the use of radial projections. It is instructive to consider this matter in greater detail. Dr. Parlett mentioned that the Tribunal observed that “[t]o establish the projection generated by the coast of a State, the Tribunal considers that ‘what matters is whether [the coastal frontages] abut as a whole upon the disputed area by a radial or directional presence relevant to the delimitation’”<sup>50</sup>. And that by the way is also referring to what the Tribunal itself said. However, what she did not tell you, is that Tribunal also observed that, and I quote from the Awards, [Figure AOE-5 on] “[i]n the Tribunal’s view, there is a margin of appreciation in determining the projections generated by a segment of coastline and a point at which a line drawn at an acute angle to the general direction of the coast can no longer be fairly said to represent the seaward projection of that coast”<sup>51</sup>. [Figure AOE-5 off] [Figure AOE-6 on] Using a radial projection from the coast to determine the relevant area is completely contrary to the finding that a line drawn at an acute angle, that is, an angle of less than 90 degrees, at some point no longer represents the seaward projection of the coast. Along a straight line coast a radial projection will make an acute angle ranging between 90 and 0 degrees, as is illustrated on the figure on screen. [Figure AOE-6 off]

26. Dr. Parlett then submitted that the treatment of the Andaman Islands constituted proof of the fact that the Tribunal in *Bangladesh v. India* defined the relevant area by reference to radial projection<sup>52</sup>. [Figure AOE- 7 on] Let us again look at sketch-map 4 of the Award. [Figure on] The relevant area is defined in red and the part of the Andaman Islands that was considered to be part of India’s relevant coast by the orange line. The Tribunal had this to say in justifying the distinction

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<sup>48</sup>CR 2017/7, p. 47, para. 33.

<sup>49</sup>*Ibid.*

<sup>50</sup>*Ibid.*, p. 48, para. 34.

<sup>51</sup>UNCLOS Annex VII Tribunal, *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, para. 302.

<sup>52</sup>CR 2017/7, p. 48, paras. 34-35.

between the northern and southern part of the Andaman Islands, and I quote: “the [southern Andamans] lie too far to the south to be fairly considered to generate projections that overlap with those of the coast of Bangladesh”<sup>53</sup>. Dr. Parlett put her own gloss to this finding of the Tribunal observing that, and I quote, “[i]ndeed, [the southern Andamans] are well over 400 nautical miles from the nearest point on the Bangladeshi coast”<sup>54</sup>. Now, that cannot be right. As sketch-map 4 indicates, the northern Andamans are at a similar distance from the Bangladeshi coast as the southern Andamans. The Tribunal’s reason for the differentiation must be another one. As sketch-map 4 makes clear, the frontal projection of the northern Andaman Islands extends into the relevant area, while this is not the case for the frontal projection of the southern Andamans. We have added these frontal projections to the map to illustrate the point. On the other hand, if the Tribunal would have used radial projection to determine the relevant area and the relevant coasts, both the northern and southern Andamans would have qualified as part of India’s relevant coast. To conclude, this discussion belies Costa Rica’s claim that the Tribunal used radial projection and instead reconfirms the conclusion of the Counter-Memorial that the Award in *Bangladesh v. India* based itself on frontal projections<sup>55</sup>. [AOE-7 off]

27. The final leg of Dr. Parlett’s discussion of the law applicable to the determination of the relevant coasts and the relevant area concerned the question, on what basis may parts of the coast be excluded from the relevant coast? Interestingly, this argument completely destroyed the claim that this Court and other tribunals routinely have had recourse to radial projection to determine the relevant coasts and the relevant area. Dr. Parlett submitted that there are three reasons to exclude coasts from a party’s relevant coasts<sup>56</sup>. The first is that two parts of the coast of one State face each other<sup>57</sup>. The second reason to exclude a coast is that it faces onto the coast of a third State<sup>58</sup>. The

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<sup>53</sup>UNCLOS Annex VII Tribunal, *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, para. 304.

<sup>54</sup>CR 2017/7, p. 48, para. 35.

<sup>55</sup>See CMN, paras. 2.33-2.34.

<sup>56</sup>CR 2017/7, p. 50, para. 40.

<sup>57</sup>*Ibid.*, para. 41.

<sup>58</sup>*Ibid.*, para. 42.

third reason to exclude a coast is that it faces entirely away from the area of overlapping potential entitlements<sup>59</sup>.

28. Nicaragua has no problem agreeing to the first two of these reasons. As far as the third reason for excluding coasts from the relevant coasts is concerned, my prior discussion of the Andaman Islands indicates that the qualification “entirely” is misplaced.

29. A first thing to be noted about these three reasons is that Dr. Parlett three times uses the word “faces” and not, as one might expect in view of Costa Rica’s position, the words “radially projects”. The verb to face has a connotation of a frontal relationship. When I face the Court I have my eyes on the Bench. I think it would not be proper to turn my back on the Court to demonstrate the effects of a radial view.

30. The fact that Dr. Parlett actually relies on frontal projections to exclude coasts from the relevant coasts is fully confirmed by the examples she provides. In looking at two parts of the coast of one State facing each other, her first reason, she discusses the Court’s treatment of the Karkinit’ska Gulf in *Black Sea*.<sup>60</sup> [Figure AOE-8 on] This matter was also considered in the Counter-Memorial, at paragraphs 2.28 to 2.30. But let us now have a look at the figure you were also shown this Monday. The Karkinit’ska Gulf is on the top right of the figure and also in the enlargement, and was excluded from the relevant coast of Ukraine by the Court. Indeed, if a frontal projection is adopted — this is illustrated by the arrows that have been added to the figure — the coasts of the Karkinit’ska Gulf face each other. However, if the Court would have used radial projection, it no doubt would have concluded that this radial projection overlaps with the radial projection of Romania’s coast. [Figure AOE-8 off]

31. The second reason for discounting a coast — that it faces onto the coast of a third State — was illustrated by this graphic from *Cameroon v. Nigeria*<sup>61</sup>. [Figure AOE-9 on] This time there is no need to add the arrows indicating the frontal projection of the coast. The Court did so itself. As can be appreciated, the part of Cameroon’s coast frontally projecting toward Equatorial Guinea’s island of Bioko was excluded. Again, using a radial projection should have led to

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<sup>59</sup>CR 2017/7, p. 51, para. 43.

<sup>60</sup>*Ibid.*, p. 50, para. 41.

<sup>61</sup>*Ibid.*, para. 42.

inclusion of this part of Cameroon's coast in the relevant coast. The Court did not do so. [Figure AOE-9 off]

32. The final reason for discounting a coast — that it faces away from the area of overlapping entitlements — was illustrated by the Court's definition of the relevant coast of Nicaragua in the 2012 Judgment in *Territorial and Maritime Dispute*<sup>62</sup>. [Figure AOE-10 on] As counsel for Costa Rica pointed out, the Court excluded the south-facing coast of Punta de Perlas<sup>63</sup>. This again disproves Costa Rica's thesis of radial projection. This south-facing coast projects radially into the area of overlapping entitlements of Nicaragua and Colombia as is illustrated in the figure on screen. [Figure AOE- 10 off].

33. Dr. Parlett made one other point in relation to the Court's definition of the relevant coast of Nicaragua and the relevant area in its 2012 Judgment in *Territorial and Maritime Dispute*. She submitted that when, and I quote, "parts of a State's coast are disregarded as irrelevant, the waters in front of that coast might still be counted as relevant area, because they fall within the radial projection of other parts of coast that are relevant"<sup>64</sup>. That argument was supported by [Figure AOE-11 on] a figure from the 2012 Judgment with a highlight added by Costa Rica. As is readily apparent, the area identified as "Included relevant area south of Punta de Perlas" is directly in front of Nicaragua's east-facing relevant coast as identified by the Court. To remove any doubt that the Court based itself on frontal projection, reference can be had to paragraph 145 of the Judgment, which observes that the east-facing coasts of the Nicaraguan islands fringing the mainland coast are parallel to the mainland<sup>65</sup>. [Figure AOE-11 off]

## **2. The relevant coasts and the relevant area in the Caribbean Sea**

34. Mr. President, having disposed of the erroneous notion that the Court and other tribunals have routinely applied radial projection instead of frontal projection to determine the relevant coasts and the relevant area, I can be relatively brief in my discussion of the relevant coasts and the relevant area in the Caribbean Sea and the Pacific Ocean. These matters are discussed in detail in

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<sup>62</sup>CR 2017/7., p. 51, para. 43.

<sup>63</sup>*Ibid.*

<sup>64</sup>*Ibid.*, para. 44.

<sup>65</sup>*Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 678.

Nicaragua's Counter-Memorial and there is no need for a replay<sup>66</sup>. I start with a discussion of the Caribbean Sea.

35. At the beginning of his speech of this Tuesday, Mr. Lathrop briefly addressed the relevant coasts and the relevant area in the Caribbean Sea<sup>67</sup>. I agree with his assessment that the Parties are in broad agreement concerning the definition of the relevant coasts in the Caribbean Sea<sup>68</sup>.

36. I have a couple of remarks to make on Costa Rica's relevant area. There are two basic flaws in Costa Rica's approach.

37. First, Costa Rica has artificially extended the relevant area by including maritime areas of Nicaragua that are located north of Nicaragua's relevant coast in the Caribbean Sea. [Figure AOE-12 on] This area has been identified in the figure on screen, which is Figure IIc-3 from the Counter-Memorial. We have highlighted the relevant coast of Nicaragua on the basis of Costa Rica's definition of that coast, which, as I just mentioned, is quite similar to the relevant coast of Nicaragua as defined by Nicaragua. [Figure AOE-12 off]

38. As Mr. Lathrop explained, the inclusion of the area north of Nicaragua's relevant coast is based on the flawed assumption that the relevant area is determined by looking at the radial projection of the relevant coasts. When the relevant area is determined on the basis of the seaward projections of the Parties' relevant coasts, the maritime area to the north of Nicaragua's relevant coast is beyond the relevant area.

39. If one were to entertain for a moment the notion of radial projection, the logic of Costa Rica's approach escapes me. [Figure AOE-13 on] Let me show you why. On the one hand, Costa Rica accepts that its relevant coast can radially project passing through the maritime zones of Colombia. Nicaragua has no problem with the proposition that the maritime zones of one State may project beyond the maritime zones of another State<sup>69</sup>. However, on the other hand, Costa Rica denies that same treatment to Nicaragua's northern coast. As can be appreciated, that coast projects

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<sup>66</sup>See CMN, Chaps. II.B and III.C.

<sup>67</sup>CR 2017/9, pp. 33-34, paras. 4-8.

<sup>68</sup>*Ibid.*, p. 33, para. 4. See also CMN, paras. 3.59-3.69.

<sup>69</sup>See also CMN, paras. 3.60-3.63.

radially from north to south in the same way as Costa Rica's relevant coast projects from south to north. In other words, under Costa Rica's erroneous approach using radial projection to identify the relevant coasts and the relevant area, this northern part of Nicaragua's coast has to be part of the relevant coast. [Figure AOE-13 off]

40. The second problem with Costa Rica's relevant area is that it ignores an area that is part of the overlapping seaward projections of the relevant coasts of Nicaragua and Costa Rica according to Costa Rica's current position on its 1977 Treaty with Colombia. [Figure AOE-14 on] That area is now highlighted on Figure IIC-3 from the Counter-Memorial. This area is north of Costa Rica's agreed maritime boundary with Panama. Costa Rica excludes this area from its relevant area on the ground that it may be claimed by a third State, Panama. However, Panama has fully determined its maritime boundaries in the Caribbean Sea and there cannot be any question of a maritime boundary between Costa Rica and Panama beyond Panama's agreed boundaries. Consequently, the highlighted area is part of the maritime area that would be attributed to Costa Rica if the Court were to accept Costa Rica's current position on its 1977 Treaty with Colombia and its claim in relation to Nicaragua. [Figure AOE-14 off].

41. Mr. President, at the beginning of his speech Mr. Lathrop also showed you Nicaragua's relevant area in the Caribbean Sea. Perhaps understandably, he only showed you Nicaragua's relevant area in accordance with Costa Rica's view on its 1977 Treaty with Colombia. Obviously, he disagreed with Nicaragua's approach, but the figure he showed you was a faithful reproduction of Figure IIC-4 of the Counter-Memorial<sup>70</sup>. For most of Mr. Lathrop's speech I thought I would have little need to respond to him on this point. [Figure AOE-15 on] However, the very last slide of his presentation was entitled "Nicaragua's claim line creates disproportionality using Nicaragua's own relevant area from NCM Figure IIC-4". You have this figure on screen. It purports to show the same area that was on his slide I just referred to, which I said was a faithful reproduction of Figure IIC-4 of the Counter-Memorial.

42. Regretfully, Mr. Lathrop's last figure was misleading. Let me explain. The figure depicts what is Nicaragua's view on its maritime boundary with Costa Rica. This is based on the position

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<sup>70</sup>See CR 2017/9, p. 34, para. 7 and judges' folder, tab 148.

that Costa Rica cannot now claim areas that are beyond the boundary defined in its 1977 Treaty with Colombia. However, the relevant area that Mr. Lathrop used is the relevant area that would result if the Court were to accept Costa Rica's position on its 1977 Treaty with Colombia. If Mr. Lathrop would have wanted to show you the disproportionality test applied to Nicaragua's proposed boundary he obviously should have used the relevant area based on Nicaragua's position on Costa Rica's 1977 Treaty with Colombia. Nicaragua's part of that area is now identified on the figure on screen. The correct depiction of Nicaragua's part of the relevant area indicates that Nicaragua's proposal divides the relevant area proportionally. [Figure AOE-15 off]

43. Mr. President, I think it is proper to conclude this part of my presentation by briefly showing the Court Nicaragua's view on the relevant coasts and the relevant area in the Caribbean Sea. [Figure AOE-16 on] First, we have the relevant coasts and relevant area based on Costa Rica's current position on its 1977 Treaty with Colombia. The coastal length ratio between Nicaragua and Costa Rica is 1.11 to 1, using relevant coasts of respectively 246 and 221 km as measured along their natural configurations. That same ratio is 1.03 to 1 on the basis of the relevant coasts of respectively 198 and 193 km as measured along straight line segments. The relevant area measures 80,750 sq km. [Figure AOE-16 off] [Figure AOE-17 on] And here we have the relevant coasts and the relevant area based on Nicaragua's view on Costa Rica's 1977 Treaty with Colombia. The coastal lengths and ratios are the same. The only difference between these two figures is that in the present case the eastern limit of the relevant area in large part is constituted by the meridian that is part of the maritime boundary that is defined in the 1977 Treaty between Costa Rica and Colombia. The relevant area as a consequence measures 46,700 sq km [Figure AOE-17 off]<sup>71</sup>.

### **3. The relevant coasts and the relevant area in the Pacific Ocean**

44. Mr. President, I can be brief on the relevant coasts and the relevant area in the Pacific Ocean. The differences between the Parties in this instance are fully explained by their difference over the proper way to determine the seaward projections of the relevant coasts. Radially, as Costa Rica erroneously submits, or frontally. Before addressing that point I have one preliminary point.

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<sup>71</sup>For a detailed description of these relevant coasts and areas see CMN, paras. 3.67-3.69, 3.75 and 3.77-3.79.

45. Costa Rica in its Memorial had identified the length of the relevant coasts of the Parties in the Pacific Ocean by measuring them both by a number of straight lines and by measuring them along their natural configuration<sup>72</sup>. In the Counter-Memorial Nicaragua explained that the case law indicates that it is not proper to identify the relevant coast along its natural configuration where the coast of one of the Parties is sinuous and the coast of the other is smooth<sup>73</sup>. This is the case in the Pacific. Nicaragua's coast is smooth, while Costa Rica's coast is characterized by sinuosities and protruding promontories. On Monday, counsel for Costa Rica seemingly accepted Nicaragua's position. Mr. Wordsworth showed the Court a sketch-map and commented "coastal length ratio comes down to 1.4 to 1 when straight-line approximations are used, consistent with the preferred approach of the Court and other international tribunals; and it is by reference to this sketch-map that I wish to develop Costa Rica's submissions on the relevant coasts, and indeed the relevant areas"<sup>74</sup>. In view of that acceptance, there is no need to repeat the argument on this point contained in the Counter-Memorial<sup>75</sup>.

46. Let me now briefly review why most of Costa Rica's coast, contrary to what Costa Rica maintains, is not part of its relevant coast. As I already said, this is explained by Costa Rica's reliance on radial projection.

47. First, the north-eastern facing coast of the Osa Peninsula does not face seaward, to the open ocean, but faces the south-western coast of the Peninsula of Nicoya. [Figure AOE-18 on] The seaward projections of these two coasts thus overlap, and the seaward projection of the north-eastern facing coast of the Osa Peninsula does not overlap with the seaward projection of the relevant coast of Nicaragua, as is illustrated by the figure that is on screen. [Figure AOE-18 off] The other parts of Costa Rica's alleged relevant coast that Nicaragua does not consider to be part of Costa Rica's relevant coast do, admittedly, face seaward towards the open ocean. [Figure AOE-19 on] However, a glance at the figure on screen immediately shows that the seaward projections of those coasts do not overlap with the seaward projection of the relevant coast of Nicaragua. This

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<sup>72</sup>MCR, paras. 3.9-3.10.

<sup>73</sup>CMN, para. 2.24.

<sup>74</sup>CR 2017/7, p. 57, para. 6

<sup>75</sup>See CMN, para. 2.24.

may be further illustrated by taking a closer look at the stretch of these coasts that is closest to Nicaragua's relevant coast. This is the coast between Punta Guiones and Cabo Blanco on the Peninsula of Nicoya. The general direction in which this coast faces is similar to that of the relevant coast of Nicaragua, implying that the seaward projections of these two coasts also extend in a similar direction. As is illustrated by Figure Ib-3 of the Counter-Memorial that is on screen, at no point do these two projections overlap, and the minimum distance between these two projections is about 100 km. The same applies *a fortiori* to the segment of coast of Costa Rica that are further south. Those segments face in a general direction that is almost identical to the general direction of the coast between Punta Guiones and Cabo Blanco, and their seaward projections are even further distant from the seaward projection of the relevant coast of Nicaragua, as is illustrated by the figure on screen. [Figure AOE-19 off]

48. Excluding the parts of Costa Rica's coast I just discussed, Costa Rica's relevant coast in the Pacific Ocean is the coast between Punta Zacate and Punta Guiones. [Figure on] This coast can be represented by three straight lines drawn between Punta Zacate to Cabo Santa Elena to Cabo Velas to Punta Guiones. These straight lines are identified on the figure which should now be on the screen, and indeed it is. These lines avoid the difficulties caused by the sinuosity of the Costa Rican coast and ensure consistency in measuring the respective coasts of the Parties.

49. [Figure AOE-20 on] Costa Rica's relevant coast as measured along the three straight lines between Punta Zacate and Punta Guiones is 144 km. The seaward projection of these coasts extends in an approximately north-easterly direction. If the seaward projection of Nicaragua is determined in a similar manner, the relevant coast of Nicaragua extends as far north as what Nicaragua in its Counter-Memorial identified as the Corinto point, a point just north of the town of Corinto<sup>76</sup>. Measured along a straight line, the relevant coast of Nicaragua measures 238 km. The ratio between the relevant coasts of Nicaragua and Costa Rica for the delimitation in the Pacific Ocean is 1.65 to 1. The relevant area measures 102,770 sq km. For a more precise description of this relevant area I respectfully refer the Court to paragraph 2.39 of Nicaragua's Counter-Memorial. [Figure AOE-20 off]

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<sup>76</sup>CMN, para. 2.18.

50. Mr. President, Members of the Court, that concludes Nicaragua's presentation on the geographical framework and the relevant coasts and the relevant area. I thank you for your attention. Mr. President, I ask that you give the floor to professor Remiro Brotóns, unless you would want to break for coffee.

Le PRESIDENT: Je crois qu'il est peut-être plus raisonnable de faire la pause à présent et de donner la parole ensuite au plaideur suivant, si vous me le permettez Monsieur le professeur. Merci. La séance est suspendue pour 15 minutes.

*L'audience est suspendue de 16 h 5 à 16 h 20.*

Le PRESIDENT : Veuillez vous asseoir. L'audience est reprise, la parole est à M. le professeur Remiro Brotóns.

M. REMIRO BROTONS :

Monsieur le président, Mesdames et Messieurs les juges, on dit qu'on peut distinguer deux sortes de gens : ceux qui s'ennuient et ceux qui vous ennuiet. Certainement, je ne me trouve pas parmi les premiers et j'espère ne pas tomber dans les seconds à la fin de mon intervention.

## **LES DÉLIMITATIONS CONVENUES PAR LE COSTA RICA DANS LES CARAÏBES**

### **I. Introduction**

1. Monsieur le président, Mesdames et Messieurs les juges, un examen attentif des arrêts directement pertinents de la Cour et des traités conclus par le Costa Rica sur la délimitation maritime dans la mer des Caraïbes offre un terrain fertile pour s'opposer aux prétentions costa-riciennes vis-à-vis du Nicaragua.

2. [Projection n° 1 : CMN, annexe 29, II.a.5, p. 347.] A cet effet, je me propose d'attirer votre attention particulièrement sur le traité du 17 mars 1977 entre le Costa Rica et la Colombie et le traité du 2 février 1980 entre le Costa Rica et le Panama. Certes, tous les deux sont *res inter alios acta* pour le Nicaragua. Personne n'en doute. Or, ils constituent un régime et un scénario juridiques que la Cour ne saurait pas ignorer lorsqu'il s'agit de la détermination de la zone maritime pertinente pour la délimitation entre le Nicaragua et le Costa Rica, comme il a déjà été souligné par

le professeur Alex Oude-Elferink. Ces instruments seraient d'ailleurs appelés à jouer un rôle clef comme des circonstances pertinentes dans le tracé de la frontière maritime, comme mon collègue Paul Reichler le développera en profondeur plus tard [fin de la projection n° 1].

3. On a débattu largement sur ces questions à l'occasion de la requête à fin d'intervention formulée par le Costa Rica dans le *Différend territorial et maritime* entre le Nicaragua et la Colombie. Le débat entre les trois Etats a porté sur la question de savoir si, et dans quelle mesure, une éventuelle décision judiciaire dans cette affaire pouvait affecter des intérêts d'ordre juridique du Costa Rica.

4. La position du Nicaragua a été très claire, et rien n'a changé à cet égard. Le Nicaragua a affirmé que les intérêts juridiques du Costa Rica dépendaient des termes du traité de 1977 conclu avec la Colombie<sup>77</sup>. Il a souligné très clairement, d'une part, que ces intérêts n'étaient pas affectés par une délimitation de la frontière maritime entre la Colombie et le Nicaragua et, d'autre part, que le statut dudit traité ne serait pas modifié par quelque autre circonstance que ce soit<sup>78</sup>.

5. Dans la présente instance, le Costa Rica a présenté ses prétentions vis-à-vis du Nicaragua comme si le traité souscrit avec la Colombie n'existait pas [projection n° 2 : MCR, croquis 4.5, p. 58]. Le traité de 1977, comme l'affirme le Costa Rica dans son mémoire, «has no status or relevance in the present case»<sup>79</sup>. C'est pourquoi il a été expédié en dix lignes, il a été ignoré dans les croquis cartographiques, il a été omis dans ses annexes. Dans son contre-mémoire<sup>80</sup>, le Nicaragua a fait référence à tout ce que le Costa Rica préférait oublier. Je ne vais pas répéter ce qui y a déjà été dit. Mais ce qui a été dit a obligé le Costa Rica à s'expliquer avec un peu plus de détail au cours de ces plaidoiries<sup>81</sup>. Toutefois, la liste de motifs offerte pour justifier son affirmation est loin de convaincre [fin de la projection n° 2].

6. En ce qui concerne le traité de 1980 avec le Panama, le mémoire costa-ricien ne lui consacre que treize mots : «Costa Rica has delimited by agreement its Caribbean Sea maritime

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<sup>77</sup> CR 2010/13, p. 13, par. 13 (Remiro Brotóns), et p. 27-28, par. 28-30 (Reichler).

<sup>78</sup> *Différend territorial et maritime (Nicaragua c. Colombie)*, observations écrites du Nicaragua du 26 mai 2010, par. 24.

<sup>79</sup> *Délimitation maritime*, mémoire du Costa Rica (MCR), p. 21, par. 2.36.

<sup>80</sup> *Délimitation maritime*, contre-mémoire du Nicaragua (CMN), 62-74, par. 3.8-3.33.

<sup>81</sup> CR 2017/7, p. 26-30, par. 26-38 (Ugalde) ; CR 2017/9, p.10-21, par. 1-35 (Kohen).

boundary with Panama.»<sup>82</sup> C'est tout. Sans même indiquer la date. Quatre-vingt-trois caractères. Un modeste mini-tweet. Le Costa Rica a fait des progrès durant ces audiences. Il a consacré deux minutes à ce sujet<sup>83</sup>. Beaucoup de choses restent pourtant à préciser.

7. Monsieur le président, je me propose, d'abord, d'examiner le traité conclu par le Costa Rica avec la Colombie en 1977 (II) et puis, celui souscrit avec le Panama, trois ans plus tard, en 1980 (III).

## II. Le traité du 17 mars 1977 entre la Colombie et le Costa Rica

### A. Le respect du traité et les effets de plus de trente ans d'application

8. Monsieur le président, le Costa Rica soutient aujourd'hui que le traité du 17 mars 1977 est devenu *impraticable, sans effet*, suite à l'arrêt de la Cour du 19 novembre 2012<sup>84</sup>. Il convient donc d'examiner, d'abord, le *statut* de ce traité avant l'arrêt de la Cour.

9. Bien que le traité de 1977 n'eût pas encore été ratifié, le Costa Rica, loin de rejeter le traité, a affirmé, et répété, sa volonté d'en respecter les termes conformément aux obligations codifiées dans l'article 18 *a*) de la convention de Vienne<sup>85</sup>.

10. Et la Colombie a mis en exergue le fait que le Costa Rica était lié, au-delà des obligations résultant de la signature du traité.

11. En effet, durant la procédure orale sur l'admission de la requête costa-ricienne en intervention, l'agent et les conseils de la Colombie ont tous souligné avec insistance la force obligatoire du traité de 1977 pour le Costa Rica<sup>86</sup>.

12. L'un des conseils de la Colombie a résumé la situation ainsi :

«Il semble ressortir de la requête du Costa Rica que celui-ci estime avoir simplement pour obligation, conformément à l'article 18 de la convention de Vienne, de ne pas priver le traité de 1977 de son objet et de son but avant sa ratification. Or, la pratique qui prévaut depuis 1977 va bien au-delà de cette obligation limitée. En effet,

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<sup>82</sup> MCR, p. 11, par. 2.12.

<sup>83</sup> CR 2017/9, p. 18, par. 23-24 (Kohen).

<sup>84</sup> MCR, p. 11, par. 2.13.

<sup>85</sup> Requête du Costa Rica à fin d'intervention du 25 février 2010, par. 12 ; voir aussi CR 2010/15, p. 28, par. 12 (Lathrop) ; *ibid.* (agent Edgar Ugalde), par. 9 ; réponse du Costa Rica à la question posée par le juge Bennouna, par. 7.

<sup>86</sup> CR 2010/14, p. 12-13, par.14-15, 17 (Londoño) ; p. 19-27, par. 21-26 (Bundy), p. 31, 39-41, par. 7, 29, 37 (Crawford). Cette position était en conformité avec les affirmations faites dans le contre-mémoire de la Colombie du 11 novembre 2008 (par. 1.6, 4.155-4.162, 8.41). Voir aussi les observations écrites de la Colombie sur la requête à fin d'intervention du Costa Rica, ainsi que la duplique, par. 7.52, 7.58, 8.77.

c'est au traité en tant que tel qu'il est donné effet depuis plus de trente ans, sans que cela soulève ni problème ni difficulté. En attestent les éléments de fait, la correspondance diplomatique entre les Parties, les déclarations des plus hauts représentants du Costa Rica, ainsi que la reconnaissance d'un tripoint dans le traité conclu entre le Costa Rica et le Panama...»<sup>87</sup>

13. La Colombie n'a laissé aucune place à l'ambiguïté et a fermement réaffirmé sa position dans ses commentaires sur la réponse du Costa Rica à une question formulée par le juge Bennouna<sup>88</sup>. Le Nicaragua a été du même avis<sup>89</sup> et la Cour en a pris note dans l'arrêt du 4 mai 2011<sup>90</sup>.

14. De même, dans la procédure orale sur le fond dans l'affaire Nicaragua contre la Colombie, M. Bundy, conseil de la Colombie, a répété :

«Le Costa Rica a maintes fois fait savoir qu'il avait appliqué le traité de 1977 volontairement et continuerait de le faire. En outre, un accord conclu en 1984 entre la Colombie et le Costa Rica et portant sur la délimitation dans l'océan Pacifique, qui a bien été ratifié, mentionne que la frontière maritime entre les deux Etats dans les Caraïbes avait été «fixée»»<sup>91</sup>

15. Monsieur le président, le conseil du Costa Rica a soutenu dans ces audiences que «l'application provisoire d'un traité qui n'est pas entré en vigueur relève simplement du respect des dispositions du droit des traités, telles qu'exprimées à l'article 18 de la convention de Vienne»<sup>92</sup>. Cette base juridique ne semble pas être suffisante pour justifier une application du traité qui, même provisoire, s'est prolongée durant plus de trente ans. L'article 18 de la convention de Vienne impose seulement l'obligation de «s'abstenir d'actes qui priveraient un traité de son objet et de son but ... tant qu'il n'a pas manifesté son intention de ne pas devenir partie au traité». Monsieur le président, s'abstenir de, pas d'appliquer.

16. L'application à titre provisoire d'un traité doit nous renvoyer à l'article 25 de la convention, disposition qui a fait l'objet des réserves tant du Costa Rica que de la Colombie, dont

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<sup>87</sup> Voir CR 2010/14, p. 39, par. 29 (Crawford).

<sup>88</sup> CR 2010/17, p. 26-27 ; observations de la Colombie sur la réponse du Costa Rica à la question posée par M. le juge Bennouna, 4).

<sup>89</sup> CR 2010/13, p. 40, par. 31, 32, 37, 38, 43 (Reichler).

<sup>90</sup> *Différend territorial et maritime (Nicaragua c. Colombie), requête du Costa Rica à fin d'intervention, arrêt, C.I.J. Recueil 2011 (II)*, p. 365, par. 59 ; p. 367, par. 63.

<sup>91</sup> CR 2012/12, P. 21, par. 52.

<sup>92</sup> CR 2017/9, p. 20, par. 33 (Kohen).

les Constitutions interdisent cette institution<sup>93</sup>. L'application, l'observance, du traité ne trouve donc pas de base ni à l'article 18 ni, moins encore, à l'article 25 de la convention. Il se trouve ailleurs. On pourrait se demander comment, si l'Assemblée nationale du Costa Rica avait mis fin au parcours parlementaire en 2000, le Gouvernement aurait continué jusqu'à nos jours à appliquer le traité.

## **B. Les soi-disant présomptions sur lesquelles le Costa Rica s'est fondé pour conclure le traité de 1977**

17. Monsieur le président, je dirai ensuite quelques mots sur les prétendues *présomptions* qui, selon le Costa Rica, l'auraient conduit à signer le traité de 1977.

18. Dans la requête à fin d'intervention et, ultérieurement, dans la procédure orale sur sa recevabilité, le Costa Rica a soutenu que les négociations qui ont conduit à l'établissement de la ligne de 1977 reposaient sur l'idée que le Costa Rica et la Colombie avaient des titres qui se chevauchaient sur des espaces maritimes qu'ils devaient partager d'un commun accord.

19. Cette idée essentielle découlait — nous a dit le Costa Rica — de deux hypothèses. Selon la première, la Colombie aurait eu une frontière maritime convenue avec le Nicaragua le long du 82<sup>e</sup> méridien de longitude ouest, laissant les espaces maritimes situés à l'est de ce méridien à la Colombie. Selon la seconde, les formations insulaires de la Colombie devaient se voir reconnaître un plein effet dans la délimitation. Compte tenu des titres maritimes du Costa Rica, cela signifiait que la Colombie était l'Etat avec lequel le Costa Rica avait une frontière dans cette partie de la mer des Caraïbes<sup>94</sup>.

20. Mais, hélas! Selon San José, les *présomptions* qui sous-tendent la signature par le Costa Rica du traité seraient devenues infondées ou remises en question suite à l'arrêt du 13 décembre 2007 portant sur les exceptions préliminaires soulevées par la Colombie dans le *Différend territorial et maritime avec le Nicaragua*<sup>95</sup>. Le Costa Rica a déclaré, dans sa requête à fin d'intervention que :

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<sup>93</sup> Pour le texte des réserves, voir [https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=en](https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=en).

<sup>94</sup> Voir requête à fin d'intervention, par. 13 ; CR 2010/12, p. 35, par. 13 (Lathrop).

<sup>95</sup> *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II)*, p. 832.

«Sur la base de la décision rendue sur les exceptions préliminaires dans l'affaire opposant la Colombie et le Nicaragua, la première de ces hypothèses paraît erronée. Quant à la seconde, elle est aujourd'hui en cause dans la procédure sur le fond. Le Costa Rica tient à préciser qu'il ne prend pas position sur la validité de l'une ou l'autre, mais note seulement que la décision que rendra la Cour sur la frontière maritime entre le Nicaragua et la Colombie pourrait influencer sur ces hypothèses et, dans la pratique, vider de son sens l'accord conclu en 1977 entre le Costa Rica et la Colombie.»<sup>96</sup>

21. Malheureusement pour le Costa Rica, ces *hypothèses* ont été réfutées, sur des bases différentes, par le Nicaragua<sup>97</sup> et par la Colombie<sup>98</sup>.

22. La Colombie a été parfaitement claire sur ce point. C'est ainsi que l'un de ses conseils s'exprimait quand il exposait les points de désaccord avec le Costa Rica :

«Le troisième point de désaccord a trait à l'«explication» *a posteriori* donnée par le Costa Rica de ce que l'on pourrait appeler les hypothèses jumelles qui sous-tendent le traité de 1977 ... L'une de ces hypothèses ... porte sur le 82° méridien de longitude ouest, mais en réalité, rien n'indique que celui-ci ait été pris en compte par les Parties, et la portion septentrionale de la ligne frontière déterminée dans l'accord entre la Colombie et le Costa Rica n'est pas située sur ce méridien. La seconde hypothèse était que «les formations insulaires de la Colombie devaient se voir reconnaître un plein effet dans une délimitation». Cependant, il ne s'agissait pas là d'une donnée, d'un fait objectif — c'est-à-dire d'une hypothèse de départ —, mais d'une question de titre. La délimitation d'une frontière tout comme l'importance qu'il convient d'accorder aux côtes pertinentes peuvent faire l'objet de discussions entre les Parties. C'est ce qui s'est produit entre la Colombie et le Costa Rica, ce dernier ayant expressément accepté que les îles de San Andrés ..., îles reconnues comme étant colombiennes, se voient accorder plein effet. Ce n'était pas une hypothèse, mais un accord.»<sup>99</sup>

23. Donc, le Costa Rica n'a pas invoqué ces *hypothèses* pour tenter d'établir un motif de nullité ou d'extinction du traité. Le Costa Rica s'est abstenu de suggérer une «erreur» comme motif de nullité<sup>100</sup>, ou un «changement fondamental de circonstances»<sup>101</sup> ou la «survenance d'une situation rendant l'exécution impossible»<sup>102</sup> comme motifs d'extinction du traité.

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<sup>96</sup> Requête à fin d'intervention, par. 13.

<sup>97</sup> Observations écrites du Nicaragua du 26 mai 2010, par. 22-23 ; voir aussi CR 2010/13, (Agent), par. 16-17 ; *ibid.*, (Reichler), par. 42-43 ; annexe aux observations du Nicaragua sur la réponse du Costa Rica à la question posée par M. le juge Bennouna (par. 13-15).

<sup>98</sup> CR 2010/14, p. 25-27, par. 37-42 (Bundy) ; *ib.*, p. 35-36, par. 14, 20 (Crawford) ; voir aussi duplique, par. 7.55, 7.58.

<sup>99</sup> CR 2010/14, p. 36, par. 20.

<sup>100</sup> Article 48.1 de la convention de Vienne sur le droit des traités.

<sup>101</sup> Article 62 de la convention.

<sup>102</sup> Article 61.1 de la convention.

24. Sans doute, le Costa Rica était parfaitement conscient qu'invoquer une «erreur» aurait été impossible et injustifié<sup>103</sup>. D'autre part, on ne pouvait pas invoquer un changement fondamental de circonstances comme motif pour mettre fin à un traité établissant une frontière<sup>104</sup>. Le Costa Rica ne peut pas non plus invoquer l'impossibilité d'exécution du traité sans admettre qu'il était préalablement entré en vigueur.

25. Monsieur le président, on pourrait dire du Costa Rica qu'il a fait preuve d'une grande ténacité pour essayer de trouver un motif pour se débarrasser de ses obligations envers la Colombie tout en faisant bonne figure. Le Costa Rica s'est présenté lors de la procédure sur l'admission de sa requête d'intervention en tant que victime. Le Costa Rica voulait, souhaitait, désirait se conformer au traité de 1977 avec la Colombie et rien ne l'aurait rendu plus heureux que si la Cour avait approuvé la ligne de délimitation convenue à l'article 1<sup>er</sup>. Malheureusement, les circonstances, circonstances avec lesquelles il n'avait rien à voir, risquaient de l'en empêcher<sup>105</sup>. Finalement, l'arrêt de 2012 a confirmé les prédictions, les pires.

26. En tout cas, le deuil a été bref et le Costa Rica a tenté — et il tente — d'en tirer parti comme si les espaces maritimes qu'il avait reconnus colombiens étaient devenus des biens vacants comme conséquence de l'arrêt de la Cour<sup>106</sup>.

### **C. Le traité de 1977 est-il *impraticable* ou *sans effet* suite à l'arrêt du 19 novembre 2012 ?**

27. Monsieur le président, cela nous amène à la question fondamentale, la question de savoir si, comme le soutient le Costa Rica, le traité de 1977 est devenu *impraticable*, *sans effet*, suite à l'arrêt de la Cour du 19 novembre 2012. Mais, c'est vraiment le cas ?

28. Le Costa Rica a dit, et répété, comme on le sait, que le traité n'a pas été ratifié<sup>107</sup>. Or, on a dû attendre jusqu'à ces audiences pour assister à une véritable première : le Costa Rica a annoncé

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<sup>103</sup> Articles 45 et 48.2 de la convention.

<sup>104</sup> Article 62.2 a) de la convention.

<sup>105</sup> CR 2010/15, par. 12 (Lathrop).

<sup>106</sup> CR 2010/15, p. 13-16, par. 9, 11, 12, 14.

<sup>107</sup> CR 2017/7, p. 18, par. 10 (Ugalde Alvarez), p. 26, par. 26, p. 30, par. 38 (Sergio Ugalde) ; CR 2017/9, p. 10-14, par. 1-3, 5, 10, 12 (Kohen).

pour la première fois qu'il ne le sera jamais<sup>108</sup>. Une question nous vient à l'esprit : est-ce que le Costa Rica a communiqué la nouvelle à l'autre partie contractante ?

29. La note adressée à la Colombie par le Costa Rica le 27 février 2013, la seule référence qu'il nous a offerte, omettait toute mention du *statut* du traité et se concentrait sur son impraticabilité et inefficacité suite à l'arrêt de la Cour<sup>109</sup>.

30. Dans cette note, le Costa Rica fait référence à la possible signature d'un nouveau traité de coopération maritime, faisant mention d'une proposition d'un accord de patrouilles conjointes, et de possibles accords à conclure lors de la réunion de haut niveau sur la sécurité et la justice (GANSJ), qui devait se tenir à San José en mai 2013.

31. Devrait-on interpréter que cette note impliquait la manifestation de l'intention du Costa Rica de ne pas devenir partie au traité de 1977 en raison de son impraticabilité ?<sup>110</sup> On peut nourrir de sérieux doutes. Le modeste niveau institutionnel de cette initiative diplomatique, sûrement délibéré — une note de l'ambassadeur du Costa Rica au responsable du bureau du ministère colombien des affaires étrangères en charge de la coordination des affaires devant la Cour — contraste sévèrement avec l'importance des enjeux.

32. Monsieur le président, considérant que le mémoire du Costa Rica a été déposé le 3 février 2015, soit deux ans après la note mentionnée ci-dessus, on pourrait raisonnablement s'attendre à ce que le Costa Rica présente en quelque détail les événements, déclarations ou propositions les plus significatifs adressés à la Colombie à ce sujet. Le Costa Rica ne l'avait pas fait alors, et il ne le fait pas aujourd'hui.

33. Les positions de la Colombie demeurent largement inconnues : Bogotá a-t-elle réagi aux déclarations du Costa Rica affirmant que le traité est aujourd'hui «impraticable et sans effet» ? Le nouvel accord de coopération maritime proposé par le Costa Rica a-t-il connu une quelconque suite ? Nous ignorons tout cela, et le Costa Rica se garde de vous en informer alors que les réponses à ces questions pourraient se révéler particulièrement pertinentes.

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<sup>108</sup> CR 2017/7, p. 26-27, par. 27, p. 30, par. 38 (Sergio Ugalde) ; CR 2017/9, p. 11, par. 3 (Kohen).

<sup>109</sup> MCR, vol. I, par. 2.13. Voir aussi la note (ECRICOL-13-097) en date du 27 février 2013 adressée par l'ambassadeur du Costa Rica au bureau du ministère des affaires étrangères de la Colombie (MCR, vol. II, annexe 18).

<sup>110</sup> CR 2017/7, p. 26-27, par. 27 (Ugalde).

34. Quoi qu'il en soit, il convient de noter que la simple idée de s'entendre sur une patrouille conjointe dans la mer des Caraïbes, ainsi que sur d'autres questions à inclure dans un «nouveau» traité de coopération maritime, suffit à montrer que, en dépit des affirmations selon lesquelles l'acceptation par la Cour des prétentions du Nicaragua, prétendument, ruinerait la relation de voisinage établie par le traité de 1977<sup>111</sup>, le Costa Rica tente en réalité de maintenir un voisinage direct avec la Colombie.

35. En outre, lorsqu'on considère d'autres réactions de la Colombie face aux conséquences de l'arrêt sur le traité, il semble peu probable que Bogotá ait pu accepter comme un fait évident les arguments du Costa Rica selon lesquels la décision de la Cour rendait le traité «impraticable et sans effet».

36. En fait, dans une note en date du 14 mars 2016 adressée au Greffe de la Cour par le ministère des affaires étrangères, la Colombie a souligné qu'en l'espèce, chacune des deux Parties avait fait valoir sa position en ce qui concerne le statut et la portée du traité et avait formulé des revendications quant aux frontières situées dans les zones couvertes par cet instrument. La Colombie a observé que :

«à la lumière du fait que la Colombie n'est pas partie à la procédure, la Cour n'a pas compétence à se prononcer sur les relations juridiques entre la Colombie et le Costa Rica, y compris le statut, la signification et la portée des droits et obligations de ces derniers en vertu du traité de 1977»<sup>112</sup>.

37. Certes, la Cour ne peut pas se prononcer, mais elle ne peut pas l'ignorer non plus. La Colombie a fortement insisté sur le fait que le Costa Rica est tenu par le traité comme conséquence de son propre comportement pendant plus de trois décennies en dépit de sa non-ratification. C'est pourquoi la manifestation de son intention de ne pas ratifier le traité est tardive et elle ne peut produire les effets voulus. L'obligation récusée a été déjà générée par une autre voie.

38. En outre, le Costa Rica a expressément réservé sa position en ce qui concerne les questions soulevées dans la note colombienne, et il semblait un peu inquiet quant à la possibilité de

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<sup>111</sup> CR 2010/12, p. 19, par. 18 (Edgard Ugalde) ; CR 2010/15, p. 14-15, par. 12 (Lathrop).

<sup>112</sup> S-DVAM-16-024745, communiquée au Nicaragua par le greffier, lettre n° 146744 en date du 16 mars 2016.

la formulation par la Colombie d'une requête d'intervention lorsqu'il s'est dépêché de constater que, à son avis, la procédure écrite était close<sup>113</sup>.

39. Monsieur le président, le traité de 1977 [projection n° 3] n'est impraticable que dans la mesure où la Cour refuse d'attribuer au Costa Rica des zones maritimes situées au nord et à l'est de la délimitation convenue à l'article I<sup>er</sup> du traité. Si les espaces reconnus au Nicaragua face à la Colombie par l'arrêt de 2012 étaient maintenant attribués au Costa Rica, il ne serait pas impossible d'appliquer le traité [fin de la projection n° 3].

40. Comme l'a noté la Cour dans ledit arrêt, «le traité entre la Colombie et le Costa Rica, qui à ce jour n'a pas été ratifié, vaut à tout le moins reconnaissance potentielle des prétentions colombiennes sur la zone située au nord et à l'est de la ligne frontière qu'il définit»<sup>114</sup>.

41. Les conséquences de l'arrêt de 2012 pourraient ne pas être celles que le Costa Rica imagine *pro domo sua*. Le scénario prometteur pourrait déboucher sur un autre différend, cette fois entre la Colombie et le Costa Rica sur la «dévolution» à la Colombie de ce qui, d'après ce traité, lui appartient — et que la Cour, dans la délimitation maritime avec le Costa Rica, n'aurait pas attribué au Nicaragua.

### III. LE TRAITÉ DU 2 FÉVRIER 1980 ENTRE LE COSTA RICA ET LE PANAMA

42. Monsieur le président, je vais maintenant m'occuper du traité du 2 février 1980 entre le Costa Rica et le Panama. Il n'est pas difficile de découvrir la raison pour laquelle le Costa Rica essaie de l'éviter. L'article I<sup>er</sup> du traité établit comme limite dans la mer des Caraïbes une ligne droite, allant de la fin de la frontière terrestre [projection n° 4] à un point «où les limites du Costa Rica, de la Colombie et du Panama se croisent»<sup>115</sup>.

43. Cette disposition, d'une importance capitale, incarne une reconnaissance sans ambiguïté de l'existence, et de la permanence, d'une ligne de délimitation maritime entre le Costa Rica et la Colombie, en conformité avec le traité de 1977 — un segment de cette ligne montant jusqu'à un

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<sup>113</sup> Lettre du 30 mars 2016 (réf. ECRPB-017-2016), communiquée au Nicaragua par le greffier, lettre n° 146773 datée du même jour.

<sup>114</sup> *Différend territorial et maritime (Nicaragua c. Colombie), arrêt, C.I.J. Recueil 2012 (II)*, p. 707, par. 227.

<sup>115</sup> Article I<sup>er</sup>.1 du traité (les italiques sont de nous).

point situé à la latitude 11° 00' 00" Nord, longitude 81° 15' 00" Ouest, qui est le point final de la ligne divisoire entre la Colombie et le Panama [fin de la projection n° 4].

44. Durant la procédure orale sur l'admission de la requête à fin d'intervention dans l'affaire entre le Nicaragua et la Colombie, le conseil du Costa Rica a tenté d'édulcorer la prescription de l'article I<sup>er</sup> du traité de 1980 en se référant à elle comme «a notional tripoint», un tripoint *hypothétique*<sup>116</sup> — affirmation qui a alors été fortement réfutée par la Colombie qui a précisé que «(t)here was in fact nothing notional about it» («qu'il n'y avait, en réalité, rien d'hypothétique à ce sujet»)<sup>117</sup>.

45. La Colombie a été très précise sur ce point. Selon les termes employés par M. Bundy, «en se référant, dans leur traité, aux frontières du Costa Rica et de la Colombie se rejoignant en ce tripoint, le Costa Rica et le Panama ont reconnu l'existence d'une frontière entre la Colombie et le Costa Rica»<sup>118</sup>.

46. En outre, personne ne pouvait être surpris par le fait que, pour la Colombie, le traité de 1977 était intouchable dans la mesure où cet instrument constitue une sorte de lien dans la chaîne harmonique des traités conclus entre la Colombie et le Panama (1976) et le Costa Rica et le Panama (1980). «Les trois accords — comme l'a dit le conseil colombien — ... sont étroitement liés les uns aux autres.»<sup>119</sup>

47. Le Costa Rica lui-même semble séduit par cette idée [projection n° 5 : CMN, annexe 29, II.c.3, p. 353] quand on considère la ligne qu'il propose pour tracer la limite orientale de la zone maritime pertinente, une ligne qui est la prolongation de la ligne de démarcation établie par le traité de 1980 en vigueur entre le Costa Rica et le Panama. Tout ce qui se trouve à l'est de cette ligne correspond à une zone convenue comme colombienne par le traité de 1976 entre la Colombie et le Panama [fin de la projection n° 5]. Monsieur le président, il n'est pas superflu de noter qu'à l'occasion de la requête à fin d'intervention dans le différend territorial et maritime entre le Nicaragua et la Colombie [projection n° 6], le Costa Rica avait intégré cette zone dans la zone dans

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<sup>116</sup> CR 2010/12, par. 10 (Brenes).

<sup>117</sup> CR 2010/14, par. 46 (Bundy).

<sup>118</sup> CR 2010/14, par. 47 (Bundy).

<sup>119</sup> CR 2010/14, par. 16 (Bundy). Voir aussi par. 27, 39, 46-48.

laquelle il prétendait avoir un intérêt d'ordre juridique susceptible d'être affecté par la décision de la Cour<sup>120</sup> [fin de la projection n° 6].

48. Le tripoint établi à l'article I<sup>er</sup> du traité de 1980 reste en vie. Il invite au voisinage maritime avec la Colombie. C'est un point d'interaction fatal. La ligne proposée par le Costa Rica pour tracer la limite orientale de la zone maritime pertinente ne fait que l'encourager. Demain, mon collègue Paul Reichler s'arrêtera sur ce scénario.

#### IV. Conclusions

49. Monsieur le président, Mesdames et Messieurs les juges, attribuer au Costa Rica des espaces dont la Cour a décidé en 2012, face à la Colombie, qu'ils appartenaient au Nicaragua, serait déstabilisant, mais aussi inéquitable. Déstabilisant, car cela conduirait à de nouveaux litiges [projection n° 7]. Que se passe-t-il entre le point final de la frontière avec le Nicaragua que le Costa Rica propose en l'espèce et le point final de sa frontière avec le Panama, le célèbre tripoint où démarrait la frontière avec la Colombie ? Inéquitable aussi parce que le Costa Rica s'est délibérément impliqué dans une stratégie conçue pour tisser, plus qu'un réseau, une toile d'araignée qui piégerait le Nicaragua dans le fameux 82<sup>e</sup> méridien, une stratégie déjà discréditée par l'arrêt de 2012 [fin de la projection n° 7].

50. Contrairement à ce que le Costa Rica prétend<sup>121</sup>, Monsieur le président, il n'existe pas de *vide* possible dans les espaces attribués à la Colombie en vertu du traité de 1977 et au Nicaragua dans l'arrêt de 2012. Il ne s'agit pas non plus d'une subrogation ou d'une succession du Nicaragua dans les prétendus droits conventionnels de la Colombie, comme on l'a dit mardi dernier<sup>122</sup>. Le Nicaragua a toujours maintenu ses titres vis-à-vis de la Colombie et le Costa Rica en était parfaitement conscient. Le Costa Rica a soutenu la Colombie jusqu'à nos jours et, une fois que la Cour a rejeté les titres de la Colombie vis-à-vis du Nicaragua, il semble inapproprié que le Costa Rica réclame une partie substantielle de l'*acquis* nicaraguayen.

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<sup>120</sup> *Différend territorial et maritime (Nicaragua c. Colombie), requête du Costa Rica à fin d'intervention, arrêt, C.I.J. Recueil 2011 (II)*, p. 366.

<sup>121</sup> CR 2010/15, p. 15-16, par. 14 (Lathrop).

<sup>122</sup> CR 2017/9, p. 11, par. 3, p.14, par. 12, p. 18, par. 25 (Kohen).

51. Une fois que la délimitation maritime entre le Nicaragua et la Colombie a exclu la juridiction colombienne des espaces situés au nord et à l'est de la ligne du traité de 1977, ces espaces sont entrés dans le champ des droits souverains nicaraguayens. C'est la seule solution logique, conforme aux principes de certitude, de sécurité et d'équité requis dans le processus de délimitation. Mesdames et Messieurs les juges, il serait difficile d'expliquer comment, alors que le Costa Rica a reconnu à la Colombie un titre meilleur que le sien sur des espaces que la Cour a considéré qu'ils ne pouvaient pas appartenir à la Colombie face au Nicaragua, il prétend désormais à un meilleur titre sur ces mêmes espaces.

52. Ainsi, les droits du Costa Rica en vertu du traité de 1977 et les droits du Nicaragua, conformément à l'arrêt de 2012, sont respectés, et on pourrait même dire les droits du Panama. Si le droit de la Colombie est reconnu par le Costa Rica en vertu du traité de 1977 et que le titre du Nicaragua prévaut sur le titre colombien, le seul moyen d'éviter une situation absurde est de reconnaître que les espaces actuellement revendiqués par le Costa Rica appartiennent au Nicaragua. Nous montrerons d'ailleurs positivement, dans la suite de ces plaidoiries, que le Nicaragua a indiscutablement un titre sur les espaces maritimes en question.

53. Quel que soit le statut du traité de 1977, les intérêts d'ordre juridique du Costa Rica ont été scellés par ledit traité. Ces intérêts n'ont pas été affectés par l'arrêt de la Cour de 2012. Le Costa Rica lui-même avait reconnu, dans la réponse à une question formulée par le juge Bennouna, que le traité de 1977 «ne constituait pas par lui-même un intérêt d'ordre juridique susceptible d'être affecté par la décision de la Cour en l'affaire»<sup>123</sup>. Dans l'arrêt du 4 mai 2011, la Cour a pris note de cette position et a considéré qu'il n'était pas dès lors nécessaire d'examiner si, comme l'avait soutenu auparavant le Costa Rica, l'acceptation des prétentions du Nicaragua aurait comme conséquence que «toute la base sur laquelle la ligne de 1977 a été négociée pourrait être anéantie par la création d'une zone d'eaux non colombiennes juste au nord et à l'est de cette ligne, ce qui viderait de son sens l'accord conclu entre le Costa Rica et la Colombie»<sup>124</sup> ; la Cour en a tiré la

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<sup>123</sup> *Différend territorial et maritime (Nicaragua c. Colombie), requête du Costa Rica à fin d'intervention, arrêt, C.I.J. Recueil 2011 (II), p. 369, par. 71.*

<sup>124</sup> *Différend territorial et maritime (Nicaragua c. Colombie), requête du Costa Rica à fin d'intervention, arrêt, C.I.J. Recueil 2011 (II), p. 368-369, par. 70-71.*

conséquence qu'il n'était pas non plus nécessaire d'examiner les arguments présentés en réponse par le Nicaragua ou la Colombie<sup>125</sup>.

54. Comme le soutient d'ailleurs le Costa Rica dans son mémoire, un Etat peut ne pas avoir titre à un espace maritime «parce qu'il est au-delà d'une frontière délimitée avec un Etat voisin»<sup>126</sup> [projection n° 8 : MCR, croquis 2.3, p. 10] ; dans les Caraïbes, selon le Costa Rica, «il y a des frontières maritimes établies avec des Etats tiers, lesquelles affectent la zone en question : une frontière judiciaire déterminée (entre le Nicaragua et la Colombie) et une frontière convenue (entre le Costa Rica et le Panama)»<sup>127</sup>.

55. Monsieur le président, la mémoire est étrangement sélective [projection n° 9]. Le Costa Rica oublie — ou préfère ignorer — l'existence d'une autre frontière, celle convenue avec la Colombie [fin des projections n<sup>os</sup> 8-9].

Monsieur le président, Mesdames et Messieurs les juges, ici se termine ma plaidoirie d'aujourd'hui. Votre attention, dont je vous remercie, est ma récompense. Je vous prie Monsieur le président, d'appeler à la barre l'ambassadeur Carlos Argüello pour la suite de la présentation de la position du Nicaragua.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. Je donne maintenant la parole à S. Exc. M. l'ambassadeur Argüello, l'agent du Nicaragua. Monsieur l'ambassadeur, vous avez la parole.

Mr. ARGÜELLO GOMEZ:

**THE STARTING POINT OF THE MARITIME DELIMITATION  
AND THE LAND BOUNDARY TERMINUS**

1. Mr. President, Members of the Court, my task at this point it is to address the Court as counsel for Nicaragua on the question of the starting-point of the maritime delimitation and that of the land boundary. In doing so, I will attempt to answer part of the question posed to the Parties by the Court and Professor Lowe will go into further details tomorrow morning.

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<sup>125</sup> *Différend territorial et maritime (Nicaragua c. Colombie), requête du Costa Rica à fin d'intervention, arrêt, C.I.J. Recueil 2011 (II), p. 369, par. 72.*

<sup>126</sup> *Délimitation maritime (MCR, par. 4.11).*

<sup>127</sup> *Délimitation maritime (MCR, par. 4.12).*

2. Although the maritime delimitation case has been joined with that of the dispute over the land boundary, it will be useful to address them separately.

### **I. The starting-point of the delimitation**

3. The question that will be addressed in this presentation is first of all a legal question that can only be adequately answered by looking at the documents that determine the limits between both Parties. The reference is to the three basic documents at play here: the 15 April 1858 Treaty of Limits, the 22 March 1888 Cleveland Award on the correct understanding of this treaty and the First Alexander Award of 30 September 1897, that dealt with the question of the starting-point of the boundary. [Slide 1 on]

Article II of the 1858 Treaty stated:

“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 . . .”<sup>128</sup>

4. The Cleveland Award reaffirmed this but with some additions. On point No. 1 of the third operative part of the award, it decided that, [Slide 1 on]

“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”<sup>129</sup>.

5. President Cleveland thus reiterated the provision of the treaty that the starting-point of the boundary was located in the “the extremity of Punta de Castilla at the mouth of the San Juan de Nicaragua River” but he added [Slide 1 on] “*as they both existed on the 15th day of April 1858*”. This addition by President Cleveland was understood by the Parties in different ways — that might even seem ironical in the present circumstances — and that I will address presently.

6. The second addition by President Cleveland was that: “The ownership of any accretion to said Punta de Castilla is to be governed by the laws applicable to that subject.” This addition did

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<sup>128</sup>Treaty of Limits 1858 (MCR, Ann. 1).

<sup>129</sup>Cleveland Award 1888: *RIAA*, Vol. XXVIII, p. 209.

not cause any disputes because no accretions have occurred. The only changes have been decrections caused by erosion. This has been recognized by Costa Rica<sup>130</sup>. [Slide 1 off]

7. Mr. President, some years after the Cleveland Award was delivered, both parties signed a convention on 27 March 1896 whereby they bound themselves to appoint a commission “for the purpose of duly defining and marking out the dividing line . . . according to the stipulations of the Treaty of 15 April 1858 and the award of . . . Mr. Grover Cleveland”<sup>131</sup>. The Convention further provided that this commission “shall include an engineer appointed by the President of the United States . . . whose mandate shall include . . . resolv(ing) any dispute between the Commissions of Costa Rica and Nicaragua arising from the operations”<sup>132</sup>.

8. The commission inaugurated its operations on 15 May 1897 with the presence of General E.P. Alexander who was the engineer-arbitrator appointed by the President of the United States in accordance with Article II of the 1896 Convention. During the second meeting of the commission, in accordance with the minutes No. II of 5 June 1897<sup>133</sup>, it was decided that since the Parties were not in agreement on the interpretation of Article II of the 1858 Treaty that established the starting-point of the demarcation line, they were to present to the arbitrator their different points of view in writing.

9. The written statements of the parties are not only interesting in themselves because they clarify the positions of the parties but, more importantly, they clarify the intention and the reasoning of the First Alexander Award.

10. The Nicaraguan understanding of the 1858 Treaty and the Cleveland Award was that the starting-point was not a fixed point but that it changed with the changes of the San Juan River. Costa Rica, on the other hand, considered that the starting-point was immovable.

11. In the words of the Nicaraguan Commissioners, addressed to General Alexander: [Slide 2 on]

“What are the words of Article II which the Costa Rica Commission could quote to show that the intention of the parties was to designate a fixed point? Punta

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<sup>130</sup>CR 2017/8, p. 53, para. 37 (Brenes).

<sup>131</sup>Article 1 of the Convention of 27 Mar. 1896, *RIAA*, Vol. XXVIII, p. 211.

<sup>132</sup>Article 2 of the Convention of 27 Mar. 1896, *RIAA*, Vol. XXVIII, p. 212.

<sup>133</sup>Minutes included in Costa Rica’s judges’ folder, 11 Jan. 2011.

Arenas is not immovable, nor could the banks of the river have that property. And if it was to Punta Arenas that the Treaty referred, it is obvious that it was not fixed but a variable point that was intended.

.....  
“If, therefore, there is nothing which indicates the intention of the contracting parties to have any but a natural boundary, such as the right bank of the river that divides the territories; it follows that the boundary, and its point of departure, must suffer the changes to which boundaries of this kind are subject”<sup>134</sup>. [Slide 2 off]

12. Costa Rica’s submission for its part clearly stated that if there was any difficulty in ascertaining the starting-point, it is [Slide 3 on]

“(p)urely one of fact, to wit: to ascertain with mathematical precision, the geographical point occupied by the extremity of Punta Castilla on the 15th of April 1858. Having determined this, all difficulty disappears, and the place found, will undoubtedly be, the starting point of the boundary line, as if in this place the mouth of the river would be open at the present moment, or even though said place should now be found on dry ground, as a consequence of the changes which the neighbouring lands and waters have undergone during the space of nearly 40 years that have elapsed since the signing of the Treaty of Limits up to the present time.”

“That the place called *Extremity of Punta de Castilla*, starting point of the boundary line, should be located at the same place where it existed when the Treaty of Limits was signed, that is under the same degree of Longitude and Latitude corresponding to the right bank of the mouth of the San Juan river at that time . . .

“That the changes that have taken place in the Port of San Juan del Norte, whatever may have been their nature, do not produce the effect either of changing the situation of Punta de Castilla, starting point of the boundary line, nor the effect of changing the demarcation of said line”<sup>135</sup>. [Slide 3 off]

End of quote by the Costa Rican Commissioners.

13. Mr. President, if there had been no decision, no award by General Alexander, these statements might be appreciated today mainly for their historic but not necessarily their legal interest. States like individuals might change their minds. But General Alexander agreed with Costa Rica and decided that the starting-point was fixed and he proceeded to locate it on the ground, erected a boundary marker in place and cross-referenced it to the main square in the only town in the neighbourhood: the centre of Plaza Victoria in Greytown, Nicaragua.

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<sup>134</sup>Nicaraguan Reply of 30 June 1897 to the Statement of 14 June 1897 of the Costa Rica Commission, Institutional Memory of the Ministry of Foreign Affairs of Costa Rica 1898, p.185, available at <http://www.asamblea.go.cr/sd/Memoriasgobierno/Memoria%20Ministerio%20de%20Relaciones%20Exteriores%20y%20Culto%201898-4.pdf>

<sup>135</sup>Exposition submitted by Costa Rica to Alexander on 14 June 1897, Institutional Memory of the Ministry of Foreign Affairs of Costa Rica, 1898, p.134 available at <http://www.asamblea.go.cr/sd/Memoriasgobierno/Memoria%20Ministerio%20de%20Relaciones%20Exteriores%20y%20Culto%201898-4.pdf>

14. To leave no doubt on this point, I shall first review the award itself and then the statements and actions of the parties as reflected in the minutes of the meetings of the Commission with General Alexander. First, the Award of 30 September 1897 itself.

15. The first thing that results from reading the award is that General Alexander was not looking for the mouth of the river but for the location of Punta Castilla. Mr. Wordsworth contradicts this arguing that Punta de Castilla was a point of no importance<sup>136</sup>. He attempts to deduce from this that the mention of this point in the treaty was of no consequence since the real intention was that the river mouth was to be the boundary. But the arbitrator was of quite a different opinion. He took great pains in identifying where this *punta* was located, where its name was cited or not cited by the learned authorities of his time. This included reviewing different authors, surveyors and map makers, all of which he carefully details in his award<sup>137</sup>. If it had been a question of identifying the location of the mouth of the river the only consideration would have been a walk along the beach to determine where the river reached the sea.

16. The decision of the arbitrator was that “generally the mainland of Harbor Head (is) the location of the initial point of the boundary line . . .” but that “it now becomes necessary to specify more minutely, in order that the said line may be *exactly located and permanently marked*”<sup>138</sup>. That the said line may be *exactly located and permanently marked*. His position couldn’t be more exactly expressed or clearly marked.

17. General Alexander did not try to identify in his Award “[t]he exact spot which was the extremity of the headland of Punta de Castilla”<sup>139</sup> on 15 April, since this spot “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”<sup>140</sup>. At this point it should be noted that the reason why he was not attempting to reconstruct the exact spot in his Award was not because the boundary had changed or that it had to follow the changing course of a river. The reason was that he had no way of locating this exact spot. That is, if there had

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<sup>136</sup>CR 2017/08, p. 23, para. 12 (Wordsworth).

<sup>137</sup>Award of 30 Sep. 1897, *RIAA*, Vol. XXVIII, pp. 219-220.

<sup>138</sup>*Ibid.*, Vol. XXVIII, p. 219.

<sup>139</sup>Award of 30 Sep. 1897, *RIAA*, Vol. XXVIII, p. 220.

<sup>140</sup>*Ibid.*

been maps or ways of locating this exact spot, he would have done so even if it was out at sea. But he determined that it simply was not possible to do so. Under these circumstances he decided that “it best fulfils the demands of the treaty and of President Cleveland’s award to adopt what is practically the headland of today, or the northwestern extremity of what seem to be the solid land, on the east side of Harbor Head Lagoon”<sup>141</sup>.

18. The operative part of the First Alexander Award makes it even clearer that he was not looking for the mouth of the river in 1897. He determined that the coast at the eastern extremity of Harbor Head Lagoon was Punta de Castilla, and from there “the boundary 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”<sup>142</sup>. It is then clear that the starting-point is not located at the mouth of the river since the border follows the water’s edge around the lagoon and then it follows a channel (or caño) until it reached the river proper wherever this “river proper” is located. What Costa Rica is requesting now, 120 years later, is that the delimitation should start at what it considers the mouth of the “river proper”, wherever this is located at any point in time.

19. After the Alexander Award was rendered, the reaction and statements of the Parties leave no room for doubt that they understood that General Alexander’s Award had determined a specific and immovable spot as the starting-point of the boundary, as Costa Rica had then advocated.

20. Minutes No. VI of the meeting of the Commission on 2 October 1897<sup>143</sup> indicate that after having inspected personally the place selected by the Arbitrator as the starting-point of the line of delimitation, the “Arbitrator fixed the point for the erection of the monument that will serve as boundary marker in the Atlantic Coast”<sup>144</sup> and gave the method for its identification and the type of marker that should be installed.

21. In Minutes No. X of 2 March 1898, it is reported that the Commission proceeded to “fix the monument that determines the point of departure of the dividing line on the Caribbean Coast, relating it to the centre of Plaza Victoria of San Juan del Norte (Greytown)”<sup>145</sup>. The Minutes then

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<sup>141</sup>*Ibid.*

<sup>142</sup>*Ibid.*

<sup>143</sup>CMN, Ann. 4.

<sup>144</sup>*Ibid.*

<sup>145</sup>*Ibid.*, Ann. 5.

proceed to transcribe the astronomic information necessary for this connection between Plaza Victoria and the point of departure. It must be noted that at this point the monument was just being placed on the ground and the only reason for relating it to or connecting it with the location of the centre of Plaza Victoria was precisely because if there were to be any changes to the monument, its position could be reconstructed. As an experienced engineer, General Alexander had anticipated that there could be changes along the coastline and that since the starting-point was a fixed, immovable point, it had to be backed up in case of any changes<sup>146</sup>.

22. General Alexander's decision to relate or connect with Plaza Victoria the spot where the first marker was located proved his foresight. Minutes No. XVI of 13 June 1899<sup>147</sup> indicate that this first marker had been overturned (*volcado*) by the sea, and that since both commissions wanted to preserve this marker as the initial point of the delimitation line, they decided to reconstruct it at a point that would protect it from the invasions of the sea, and connect it geodesically with the spot it had previously occupied. The method to be followed in order to do this would be explained in a following meeting.

23. Thus, in Minutes No. XX of 19 August 1899 it is stated that [Slide 4 on]

“Considering that the initial marker, placed near Punta de Castilla, has completely disappeared due to the force of nature and the sea, and that the location of Punta de Castilla and the initial marker must be preserved, and provide easy means for the exact location of those points at any moment.”<sup>148</sup>

In order to be able to maintain that position, it was agreed at Costa Rica's request to erect three auxiliary markers in the spots indicated in those same Minutes. [Slide 4 off]

24. The Note sent by the Costa Rican Commissioner, to his Minister for Foreign Affairs, a few days after the decision reflected in [Minutes] No. XX, on 25 August 1899, explains the reason why the Costa Rican Commissioner had insisted that these auxiliary markers be placed even though a marker already existed connecting the spot to Plaza Victoria. The Costa Rican Commissioner informed the Minister that [Slide 5 on]:

“In order to avoid in the future jurisdictional problems that might arise, and given the evident importance that preserving the exact location of Punta de Castilla, I

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<sup>146</sup>Minutes No. XV of 23 Dec. 1898 inform that after the inscriptions were made on the initial marker, additional points of reference were constructed in Harbor Head and in Plaza Victoria, CMN, Ann. 7.

<sup>147</sup>CMN, Ann. 8.

<sup>148</sup>CMN, Ann. 9.

(the Commissioner) have considered not only convenient but indispensable that that point be fixed in the clearest and most precise way . . .”<sup>149</sup>

25. The Commissioner goes on to explain that even though important Costa Rican personalities had considered that since there was already a marker in Plaza Victoria, they did not see the need for erecting other markers, his opinion was different. The Costa Rican Commissioner explained to the Foreign Minister, that after having studied the spot of Plaza Victoria marker, “it can be clearly inferred that that marker, after a very intensive study, would only give an approximate position for Punta de Castilla and, therefore, it should be kept in order to make use of it in a remote eventuality”<sup>150</sup>. Mr. President, we are now faced precisely with that remote eventuality pointed out by the Costa Rican Commissioner 120 years ago. [Slide 5 off]

26. This situation became clear when the experts appointed by the Court were not able to locate the auxiliary markers that were placed at the request of the Costa Rican Commissioner on 19 August 1899, and it became necessary for them to use the centre of Plaza Victoria for the calculation of the marker set at the starting-point to the delimitation by General Alexander. Although the experts were not able to locate the marker placed at the centre of Plaza Victoria, they were able to determine its location “with an acceptable degree of accuracy for the objectives” of their report<sup>151</sup>. In fact, the co-ordinates calculated for Punta de Castilla based on the triangulation of the location of the centre of Plaza Victoria was made with an “error margin associated with the location of these points (that) can be grossly estimated at 20 m”<sup>152</sup>.

27. At this juncture it is useful to note that when the auxiliary markers were placed, the original marker had been washed out to sea. So, how was the position of that marker determined? Naturally, it was referenced to the marker at the centre of Plaza Victoria, the location of which had been determined when the original marker was still in place. This is precisely what the experts appointed by the Court have done today with a margin of error of only 20 m.

28. Mr. President, the conclusions that can be reached from the above are:

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<sup>149</sup>Institutional Memory of the Ministry of Foreign Affairs of Costa Rica 1900, p. 84, available at: <http://www.asamblea.go.cr/sd/Memoriasgobierno/Memoria%20Ministerio%20de%20Relaciones%20Exteriores%20y%20Culto%201900-2.pdf>.

<sup>150</sup>*Ibid.*

<sup>151</sup>Expert Opinion, para. 174.

<sup>152</sup>Expert Opinion, para. 183.

- That the starting-point of the delimitation was located at sea and not on land and that the Bilateral Commission (Costa Rica/Nicaragua) assisted by the arbitrator determined its exact position on 19 August 1899<sup>153</sup>.
- That the location of the starting-point of the delimitation was considered fixed and immovable by the arbitrator and the Parties.
- That this location can be established today with sufficient accuracy for the purposes of these joined cases.
- That the location of this point at sea makes it not only the unquestionable fixed point for starting the maritime boundary, but also the *most appropriate* for avoiding the instability of the Caribbean coast.
- That the existence of this point makes it unnecessary to look for other possible alternatives out at sea and provides an adequate response to the question of the Court.

29. Mr. President, the response of Costa Rica to that question posed by the Court was given by Mr. Brenes. He stated that the starting-point should be located on land at the right bank of the present-day mouth of the San Juan River and gave the co-ordinates of that starting-point<sup>154</sup>. Mr. Lathrop, for his part, after reaffirming the position stated by Mr. Brenes, explained that if the Court decided to select a point out at sea, the appropriate point could be located 3 miles out at sea fronting the present position of the mouth of the San Juan River. He added that any changes in the mouth would be followed by changes of the direction of the line from the fixed point out at sea to the position of the mouth of the river at any given moment<sup>155</sup>.

30. The solution proposed by Costa Rica, firstly, goes directly against the provisions of the First Alexander Award which are binding on the Parties to this case. Secondly, it simply fixes for all time a starting-point for the maritime delimitation based on the present-day position of the San Juan. Yet, according to the experts, the river mouth will migrate substantially to the east, possibly all the way to Harbor Head Lagoon<sup>156</sup>. It makes little sense.

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<sup>153</sup>Proceedings XX, CMN, Ann. 9.

<sup>154</sup>CR 2017/8, p. 52, para. 34 (Brenes).

<sup>155</sup>CR 2017/9, pp.40-41, paras. 21-22 (Lathrop).

<sup>156</sup>Expert Opinion, para. 195.

31. The cases before the Court that have been joined involve first, a maritime delimitation in the Caribbean and, second, the land boundary in what the Court has called “the Northern Part of Isla Portillos”<sup>157</sup>. On the question of the names, there is a footnote placed there indicating that Costa Rica understood in the nineteenth century that that area was called Punta de Castilla and not Isla Portillos. The footnote explains the situation.

32. Mr. President, it is indisputable that the starting-point is applicable both to the maritime delimitation and to the land boundary. The difference is that the maritime delimitation, without having to resolve any special technical problems, should start at the exact point determined by Alexander during the exercise of his mandate as engineer-arbitrator. On the other hand, the land point is not a fixed point since the starting-point located out at sea has to be related to a changing coastline; that is, brought to a point on the present coastline.

33. In specific regard to the starting-point for the maritime boundary, the answer given by the Court-appointed experts to the Court’s fourth question is particularly illuminating. The Court asked, and I quote: “To what extent is it possible, or probable, that the area concerned will undergo major physical changes in the short and long term?”<sup>158</sup>

34. The experts noted that these changes might include the “reduction in the extent of Los Portillos/Harbor Head Lagoon, and eventually its disappearance”<sup>159</sup> but at the same time indicated

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<sup>157</sup>Nicaragua did not wish to create any special incident on the question of the name assigned to this case that might waste the Court’s time on discussions of matters of mainly historical meaning. But since Costa Rica places or misplaces importance on the name “Portillos” as the name for the area in question, for the historic record this quote from the Statement presented by the Commissioners of Costa Rica to General Alexander on 14 June 1897 puts things to right:

“By (Punta de) Castilla it has been understood, and thus it is confirmed by the Treaty of Limits (Art. 5) the dry (solid) land to the east of the Lagoon today called Harbour Head that limits with the sea and extends until reaching the channel of the San Juan River known as the Taura.”

Since the land in dispute is to the west of Punta de Castilla (so called Isla Portillos by Costa Rica) it was never part of Punta Castilla or Isla Portillos. Institutional Memory of the Ministry of Foreign Affairs of Costa Rica 1898, p.133, available at <http://www.asamblea.go.cr/sd/Memoriasgobierno/Memoria%20Ministerio%20de%20Relaciones%20Exteriores%20y%20Culto%201898-4.pdf>

<sup>158</sup>Expert opinion, para. 191.

<sup>159</sup>Expert opinion, para. 193 (1).

that there could be an “[e]astward shift of the San Juan River mouth of around 1 km”<sup>160</sup> and consider it possible that “the lagoon might become the mouth of the river”<sup>161</sup>.

35. The possibility of major physical changes occurring in the area was also noted by independent experts several decades before the case presently began. In the well-known publication edited by Charney and Alexander — *International Maritime Boundaries* — in the first volume published in 1993, in the section analysing the boundaries in “Middle America and the Caribbean” we read, and I quote:

“Scholars who have begun to re-evaluate the geography of the isthmus in terms of potential maritime delimitations now point to the intensity of physical changes at the mouths of some boundary rivers (Coco between Honduras and Nicaragua and San Juan between Nicaragua and Costa Rica . . .)”<sup>162</sup>

So, at that time, they were considering the difficulties involved in the northern delimitation of Nicaragua with Honduras involving the River Coco and the southern delimitation involving the River San Juan.

36. When the *Nicaragua v. Honduras maritime delimitation* case was filed in December 1999, the Court was faced with this problem of “an uncertain land boundary terminus” and it decided that the delimitation would begin at some distance out at sea<sup>163</sup>. In the situation presented by that case, the Court had to use its best judgment and select and identify a starting-point located out at sea that would serve the purpose of avoiding a changing land terminus. In passing, I would note that this case was decided almost precisely ten years ago and that the maritime and land areas involved are more extensive than those presently at issue and, nonetheless, both countries, Nicaragua and Honduras, have lived with the situation without any problems of any nature and are actively seeking a bilateral agreement that is very near completion. That is why the

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<sup>160</sup>Expert opinion, para. 193 (2).

<sup>161</sup>Expert opinion, para. 195.

<sup>162</sup>Nweihed K., “Middle American and Caribbean Maritime Boundaries”, in *International Maritime Boundaries*, Charney and Alexander (eds.), p. 280.

<sup>163</sup>“That a delimitation may begin at some distance out at sea has found support in judicial practice in cases where there is an uncertain land boundary terminus (see, for example, *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*, Award of 14 February 1985).” *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007 (II), p. 756, para. 311.

statement by Mr. Lathrop<sup>164</sup> indicating that Costa Rica does not want a similar result with Nicaragua misses the real reason why this result would not be practical.

37. In the present circumstances we have a clearly unstable land boundary terminus and at the same *time a fixed and immovable point out at sea that was fixed as the starting-point of the delimitation* between Nicaragua and Costa Rica by an arbitral award rendered with full co-operation and participation and acceptance of the results by both parties 120 years ago.

38. The award by the arbitrator cannot be ignored or superseded by any other ruling. Besides, under the circumstances it would not be suitable for a permanent maritime delimitation to start at a more or less unstable land point that will inevitably change and occasion more unnecessary disputes.

39. The only logical conclusion is that the maritime delimitation should start exactly at the starting-point that has already been determined and identified for more than a century. If there was reason in the *Nicaragua v. Honduras* case for the Court to select a starting-point located out at sea, even where there was no arbitral award or agreement of the parties on such a starting-point, there are even more compelling reasons, in this case, to start the delimitation out at sea where precisely the starting-point is located in conformity with an arbitral award that the Parties have long accepted as binding.

40. Mr. Wordsworth attempted to find some support in the Second Alexander Award for the position that the starting-point was a variable point that followed the meanderings of the San Juan River<sup>165</sup>. This conclusion is not correct. The Second Award was rendered as a response to Costa Rica's proposal that the arbitrator should, and I quote: [Slide 7 on]

“proceed to the measurement of the line that ran from the starting point and continued along the shore of Harbour Head and thence along the shore around the harbour until it reaches the San Juan river proper by the first channel met and thence along the bank of the river to a point three miles below Castillo Viejo and that a map should be made of such line and that all of that should be set down in the daily record”<sup>166</sup>. [Slide 7 off]

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<sup>164</sup>CR 2017/9, p. 41, para. 21 (Lathrop).

<sup>165</sup>CR 2017/8, p. 214, para. 16.

<sup>166</sup>Award of 20 Dec. 1897, *RIAA*, Vol. XXVIII, p. 224.

The starting-point was not under discussion as the endpoint located three miles before Castillo Viejo was also not under discussion. A marker had been placed at the starting-point, as well as a marker at the point below Castillo Viejo, located more than 80 miles from the starting-point. No markers were placed along the bank of the river precisely because it was subject to change. A quick perusal of the Second and Third Awards makes this perfectly clear. If Costa Rica persists in this misreading of these awards, I will unfortunately have to waste the Court's time reading larger excerpts from these documents in the second round of oral proceedings.

## **II. The land boundary**

41. Mr. President, Members of the Court, the matter of the starting-point of the land boundary is different, but not entirely different from the maritime delimitation. It is not an exact location fixed by treaty or by an arbitral award but a variable location or spot on land that has to be determined with relation precisely to the starting-point out at sea.

42. The second question posed by the Court to the experts was addressed to the position of the starting-point on land. The Court asked, and I quote:

“What are the geographical co-ordinates of the land point which most closely approximates to that identified by the first Alexander Award as the starting-point of the land boundary?”<sup>167</sup>

43. The experts judiciously pointed out that in order to answer this question it was necessary to recall some historical and factual elements<sup>168</sup>. After this review, they indicated that the question can be interpreted — and thus answered — in two different ways<sup>169</sup>.

### **A. First alternative**

44. The first alternative that the experts mentioned is one that would follow the apparent reasoning of the arbitrator, General Alexander, who, faced with the fact that Punta de Castilla, as it was in 1858, had “long been swept over by the Caribbean Sea”<sup>170</sup>, decided, and I quote “to adopt what is practically the headland of today, or the northwestern extremity of what seems to be solid

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<sup>167</sup>Expert opinion, para. 119.

<sup>168</sup>Expert opinion, para. 120.

<sup>169</sup>Expert opinion, para. 129.

<sup>170</sup>Award of 30 Sep. 1897, *RIAA*, Vol. XXVIII, p. 220.

land, on the east side of Harbour Head Lagoon”<sup>171</sup> and proceeded to select that land point in 1897. The experts suggest that this could also be done today and point out that “[a]lthough the headland of Punta de Castilla has experienced significant retreat due to coastal erosion . . . it still exists as a geomorphic and geographical feature in the landscape”<sup>172</sup>. And therefore, this point could be determined as it exists today.

45. From the brief space dedicated in their report to this possibility it is apparent that the experts did not give it much consideration. In any case it really does not represent the arbitrator’s way of thinking nor what he decided in his award.

46. It is correct, as the experts indicate, that the arbitrator decided to select a then (1897) current land position for the starting-point in view of the fact that Punta de Castilla had suffered major changes since the Treaty of 1858. But the arbitrator made this decision, as he carefully points out, because there was “too little concurrence in the shore outline of the old maps to permit any certainty of statement of distance or exact direction to it (Punta Castilla in 1858) from the present headland”<sup>173</sup>. In other words, if he had sufficient elements to determine where that point had been located in 1858, he would have proceeded to do so.

47. If there is any question that this was General Alexander’s way of thinking, all doubts would be totally erased by the way he reacted when the marker he had placed on the starting-point he “adopted” was washed away at sea. The place where this marker was located, in spite of the fact that it had been washed out to sea, was maintained as the starting-point and there was no question of finding another appropriate spot on solid land. The difference was that, as he stated, he had no way of establishing the position of Punta Castilla in 1858 but he had a very clear way of establishing the position of the marker he had erected on 2 March 1898 since he had been very careful to refer its position to the location of the centre of Plaza Victoria.

48. In any case, to adopt as a starting-point for the delimitation a different point than that determined by the Alexander Award, would be in fact declaring that decision null and void or at least irrelevant, after being uncontested by the Parties for 120 years.

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<sup>171</sup>Award of 30 Sep. 1897, *RIAA*, Vol. XXVIII, p. 220.

<sup>172</sup>Expert opinion, para. 131.

<sup>173</sup>Award of 30 Sep. 1897, *RIAA*, Vol. XXVIII, p. 220.

## **B. Second alternative**

49. Therefore, for the determination of the land boundary it is necessary to bring the starting-point located at sea to the solid land on the coast. The experts appointed by the Court identify in their report “the closest land point to the locations estimated for the Initial Marker and Punta de Castilla”<sup>174</sup>. And point out that “the position of the closest land points changes due to the frequent variation in the spit-barrier of Los Portillos/Harbor Head Lagoon”<sup>175</sup>. The question of whether the land point has to be the closest to the starting-point located at sea is not an exclusively technical question but has to be resolved through a legal analysis of the pertinent documents and facts.

50. In any case, these are the facts garnered during their onsite visit by the experts. [Slide 8 on] The land points closest to the starting-point can be appreciated in figures 82 to 85 of their report on screen. In sum they represent a triangle formed by the starting-point at sea (the original marker, called *mojón inicial* in the graphics, that is the Alexander marker) and two sides reaching to the coastline which forms the base of the triangle. One of the sides of the triangle reaches the coastline at the north-east point of Harbor Head Lagoon (point PLE) that is contiguous to the headland of Punta de Castilla as indicated in paragraph 131 of the report. The other side of the triangle reaches the coast at a point located at the north-western section of Harbor Head Lagoon (point PLW). Between these two land points the experts draw another line from the starting-point to the coast that reaches the coast at a point located between these two points but closer to the eastern sector (point PLE). The point reached on the coast by this third line is between 10 and 15 per cent closer to the starting-point than the other two points. [Slide 8 off]

51. Mr. President, before even considering any response based on the legal documentation relevant to this case, it would seem that in a situation in which the closest land point “changes due to the frequent variation in the spit barrier of Los Portillos/Harbor Head Lagoon”<sup>176</sup>, a difference of 100 m in one case or the other should be, if at all, only a secondary consideration. By simply looking at the figures presented by the experts, it is evident that the only point that is not subject to “frequent variation” is the one that is not located in the spit barrier but rather next to what today is

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<sup>174</sup>Expert Opinion, para. 184.

<sup>175</sup>Expert Opinion, para. 184.

<sup>176</sup>Expert Opinion, para. 184.

the headland of Punta de Castilla<sup>177</sup>. The preservation of this point as the starting-point for the land boundary is important and practical. Punta de Castilla may have receded due to the effects of the sea between 1858 and 1898, and further retreated between 1898 and today, but it is still identifiable as pointed out by the experts. Thus, if there were no other considerations, the most practical and longer-lasting decision would be to select as the starting-point of the land boundary, the point located on the north-east side of Harbor Head Lagoon; that is, the point located next to what today is still the headland of Punta de Castilla.

52. Mr. President, but quite apart from the practical expediency of selecting a point located on the north-eastern margin of Harbor Head Lagoon, there is the legal consideration that the 1858 Treaty, the 1888 Cleveland Award and the 1897 Alexander Award, all place the starting-point at Punta de Castilla.

53. To choose the western or north-western margin of Harbor Head Lagoon or a point located along the spit barrier would simply go against the clear provisions of the Treaty and the awards.

54. To choose a starting-point not located on the north-eastern corner of Harbor Head Lagoon would directly contradict the Alexander Award of 30 September 1897. The operative part of this Award, often cited in this Great Hall, provides that:

“the initial line of the boundary (runs) as follows, to wit: [Slide 9 on]

Its direction shall be due northeast and southwest, across the bank of sand, from the Caribbean Sea into the waters of Harbor Head Lagoon . . . 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.”<sup>178</sup>

55. The first thing we perceive in this description is that the boundary line went across the sand barrier then in existence and directly into Harbor Head Lagoon since, as also indicated in the Award, “the mainland east of Harbor Head (is) the location of the initial point of the boundary line”<sup>179</sup>. This mainland east of Harbor Head was precisely Punta de Castilla.

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<sup>177</sup>Expert Opinion, para. 131.

<sup>178</sup>Award of 30 Sep. 1897, *RIAA*, Vol. XXVIII, p. 220.

<sup>179</sup>*Ibid.*, p. 219.

56. The other point in the Award is that after crossing the sand barrier “the boundary line shall turn to the left, or southeastward . . .”<sup>180</sup>. The only way the initial point of the boundary could “turn to the left, or southeastward” after reaching the initial point is if this point was located on the north-eastern extremity of the lagoon, on the western side of Punta de Castilla. Furthermore, this point could not be located on the present day spit barrier because it could then not turn to the left or “southeastward” because it would then be heading directly into the waters of the lagoon. [Slide 9 off]

57. Mr. President, so far we have reviewed the legal documents that have determined the starting-point of the line of delimitation and the contemporaneous conduct and positions of the Parties in relation to this question. We have also reviewed the physical changes in the area, particularly as reported by the Court’s experts.

58. Now we will review the present-day position of Costa Rica, that is, until three years ago when it radically changed its long-held position. This long-held position can be verified by reviewing the position of Costa Rica in all the cases brought before this Court prior to the present ones. Apart from these last, Costa Rica had filed two cases against Nicaragua and requested intervention in another. The following is the position held by Costa Rica in those instances by chronological order.

### **C. Cases before the Court**

59. [Slide 10 on] In the *Navigational Rights* case (*Costa Rica v. Nicaragua*), Costa Rica, like Nicaragua, and I should mention that this case began in 2005, Costa Rica, like Nicaragua understood that the starting-point of the land boundary was — and is — located at the north-east corner of Harbor Head Lagoon. This is evident from the position it adopted before this Court as can be appreciated in the map presented by Costa Rica in its Memorial in the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* on 26 August 2006. [Slide 10 off]

60. Another clear example is the case concerning the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*. In 2011 Costa Rica filed an Application for permission to intervene<sup>181</sup>.

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<sup>180</sup>*Ibid.*, p. 220.

<sup>181</sup>*Territorial and Maritime Dispute (Nicaragua v. Colombia), Application for Permission to Intervene, Judgment, I.C.J., Reports 2011*, p. 348 and p. 420.

61. During the oral pleadings on intervention counsel for Costa Rica, projected a map that “show[ed] two very different lines extending from the Costa Rica-Nicaragua land boundary terminus at Punta Castilla”<sup>182</sup>.

62. In its Memorial in the *Certain Activities* case, Costa Rica stated that “[o]f the five Awards rendered by Alexander, the first and the second are of particular importance because they established not only the location of the starting-point of the boundary at Punta Castilla, but also the boundary in the region of Isla Portillos and Laguna Los Portillos”<sup>183</sup>.

63. [Slide 11 on] Also, Annex 179 to Costa Rica’s Memorial in the *Certain Activities* case is revealing — a Memorial, I must recall, filed just five and a half years ago — as it clearly depicts the location of Punta de Castilla and the direction of the land boundary as was understood by Costa Rica for over 100 years. The map is on the screen and in the judges’ folder. [Slide 11 off]

#### **D. Meetings of the Binational Sub-Commission on Limits and Cartography**

64. Mr. President, Members of the Court. There is further contemporary evidence of Costa Rica’s position on the question of the starting-point. Costa Rica filed as Annexes to its Memorial on Maritime Delimitation, the Minutes of four meetings of a Bilateral Commission and a Sub-Commission on Limits and Cartography that had been established originally in 1997, but initiated the meetings until 2002<sup>184</sup>. The Minutes do not comprise the totality of the meetings held by this Sub-Commission but they will suffice to prove that the competent authorities of Costa Rica at the time of those meetings — 2002 to 2006 — considered that it was necessary to establish the location of “Marker I” of General Alexander in order to proceed to a maritime delimitation and that this was the only point under consideration at that time on the Caribbean side of the border.

65. The points related to the meetings of this Sub-Commission are limited to those that are picked up in the Minutes provided by Costa Rica in its Memorial. This will avoid any question on the reliability of these minutes, since Mr. Brenes pointed out in his presentation that these Minutes

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<sup>182</sup>The northern line is Costa Rica’s modest rendition of an equitable result described earlier. The southern line is Nicaragua’s “roughly sketched” southern limit of its potential EEZ entitlement”; CR 2010/12, p. 45, para. 44 (Lathrop).

<sup>183</sup>Memorial of Costa Rica, *Certain Activities* case, p. 47, para. 2.32.

<sup>184</sup>See Anns. 31, 35, 36 and 37 to Costa Rica’s Memorial in the *Maritime Delimitation* case. See also Anns. 13 to 17 of Nicaragua’s Counter-Memorial.

had not been signed by the members of this Sub-Commission<sup>185</sup>. In passing, it might be interesting to note that both Mr. Brenes and the Co-Agent, Mr. Ugalde, were members of this Sub-Commission.

66. Both the Co-Agent and other members of the Costa Rican team have been at pains to attempt to demonstrate that no agreement was reached during those meetings on the question of the location of Marker I. But Nicaragua has never questioned this and the insistence of Costa Rica on this question is meant to obscure the main and important point; that is, that this Sub-Commission was charged with locating the starting-point fixed by Alexander as *an indispensable requirement* in order to proceed with any discussion on the delimitation of the maritime boundary. I will cite from one of these Minutes as an example of what this Sub-Commission was working on. The following extract is taken from the meeting of 30 June 2005: the Sub-Commission is “trusting that once Marker 1 is determined by both parties they can carry out the negotiation process for the delimitation in the Caribbean”<sup>186</sup>.

67. There were no other preliminary tasks assigned to the Sub-Commission as necessary before the work on the maritime delimitation in the Caribbean could begin. What is relevant is that 10, 11 years ago, the Costa Rican Authorities on territorial limits were not demanding that the determination of the location of the mouth of the river at that time was a necessary step for the maritime delimitation.

68. In any event, the fact that they could not agree on the exact location of this Marker I is at present of no consequence since this location has already been determined by the experts appointed by the Court.

69. In your judges’ folder are all the extracts of these Minutes related to the maritime questions in the Caribbean.

## **E. Map evidence**

70. [Slide 12 on] Mr. President, Members of the Court, the map evidence across the decades, you can see on the screen and in your folder, show that Costa Rica considered and accepted that the

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<sup>185</sup>CR 2017/8, p. 49, para. 23.

<sup>186</sup>MCR, Ann. 36.

land boundary line started at Punta de Castilla. What is clear is that all these maps show that the land boundary began at the north-east section of Harbor Head Lagoon and not elsewhere on the sand spit. [Slide 12 off]

71. It was not until very recently that Costa Rica changed its long-standing position. According to Costa Rica's Memorial in the *Maritime Delimitation* case, the starting-point for the maritime delimitation between the Parties in the Caribbean Sea would be located "at the base of the sand spit extending northwest from Isla Portillos, because no reliable base points can be derived from this ephemeral, low-lying feature"<sup>187</sup>.

72. In fact, what Costa Rica claims in the present cases before the Court is basically what it claimed in 1897 and was rejected by the Arbitrator Alexander. [Slide 13 on] The following graphic — shown on screen — is an image of the rejected claim of Costa Rica before the arbitrator in 1897, as shown in the sketch-map accompanying the 1897 Award. This is superimposed over the present-day situation as reflected in an image of 2017. Taking into account the physical changes undergone in the area — especially the receding coastline pointed out by the experts in Figure 87 of their report — it can be appreciated that the present-day claim of Costa Rica is not an attempt to interpret the Award in light of present-day circumstances, but simply an attempt to overturn it.

73. This must not be allowed by the Court. [Slide 13 off]

74. Mr. President, Members of the Court, in this presentation, the following points have been established:

- I. That before and during the arbitration of General Alexander the position of Costa Rica was that the starting-point of the delimitation must be a fixed and immovable point and that it was not located and did not follow the changes of the river.
- II. That the First Arbitral Award of General Alexander located and fixed an immovable point as the start of the delimitation located at the north-east junction of Harbor Head with Punta de Castilla.
- III. That during the process of the arbitration and participation of General Alexander in the Bilateral Commission, as reflected in the minutes of these meetings, both Parties were

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<sup>187</sup>See Costa Rica's Submission (2) in its Memorial, p. 86.

aware and accepted that the starting-point selected by Alexander was fixed and immovable and located at the north-east junction of Harbor Head and Punta de Castilla.

IV. That this was the position accepted by both Parties for more than a century until Costa Rica, three years ago, claimed for the first time that the starting-point was the present-day mouth of the San Juan de Nicaragua River.

V. That the starting-point for the maritime boundary should be the point identified by the experts appointed by the Court as Marker I of General Alexander.

VI. That the starting-point for the land boundary should be the point presently located by the experts appointed by the Court.

### **III. Response to the question posed by the Court**

75. Mr. President Members of the Court, I will attempt perhaps a more specific response to the question posed by you. Although the account that precedes details the position of Nicaragua on the question of the starting-point of the delimitation, the maritime delimitation also, I will now attempt in a brief and concrete way to address the question posed by the Court to the Parties and that must be answered in this first round of oral proceedings.

76. The position of Nicaragua is that there is a fixed and immovable starting-point that was determined by the Arbitrator General Alexander in his Award of 30 September 1897 and which he implemented by placing a marker on that spot, a location that was also referenced to the centre of Plaza Victoria in case of any mishap to this marker.

77. That the marker indicating this starting-point was washed out to the sea shortly after General Alexander had affixed it. That the exact location of this spot out at sea was identified by General Alexander and it has been reconstructed by the experts appointed by the Court.

78. That apart from the fact that this spot must of necessity be the starting-point of any delimitation in accordance with the Award which is law for the Parties, it is a suitable location for the maritime delimitation since it has been located out at sea for nearly 120 years and has not been affected by the instability of the coastline in the ensuing years and there is no reason to suppose that it might be so affected in the foreseeable future.

79. Mr. President, Members of the Court, this ends my presentation and brings to a close Nicaragua's interventions for today. I thank you, and the Members of the Court, for your kind attention.

Le PRESIDENT : Je remercie l'agent du Nicaragua. The Court will meet again tomorrow, between 10 a.m. and 1 p.m., to hear the continuation of Nicaragua's first round of oral argument.

Thank you. L'audience est levée.

*The Court rose at 5.50 p.m.*

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