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International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 2017

Public sitting

held on Friday 7 July 2017, at 10 a.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)*

VERBATIM RECORD

ANNÉE 2017

Audience publique

tenue le vendredi 7 juillet 2017, à 10 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)*

COMPTE RENDU

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

 Registrar Couvreur

Présents : M. Abraham, président
M. Yusuf, vice-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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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,

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comme administrateur.

Le PRESIDENT : Veuillez vous asseoir. The sitting is now open. This morning the Court will hear the continuation of Nicaragua's first round of oral argument. I now give the floor to Professor Vaughan Lowe. Monsieur le professeur.

Mr. LOWE:

DELIMITATION IN THE TERRITORIAL SEA: CARIBBEAN

1. Mr. President, Members of the Court, it is a privilege to appear before you, and an honour to have been entrusted with the part of Nicaragua's pleadings concerned with the delimitation of the territorial sea.

2. At this stage, I shall address the delimitation of the territorial sea in the Caribbean; and later this morning I shall address the delimitation of the territorial sea in the Pacific Ocean.

General points

3. Before I begin with the Caribbean coast, I should respond to some general points made by Costa Rica in its first-round submissions.

4. A good part of Dr. Parlett's speech was directed to what she called the "primacy" of equidistance in the delimitation of the territorial sea¹ and the "deliberate choice made by the drafters of UNCLOS . . . to distinguish between territorial sea delimitation on the one hand, and EEZ/continental shelf delimitation on the other"².

5. As she pointed out, those delimitation provisions appear in different articles, with different subject matters, which appear in different parts of the Convention and are phrased in different terms³. That presentational distinction is readily explained.

6. The 1958 Conventions had been in force for less than ten years when preparations for the Third United Nations Conference on the Law of the Sea (UNCLOS) began, in response to discontent with a set of very specific concerns, focusing mainly on control over resources beyond the territorial sea. As was natural, the uncontroversial parts of the 1958 Conventions, including

¹CR 2017/7, p. 35, para. 4 (Parlett).

²CR 2017/7, p. 40, para. 17 (Parlett).

³CR 2017/7, p. 39, para. 14 (Parlett).

what became UNCLOS Article 15 on territorial sea delimitation, were transposed more or less verbatim into the successive drafts of UNCLOS.

7. There was no equivalent of the EEZ in the 1958 Conventions, so new provisions had to be drafted; and those provisions had to be aligned with provisions on the continental shelf, which also apply to the sea-bed beyond the territorial sea. These provisions were more controversial because they were dividing up very large areas of what had previously been high seas, so that the practical impact of delimitation criteria was much greater.

8. That is how it came to be that there are separate provisions, in different terms, in different parts of the 1982 Convention, dealing with delimitation of the territorial sea in Article 15 on the one hand, and, in the practically identical Articles 74 and 83, with delimitation of the EEZ and the continental shelf on the other hand.

9. The difference in wording may appear more significant than the location of the articles in the Convention. [Slide] As is often the case with over-familiar provisions, it is worth re-reading them from time to time to see exactly what they say — what the ordinary meaning of their terms is.

10. We note, in passing, that, unlike Articles 74 and 83, which stipulate how delimitation is to be effected (“by agreement on the basis of international law . . . in order to achieve an equitable solution”; Article 15 does *not* actually stipulate how delimitation is to be effected, whether by the Court or by agreement between States. It stipulates how States must act in the absence of an agreement on delimitation:

“Where the coasts of two or more States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line . . . [except] where it is necessary by reason of historic title or other special circumstances to delimitation the territorial seas of the two States in a way which is at variance therewith.”

11. Nonetheless, Article 15 is commonly referred to as a provision on delimitation. That shows the limitations of a fixation on exclusively literal approaches to treaty interpretation. What really matters, however, is how those provisions are interpreted and applied. [Slide off]

12. In the territorial sea, we have Article 15 setting out the “equidistance/special circumstances” rule. In *Qatar v. Bahrain*, this Court said:

“Article 15 of the 1982 Convention is virtually identical to Article 12, paragraph 1, of the 1958 Convention on the Territorial Sea and the Contiguous Zone,

and is to be regarded as having a customary character. It is often referred to as the ‘equidistance/special circumstances’ rule. The most logical and widely practised approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances”⁴.

The Court made the same point in *Cameroon v. Nigeria*⁵.

13. For the EEZ and continental shelf we have what Dr. Parlett described: UNCLOS articles which the Court has interpreted as requiring a three-stage test, starting with a provisional equidistance line, considering whether the existence of special circumstances require its adjustment, and then testing the result is equitable by looking for gross disproportionality⁶. Although, in this case, neither side is relying upon disproportionality as an argument.

14. So where is the difference between the approaches to the delimitation of the territorial sea and the EEZ? Not the conceptual or linguistic difference. Of course, one can distinguish on an abstract plane between different legal régimes and different verbal expressions. But where is the practical difference? What must the Court do in one case that it need not do in the other? We say that there is no practical difference, at least in the context of this case.

15. The process of convergence in maritime delimitation methodology was remarked upon by President Guillaume in his speech to the United Nations Sixth Committee in October 2001, when he said, commenting on the Court’s 1993 Judgment in the *Jan Mayen* case:

“the law on maritime delimitation was completely reunified. Whether it be for the territorial sea, the continental shelf or the fishing zone, it is an equitable result that must be achieved. Such a result may be achieved by first identifying the equidistance line, then correcting that line to take into account special circumstances or relevant factors, which are both essentially geographical in nature”⁷.

16. UNCLOS Articles 15, 74 and 83 apply to the drawing of different segments of one continuous line. It is true that there is no explicit treaty provision stipulating that the last point seaward on the territorial sea boundary must also be the first point on the EEZ boundary. But when

⁴*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment, I.C.J. Reports 2001*, p. 94, para. 176; and cf. paras. 230-231.

⁵*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 441, para. 288: “The Court has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdictions is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an “equitable result”.”

⁶CR 2017/7, p. 36, para. 6 (Parlett).

⁷Available at: <http://www.icj-cij.org/files/press-releases/5/2995.pdf>, p. 9.

the Court is asked to draw a single line delimiting the entire maritime boundary, it is a reasonable presumption that it will draw it so that the part in the territorial sea joins up with the part beyond the territorial sea.

17. That is what we meant by echoing the Court's statements, such as those cited in paragraphs 2.43-2.44 of the Counter-Memorial, that the approaches to delimitation of the different maritime zones are convergent, and that Articles 15, 74 and 83 should be read together and in context.

18. Costa Rica made much of what it considered to be Nicaragua's failure to isolate the territorial sea and EEZ segments of the maritime boundary and to deal separately with each. But it does not show that there is any legal rule requiring this separation, either set out in UNCLOS or elsewhere. It does not explain how the "ordinary meaning" of the words of Article 15 ties the hands of the Court in settling maritime boundaries⁸.

19. And perhaps most importantly, Costa Rica does not indicate that it would make any difference if the equidistance/special circumstances approach were applied first to the territorial sea, excluding any consideration of what goes on beyond the 12-nautical-mile limit, and then to the EEZ, excluding any consideration of what goes on within the 12-nautical-mile limit.

20. Drawing maritime boundaries is a practical task, with a practical purpose. In an area with no roads, no mountain watersheds or rivers, no resident population, but only the featureless monotony of the surface of the sea, the boundary is nonetheless important. It tells sailors and pilots whose waters they are in or over, and whose laws and authority they must observe.

21. In a perfect world, they will not need to check their sextant or GPS equipment every few minutes to see if they have come to another turning point, or some other twist or turn in the boundary. The line will be made as straightforward as it can without disregarding or disturbing the legal entitlements of the two States. And that is what we meant. Delimitation methodology is an aid to drawing just and practical boundaries, not a reason for the dogmatic imposition of equidistance, or any other particular line.

⁸CR 2017/7, p. 35, para. 4 (b).

Territorial sea delimitation in the Caribbean

22. I turn to the details of our case concerning the territorial sea in the Caribbean. [Slide]. In its Memorial, Costa Rica proposed a strict equidistance line drawn from what it regards as the proper starting-point at the mouth of the San Juan River. You see the map on the screen.

23. The way in which that line cuts across the Nicaraguan coast is evident; and I shall come back to that in a moment. But my first point is that the orientation of the provisional equidistance line here is the result of a peculiarity of the coastline which makes the precise location of the starting-point, and the selection of base points, particularly important.

24. In this area of the San Juan Delta, the Caribbean coastline of Central America flexes. [Slide] To the south, along Costa Rica's coast, it is convex. And you will see that Costa Rica's base points are located along that convexity.

25. Costa Rica refers to its coastline as concave. But as the map clearly shows, the coastline that is relevant here is convex. The coast further south has no effect whatever on the beginning of the maritime boundary.

26. [Slide] To the north of the San Juan delta the coastline is concave, and all of Nicaragua's territorial sea base points are located along that concavity.

27. Mr. Lathrop mentioned Nicaragua's straight baseline system in the Caribbean⁹. There is one; but it has no effect on the delimitation. None of Nicaragua's base points is on a straight baseline: all of Nicaragua's base points are on the low-water line on dry land. And in the Caribbean, for the first 12 nautical miles from the coast, the base points are all on the mainland coast within 8 miles or so of the starting-point.

28. So the combination of the convexity of Costa Rica's coastline, pushing the strict equidistance line away from Costa Rica and towards Nicaragua, with Nicaragua's concave coastline, exaggerating that effect by drawing the provisional equidistance line in towards Nicaragua, produces the cut-off that you see. It is a significant cut-off, with the provisional line swinging across in front of the coast of Nicaragua.

29. In our Counter-Memorial, we explained why we consider that Costa Rica uses the wrong starting-point. Nicaragua submitted, in paragraphs 3.34-3.52 and 3.84 of the Counter-Memorial,

⁹CR 2017/8, p. 34, para. 9.

that it considers what is now the low-water mark at Punta de Castilla to be the correct starting-point, not the present mouth of the San Juan River.

30. This use of Punta de Castilla has an effect upon the strict equidistance line, as this map shows. It reduces the extreme cut-off effect a little, compared with Costa Rica's strict equidistance line starting at the river mouth.

31. But Nicaragua argues that the exaggerated cut-off resulting from the change from a convex to a concave coastline in the immediate vicinity of the Punta de Castilla starting-point still requires mitigation. Here, the strict equidistance line prevents achievement of what Mr. Brenes called on Monday "the fundamental principle that the land dominates the sea through the projection of the coasts or coastal fronts"¹⁰. [Slide off]

32. There were suggestions from Costa Rica that the category of "special circumstances" warranting adjustment of the provisional equidistance line is very narrow — "very special geographic circumstances", Mr. Lathrop called them, apparently thinking that the words of Article 15 did not quite capture his idea of what the law should be. He took you to *Nicaragua v. Honduras* and *Qatar v. Bahrain* and *Croatia/Slovenia*, three cases in which the equidistance line was modified in the territorial sea¹¹.

33. One of the best examples is the *Guyana/Suriname* Award, where the Tribunal set out, at paragraphs 295 to 306, some incisive reflections on the role of special circumstances in territorial sea delimitations. You will find there, in paragraph 301, a reference to the appropriateness of shifting the territorial sea boundary from the equidistance line in order to avoid an "inequitable" result — there, the impeding of navigation¹² — and you will find the statement that "international courts and tribunals are not constrained by a finite list of special circumstances"¹³. The Award, in its discussion of territorial sea delimitation, also cited the approach of the Tribunal in the *United Kingdom-French Continental Shelf* arbitration, according to which "the notion of special

¹⁰CR 2017/8, pp. 43-44, para. 3.

¹¹CR 2017/9, pp. 36-37, para. 10.

¹²And cf., para. 306.

¹³*Ibid.*, 302.

circumstances generally refers to equitable considerations rather than a notion of defined or limited categories of circumstances”¹⁴.

34. But there is no need to multiply these references. It is common ground that cut-offs resulting from coastal configurations can require adjustments to the provisional equidistance line. The Parties are divided on the question whether an adjustment is warranted here, and if so, what it should be.

35. [Slide] Mr. Lathrop showed you a map in which Costa Rica had “corrected” the grey arrow, as they put it, to show that there is no cut-off¹⁵. It is on the screen now. But if one were sitting in the bottom half of Nicaragua’s concave coast, anywhere south of the “corrected” grey arrow, it would be hard to believe that the projection from the Nicaraguan coast is not cut off. The map looks less like a depiction of an unimpeded view out into the Caribbean than an illustration of someone trying to peep over the wall made by the red equidistance line.

36. The Parties differ on the question whether Nicaragua suffers a cut-off in the territorial sea; but not on the position of Costa Rica in this area. You will recall that Mr. Lathrop, [slide] describing the map at tab 167 of their judges’ folder, said that “Costa Rica’s Point 13 . . . is the same point at which the actual cut-off of Costa Rica’s maritime area begins”¹⁶. So the area that we are concerned with now is one where we say that there is a cut-off of Nicaragua’s coast, but Costa Rica acknowledges that there is no countervailing cut-off of its own coast. [Slide off]

37. Well, Nicaragua proposed that the effect of these local convexities and concavities should be evened out, and that the equidistance line should be drawn using straight lines to represent the general directions of the coastlines in this area, as was done in the *Bay of Bengal* cases, for example¹⁷.

38. An appropriate correction to the provisional line can then be made by applying the Court’s own approach, employed in cases such as *Gulf of Maine*¹⁸, *Tunisia/Libya*¹⁹, and most

¹⁴*Ibid.*, para. 302.

¹⁵Session 3, judges’ folder, Map 155.

¹⁶CR 2017/9, p. 52, para. 49.

¹⁷*Bay of Bengal*.

¹⁸Available at: <http://www.icj-cij.org/files/case-related/67/067-19841012-JUD-01-00-EN.pdf>, para. 189.

¹⁹Available at: <http://www.icj-cij.org/files/case-related/63/063-19820224-JUD-01-00-EN.pdf>.

clearly *Nicaragua v. Honduras*²⁰, of running an equidistance line or bisector from the general direction of the coasts, ignoring localized distorting factors.

39. [Slide] That is the line that we set out in Figure IId-5, at page 114 of the Counter-Memorial. It is an equidistance line drawn using a simplified version of Nicaragua's adjacent coastline, between Monkey Point and Punta de Castilla.

40. As we explained in paragraph 3.91 of the Counter-Memorial, it is arguable that Costa Rica's coastline should also be simplified, in which case the equidistance line would move further in Nicaragua's favour. But in view of the additional difficulty of settling on a simplified coastline for Costa Rica, and the relatively slight impact on the overall maritime boundary line, Nicaragua does not press that point. It claims the equidistance line based on its own simplified coastline and Costa Rica's actual coastline. That is the green line labelled "Adjusted equidistance" in our Figure IId-5.

41. That line is almost imperceptibly curved, and consequently difficult to draw; and it is difficult to determine its precise location at sea. Nicaragua accordingly simplified things by drawing it as a straight line with two turning points, as is explained in paragraph 3.93 of the Counter-Memorial. The difference is negligible: a few metres at most. The simplified line is the black line on Figure IId-5 labelled "Simplified equidistance".

42. The Court may think it preferable to have an even simpler line, with a single turning point at the 12-nautical-mile limit. That is the kind of practical approach that we consider to be both proper and helpful.

43. [Slide] The mitigating effect of that adjustment to the provisional equidistance line was depicted in Figure IId-6 in the Counter-Memorial. You can see that it abates the cut-off effect on the Nicaraguan coast in the territorial sea segment close to the shore, before joining the strict equidistance line at Point C-4 on that map.

44. Costa Rica, of course, takes a different view, and has tried to persuade you that there are various technical or methodological reasons why as a matter of law you cannot adjust the provisional line. Nicaragua's position is that the law is not so dogmatic and inflexible in its detail

²⁰Available at: <http://www.icj-cij.org/files/case-related/120/120-20071008-JUD-01-00-EN.pdf>, paras. 287-289.

that the Court is shackled to the equidistance line and is obliged to follow it wherever it leads. We have explained why and how we think the line should be adjusted, as the law permits; and we leave it to the good sense of the Court to decide the matter. [Slide off]

Delimitation from an offshore starting-point

45. I turn to the question of delimitation from an offshore starting-point. I have described how Nicaragua presented its case in its Counter-Memorial. Last week, the Court asked what would the positions of the Parties be on starting the maritime boundary from a fixed point in the Caribbean Sea some distance from the coast.

46. We have given that question careful consideration, taking into account the report of the Court-appointed experts, dated 30 April 2017, and we have made a small adjustment to our case in consequence.

47. Ambassador Argüello gave Nicaragua's answer to the Court's question yesterday. In short, Nicaragua considers that such a step would be consistent with international law and the practice of the Court, and would welcome it. It would bring clarity, certainty and permanence to a maritime boundary drawn off an unstable, changing coastline.

48. Indeed, Nicaragua considers that such a fixed point offshore has long been established in the practice of the Parties.

49. [Slide] Ambassador Argüello explained yesterday how the Nicaragua-Costa Rica boundary came to be fixed: how the 1858 Treaty, the Cleveland Award, and the Alexander Award were all based upon the nineteenth-century location of the eastern headland of Harbor Head Lagoon, and how the co-ordinates of that point have recently been established by the Court's experts²¹. I shall refer to that location as the "Alexander Point". That point now lies about a kilometre offshore.

50. The Alexander Point is the one indisputably and permanently fixed point on the Caribbean coast in this case. Even though the physical "permanent marker" installed by Alexander has long been under the sea, the location has the permanence of precise geographical co-ordinates now tied to an internationally-agreed geodetic frame of reference.

²¹Experts' Report, para. 183.

51. The fact that the Alexander Point lies offshore gives rise to the question of the course of the boundary landward of that point, across the area at present covered or washed by the sea between the Alexander Point and the beach.

52. You will recall that the Court's experts were asked "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?" [Slide] They gave alternative answers; but as Ambassador Argüello said yesterday, the only point that is not subject to "frequent variation" is the extremity of the solid land at the headland of Punta de Castilla; and for both legal and practical reasons, which he explained and I will not repeat, that is what we say must be the starting-point of the land boundary.

53. Accordingly, in response to the Court's question, Nicaragua submits that in accordance with international law and in the interests of certainty and stability, the Court should declare that the starting-point of the maritime boundary is the Alexander Point, and that the starting-point of the land boundary is the present Punta de Castilla. [Slide] Between those points the shortest line, a straight geodetic line, should be drawn, which constitutes the line of the boundary between Costa Rica and Nicaragua.

54. Costa Rica indicated that the fixed point at sea could function as a "hinge" and be connected to the land by a "mobile line"²². Though they had in mind a different point on land — the mouth of the river, in which Alexander so conspicuously showed no interest at all when he fixed the boundary at the north-east of Harbor Head Lagoon — Nicaragua agrees that the "hinge" solution is practicable. The line connecting the fixed point at sea with the actual land territory could be mobile, moving with natural changes in the coastline. [Slide off]

Seaward of the Alexander Point

55. I turn to the question of the delimitation seaward of the "Alexander Point".

56. As a matter of geography and cartography, it is not possible to construct a provisional equidistance line starting from an initial point at sea, for the simple reason that there are no base points which can be used. Any base point that might be postulated would require some assumption

²²CR 2017/9, p. 41, para. 22.

to be made as to what the coastline would have been like if the starting-point had been situated on dry land. But it is not situated on dry land.

57. [Slide] There is, however, a principled approach to this question that yields robust, practical results. That approach is first, to draw the adjusted equidistance line from the land boundary terminus on the present coastline — that is, from Punta de Castilla — out to the point where it intersects the 12-nautical-mile limit (which I shall call the intersection point). That is, of course, just what Nicaragua did in its Counter-Memorial; and I explained a few minutes ago how Nicaragua had constructed an equidistance line using a simplified “general direction of the coast” line to mitigate the cut-off of its coast.

58. But then, instead of saying that the maritime boundary is the adjusted line between the land boundary terminus and the intersection point on the 12-nautical-mile limit, the shortest possible line — a geodetic line — is drawn from the 12-nautical-mile intersection point, not to the land boundary terminus on dry land, but instead to the starting-point of the maritime boundary out at sea, the Alexander Point. And, from there, the line connects to Punta de Castilla.

59. The difference is, in practical terms, very small, as this map shows. But the approach is simple, principled, and coherent with the approach of the International Court and with international law; and it yields results that look “right”.

60. [Slide] Figure IId-6, on page 116 of the Counter-Memorial, shows how that line (on that map, without the modification to take in the Alexander Point) joins up with the rest of the maritime boundary so as to produce, as Mr. Reichler will explain, an equitable result. It enables the Court to apply UNCLOS Article 15 on territorial sea delimitation in a manner that does not conflict with the application further along the maritime boundary of Articles 74 and 83, on the delimitation of the EEZ and continental shelf. In this way the effects of Articles 15, 74, 83 are integrated.

61. Before I end, I should point out one consequence of Nicaragua’s submission. Nicaragua has a straight baseline system, and although the straight baselines have not been used in this delimitation (as I explained, all of the base points are on dry land) the straight baselines do of course affect the seaward extent of Nicaragua’s territorial sea. That is why, as appears on Figure IId-6 for example, for part of its length the boundary divides Nicaragua’s territorial sea from an area of Costa Rica’s EEZ.

62. That is the consequence of Nicaragua claiming straight baselines, while Costa Rica has not as yet made any claim to straight baselines along its Caribbean coast, although it has done along its Pacific coast. It might be thought a curiosity, but it is the natural consequence of neighbouring States making different maritime claims.

63. On one side of a boundary State A may have a 12-nautical-mile territorial sea and an EEZ, while State B on the other side has a territorial sea — perhaps of a different breadth from that of State A — and a contiguous zone but no EEZ. These disparate maritime zones can sit alongside each other, geographically, without creating any legal difficulty. I mention the point only to observe that such situations are not an obstacle to the delimitation of a maritime boundary.
[Slide off]

64. That concludes my initial part of these submissions, Mr. President, and unless I can help the Court further, I would ask you to call on Mr. Reichler.

Le PRESIDENT : Merci. Thank you, Professor. I now give the floor to Mr. Paul Reichler.

Mr. REICHLER: Mr. President, Members of the Court, bonjour !

DELIMITATION OF THE MARITIME BOUNDARY IN THE CARIBBEAN SEA

1. It is, as always, an honour for me to appear before you, and a privilege to speak on behalf of the Republic of Nicaragua. I will present Nicaragua's case on delimitation of the exclusive economic zone and the continental shelf. In this presentation I will address the delimitation in the Caribbean Sea. Later in this session I will speak about delimitation in the Pacific Ocean.

2. Mr. President, next month I will reach my 70th birthday. One of the things I have managed to learn in my time on earth, in fact on this very plot of earth where I now stand, is that the Court often finds it helpful at oral hearings if counsel begin their presentations by identifying the areas where the parties are in agreement, and then identifying the areas where they disagree, so that the Court can better understand their differences and focus more precisely on how best to resolve them. That is the approach I will take now, with the aim of using my time in a manner the Court may find most productive.

3. Happily, Nicaragua and Costa Rica agree on the applicable law. Both States agree that the Court should carry out the delimitation in the Caribbean Sea and the Pacific Ocean by means of the now standard three-step process: first, the construction of a provisional equidistance line; second, consideration of whether any relevant circumstances exist that might warrant an adjustment to the provisional line to avoid prejudice to either Party, and, if so, the nature of that adjustment; and third, testing the adjusted line for gross disproportionality.

4. That the Parties agree on the process for delimiting their boundaries is hardly surprising. The three-step approach is enshrined in the Court's own jurisprudence, especially, in recent years, in the *Black Sea* case²³ and in the first *Nicaragua v. Colombia* case²⁴. Other forums have followed the Court's lead. ITLOS adopted the three-step process, relying heavily on the *Black Sea* case, in *Bangladesh v. Myanmar*²⁵. Arbitral tribunals established under the Law of the Sea Convention have also done so, an example being *Bangladesh v. India*²⁶.

5. The Parties also agree on the applicable jurisprudence. For the most part, Nicaragua and Costa Rica cite the same cases. Although, in Nicaragua's view, Costa Rica has read these cases, or at least quoted from them, selectively, and even inaccurately, my point here is that the Parties appear very much to be in agreement on which are the relevant cases. This broad agreement on the legal principles and the procedure to be followed will hopefully lighten the Court's burden.

6. But there is still some heavy lifting for the Court to do. At each step of the three-step process, there is a sharp disagreement between the Parties over the performance of that step. For example, although Nicaragua and Costa Rica agree that the first step consists of the construction of a provisional equidistance line, which should be (and normally is) a technical matter based on mathematics and objective geographic fact, they have produced very different equidistance lines. This is at tab 11. You can see Nicaragua's equidistance line in red, and Costa Rica's in blue on your screens now.

²³*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, paras. 115-122.

²⁴*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012 (II)*, paras. 190-193.

²⁵ITLOS, *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar)*, Judgment of 14 March 2012, para. 233.

²⁶*Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, PCA Award, 7 July 2014, paras. 340-346.

7. The Parties also strongly disagree about performance of the second step. While both consider that there are relevant circumstances that require adjustment of the provisional line, they have relied on different circumstances to make their respective adjustments, and, consequently, adjusted their provisional lines in opposite directions.

8. Finally, in the third step of the process, they have come to different conclusions about the equitableness of their adjusted delimitation lines based on their different conceptions of the relevant coasts and, especially, the relevant area.

9. In the remainder of my presentation, I will attempt to assist the Court as best I can in sorting through these disagreements. Prior to Costa Rica's presentation on Tuesday, I was planning to do that by going through each of the three steps of the delimitation process *seriatim*, in order to show, in each of these steps, how the Parties differ and why, so that the Court might then have a clearer picture of their different approaches, conclusions and underlying rationales. I still plan to do that, but after what we heard, and saw, on Tuesday, I now think it would be most helpful to the Court for me to go directly to the heart of the dispute.

10. And this is it. We have reproduced it at tab 12. It is Costa Rica's attempt to show that it lies in the middle of what it calls a "three-State concavity", which causes it to be cut off before 200 miles by converging equidistance boundary lines with Nicaragua and Panama. According to Costa Rica's counsel, what makes this concavity a relevant circumstance is the presence of a third State — because it is that presence which sandwiches the middle State in between the converging equidistance lines of its two neighbours, and cuts it off short of the outer limit of its maritime entitlement. Mr. Lathrop called your attention to "the pincer effect of the two lateral equidistance boundaries"²⁷. The picture they present looks like a compelling one. It certainly makes Costa Rica appear to be cut off.

11. This is their case: Poor Costa Rica! How terribly truncated it is! The picture might even bring tears to your eyes, Mr. President. But only if you keep them closed. And that is precisely what Costa Rica wants you to do. Take this picture at face value. And, above all, don't look at it very closely. Because if you do, you will see it for what it is: a ruse, an artifice, a complete fake to

²⁷CR 2017/9, p. 49, para. 41 (Lathrop).

make Costa Rica appear to be significantly cut off, when, in fact, it is not. When the picture is revealed for what it truly is, Costa Rica's entire case for delimitation in the Caribbean Sea sinks rapidly to the bottom.

12. Let us begin by looking more closely at the equidistance line Costa Rica has drawn between itself and Panama. It bears emphasis, as Costa Rica itself repeatedly emphasizes, that it is the presence of this boundary line with a third State, in a situation of concavity, which causes it to be cut off. The problem here is that this boundary line does not exist, and, in fact, as you will soon see, it will never exist. Costa Rica has itself described the purported boundary line as "notional". A more accurate word would be "fictional".

13. Here is the actual boundary between Costa Rica and Panama, reflected in their 1980 Treaty, ratified by both States. It follows a straight line, but only out to 100 miles. The Costa Rica/Panama boundary terminates, by express agreement, at the tripoint where the Costa Rica/Colombia boundary and the Colombia/Panama boundary intersect.

14. Costa Rica tells us that its 1977 treaty with Colombia is of no legal effect, such that there is presently no boundary between Costa Rica and Colombia. So let us remove the line. Nicaragua disagrees, as Professor Remiro Brotóns explained. But let us, for the sake of this exercise, assume Costa Rica to be correct. Mr. President, I ask you to look at all of the open sea between the so-called "notional" equidistance line Costa Rica has drawn with Panama, and Panama's real boundary with Colombia. The pale-blue area bounded by these two lines, which extends all the way to Costa Rica's 200-mile limit, and lies to the south of the provisional equidistance line with Nicaragua, consists of nearly 12,000 sq km. To make itself appear the victim of a third-State cut-off, Costa Rica depicts the notional equidistance line as the boundary, and attributes all 12,000 sq km to Panama.

15. But this is completely fictitious, and Costa Rica knows it. And so does the Court. This is the Court's sketch-map depicting the maritime boundary in *Nicaragua v. Colombia*. We have it at our tab 13. As you can see, it also shows the boundary between Panama and Colombia. And this is what the Court said about that boundary at paragraph 227 of its 2012 Judgment: "[T]he Court accepts that Panama's agreement with Colombia amounts to recognition by Panama of Colombian

claims to the area to the north and west of the boundary line laid down in that agreement”²⁸. The Panama/Colombia agreement was ratified by both States, and there is no question that it remains in force. Panama certainly considers it to be in force. In its 2013 submission to the United Nations, it depicted its boundaries in the Caribbean Sea just as they appear in its treaty with Colombia²⁹. In an accompanying Note, Panama’s Foreign Minister wrote that the map represents “the full extent of the maritime space of the Republic of Panama, delimited by the boundary treaties with the Republic of Costa Rica and the Republic of Colombia”³⁰. You can find this letter and the map at our tab 14. Just as the Court said, Panama is precluded, and considers itself precluded, from claiming any areas beyond its agreed boundary with Colombia.

16. Mr. President, it appears that Costa Rica has deliberately sought to turn your attention away from the Panama/Colombia boundary agreement, and the fact that Panama cannot and does not claim any areas north or east of its agreed boundary. That boundary appeared on none of the many maps displayed on Monday or Tuesday of this week. So I went back and checked their Memorial, including the annexes. You won’t find the Panama/Colombia boundary depicted anywhere in there, either. The reason is obvious. For purposes of this case, it is most inconvenient for them. It prevents them from arguing that they are the victims of a concavity-induced third-State cut-off. That is why they have never shown it to you, neither in their written nor oral pleadings. But just because *they* ignore it doesn’t mean the *Court* should.

17. Costa Rica appears to have forgotten that it previously told the Court that, in fact, it does lay claim to all of the area between the notional equidistance line it has drawn and the Panama/Colombia boundary. Not in this case, of course. That would put to death their newly invented third State cut-off argument. But in 2011, when Costa Rica sought to intervene in *Nicaragua v. Colombia*. At tab 15 you will find the Court’s sketch-map attached to its Order of 4 May 2011 denying Costa Rica’s Application, which depicts, in blue and purple, the: “Area in

²⁸*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, I.C.J. Reports 2012 (II), p. 707, para. 227.

²⁹Letter from the Ministry of Foreign Relations of the Republic of Panama to the Secretary-General of the United Nations, No. DGPE/DG/665/2013 (30 Sept. 2013), p. 4, available at: http://www.un.org/depts/los/clcs_new/submissions_files/nic66_13/pan_re_nic_2013_09_30.pdf.

³⁰Letter from the Ministry of Foreign Relations of the Republic of Panama to the Secretary-General of the United Nations, No. DGPE/DG/665/2013 (30 Sept. 2013), p. 2, available at: http://www.un.org/depts/los/clcs_new/submissions_files/nic66_13/pan_re_nic_2013_09_30.pdf (Spanish original) and http://www.un.org/depts/los/clcs_new/submissions_files/nic66_13/pan_re_nic_2013_09_30e.pdf (English).

which Costa Rica claims to have an interest of a legal nature which may be affected by the Court's decision."³¹ As you can see, Costa Rica's "legal interest" includes the entire area north and east of the Panama/Colombia boundary, as well as the area east of the 1977 Costa Rica/Colombia boundary, out to the 200-mile limit. The Court's sketch-map states at the top that it was prepared "on the basis of a map presented by Costa Rica"³². This map, by itself, completely eviscerates the cut-off argument they have invented for purposes of these proceedings.

18. Mr. President, in this case, Costa Rica has been very clever. On the one hand, they have tried to conceal their intentions in regard to the areas that Panama has renounced, by sealing themselves off from those areas with their "notional" equidistance boundary. On the other hand, they have taken care in good lawyer-like fashion to assure that they do not abandon their claims to those areas. And this is very clear from Costa Rica's escape clause, at paragraph 4.12 of its Memorial: "This notional line, used solely for the purpose of defining the relevant area in this case, cannot affect the rights of Panama, nor prejudice Costa Rica in its relations with Panama."³³ Mr. Lathrop took pains to make the same reservation of rights on Tuesday³⁴.

19. Plainly, Costa Rica has no intention of agreeing with Panama that its fictional equidistance line should actually be the boundary between the two States. Now, Costa Rica is not to be faulted for that, but it is for creating the false impression that it is cut off by a so-called notional line that it has not the faintest notion of ever accepting as a boundary, and that Panama is precluded from claiming. This is at tab 16. It is plain as day that Costa Rica is preparing to claim for itself all the maritime space, out to its 200-mile limit, that both it and Panama had previously agreed to be Colombian.

20. And who will oppose them? Panama, in the south, is blocked by its boundary agreement with Colombia. Colombia, in the north, is blocked by the delimitation line in the Court's 2012 Judgment. There is no one, and nothing, to stop them from reaching their 200-mile limit, in the extensive area to the south and east of the equidistance line with Nicaragua, however that might be

³¹*Territorial and Maritime Dispute (Nicaragua v. Colombia), Application of Costa Rica for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, p. 366.

³²*Ibid.* See also *ibid.*, para. 55.

³³MCR, para. 4.12.

³⁴See CR 2017/9, p. 34, para. 6 (Lathrop).

adjusted. Obviously, Mr. President, *they* don't believe they are cut off. They just want the *Court* to believe it.

21. Our friends on the other side have likened Costa Rica to Germany in the *North Sea* cases, and to Bangladesh in the two *Bay of Bengal* cases. Let's take a closer look. Let's do so by comparing Costa Rica's situation to that of Germany. Now, I normally would not present a slide like this to the Court, but since Costa Rica did, I think it is appropriate to give them some of their own medicine. As you can see here, Costa Rica is not like Germany. Germany was cut off 100 miles from its coast. Costa Rica, with the 1977 Treaty out of the way, reaches its full 200-mile limit, and has a broad swath of sea extending to the east beyond 187 miles, where it hits the outer limit of Panamanian waters. Now, this shows Germany *after* its boundaries were adjusted by agreement with its two neighbours. Costa Rica still looks very good by comparison.

22. Now, three helpful points can be derived from the *North Sea* and *Bay of Bengal* cases. First, the end result, for both Germany and Bangladesh, was still a triangular-shaped maritime area that narrowed into an apex as it extended seaward. This shows that the solution was not to eliminate *all* effects of the cut-off caused by converging equidistance boundaries where they do exist in real rather than notional form, but only to provide partial relief from those effects.

23. Second, in each case the relief came from *both* neighbours, not just one of them. No single neighbour was made to bear the burden of compensating either Germany or Bangladesh for its real cut-off. To the contrary, Costa Rica's own illustrations reflect that approximately equal contributions to Germany were made by Denmark and the Netherlands in the *North Sea* cases, and by Myanmar and India to Bangladesh in the *Bay of Bengal* cases. Costa Rica, by contrast, seeks compensation only from Nicaragua, and even though there is no equidistance line in the south to render any compensation in the north necessary or appropriate.

24. Third, and most important, both ITLOS and the Annex VII Arbitral Tribunal were careful to avoid making any boundary adjustments that would result in cutting off Myanmar or India. The principle thus established is that it would be inequitable to remedy one State's cut-off — even where it exists — by cutting off the other State. This is reflected in the Court's own Judgment in *Nicaragua v. Colombia* as well. This passage is from paragraph 216:

“An equitable solution requires that each State enjoy reasonable entitlements in the areas into which its coasts project. In the present case, that means that the action which the Court takes in adjusting or shifting the provisional median line should avoid completely cutting off either Party from the areas into which its coasts project.”³⁵

25. Yet, with its proposed adjustment to the provisional equidistance line, Costa Rica is asking the Court to do just what it said it would not do in *Nicaragua v. Colombia* — completely, or almost completely, cut off Nicaragua from the areas into which its coast projects south of the delimitation line with Colombia. Here is Costa Rica’s proposed adjusted line from our tab 18. As you can see, it cuts Nicaragua off from its maritime entitlements beyond the 100 miles, except for two very narrow corridors no wider than 5 miles. The net effect of this would be to convert the *Nicaragua v. Colombia* Judgment from one that is carefully balanced and equitable to one that, in combination with the result that Costa Rica seeks here, is extremely prejudicial to Nicaragua.

26. Even Costa Rica’s own slide shows how prejudicial their proposed adjustment would be to Nicaragua. We have reproduced it at our tab 19. As you can see, they have to run their coastal projection arrows for Nicaragua directly through Colombia’s maritime space in order to get them to Nicaragua’s 200-mile limit. Otherwise, the arrows are either cut off, or forced to squeeze through the eye of a needle at and beyond 100 miles.

27. By Costa Rica’s own arithmetic, this adjustment of its provisional equidistance line transfers more than 11,800 sq km of maritime space from Nicaragua to Costa Rica³⁶. But this is an understatement. To this figure must be added another 15,500 sq km of maritime space, which Costa Rica transfers from Nicaragua to itself by giving no effect to Nicaragua’s fringing islands or the Corn Islands. This, at tab 20, is a more accurate depiction of Costa Rica’s attempted maritime heist. It compares Costa Rica’s adjusted boundary line with Nicaragua’s provisional equidistance line. As you can see, Costa Rica has given itself approximately 27,000 sq km to the north of Nicaragua’s provisional equidistance line. Not only that, but it has given itself in that 27,000 sq km even more maritime area on the Nicaraguan side of a correctly drawn provisional equidistance line than it has left for Nicaragua, a mere 22,000 sq km, in the relevant area on Nicaragua’s own side of the line.

³⁵*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, I.C.J. Reports 2012 (II), p. 704, para. 216.

³⁶MCR, para. 4.43.

28. Mr. President, I think that when Costa Rica and its counsel developed their claims they must have been studying Kafka. I have a particular passage in mind. It is where the Czech literary master said: “There are some things one can only achieve by a deliberate leap in the opposite direction.”³⁷ Costa Rica has taken precisely that leap.

29. Plainly, Mr. President, Costa Rica’s exercise leads us to a dead end. They have failed to demonstrate that they are prejudiced by a third-State cut-off, or any cut-off at all. They have failed to justify any adjustment in their favour to the provisional equidistance line, let alone the preposterous adjustment that they have proposed. Their approach to delimitation in the Caribbean Sea is unhelpful. How then, should the Court delimit the boundary?

30. Mr. President, my presentation will extend beyond the mid—morning coffee break. I can suspend here, or I would find another convenient spot to suspend in about 10 or 15 minutes, as you guide me.

The PRESIDENT: I think you can go on for the moment.

Mr. REICHLER: Thank you, Mr. President.

How then should the Court delimit the boundary? The jurisprudence is clear. The boundary must be delimited by means of the three-step process, beginning with the first step of that process, the construction of a provisional equidistance line. This is supposed to be, and usually is, an objective exercise. In fact, construction of the line is a task that is now performed largely by computer. There is a specific software program, known as CARIS LOTS, which is nearly universally used. The CARIS software identifies the base points along both coasts that control the equidistance line and then it calculates and constructs the line. The Court has emphasized that an advantage of equidistance is that it is “geometrically objective”, and that it relies on methods that are “appropriate for the geography of the area”³⁸.

31. How then, can Nicaragua and Costa Rica employ the same objective, computer-driven process and come out with such different equidistance lines? The answer, Mr. President, lies not in

³⁷Gustav Janouch, *Conversations with Kafka* (1971), p. 188.

³⁸*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012 (II)*, p. 695, para. 191. See also *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 101, para. 116.

the software but in the data that the Parties input into the computer in the first place. For the software to do its job, the coasts of the Parties must first be rendered in digitized form and input into the computer. If this is done inaccurately the software has no way of knowing, and will still produce a mathematically correct equidistance line, but one that is based on an incorrect rendition of the coasts. This is what Costa Rica has done. *Has* done. Not *appears to have* done. And we know this because they have told us so. They told us they did it in their rendition of Nicaragua's coast. By their own admission, they deliberately ignored all of Nicaragua's islands³⁹. As a result, their software placed no base points on any of these features, and none of them were given any effect in the construction of Costa Rica's provisional equidistance line.

32. This is what accounts for the differences between the Parties' provisional equidistance lines in the exclusive economic zone and continental shelf. There are two places in particular where Costa Rica's disregard of Nicaragua's islands diverts the line in Costa Rica's favour. One change is relatively minor, the other is quite significant and highly prejudicial to Nicaragua.

33. This, at tab 21, shows the Parties' respective equidistance lines out to 20 miles. You can see that all of Costa Rica's base points are located on a convex portion of the Costa Rican coast, while all the Nicaraguan base points are on Nicaragua's concave coast. And, as Professor Lowe explained, the combination of Costa Rican convexity and Nicaraguan concavity causes the equidistance line to veer sharply in front of Nicaragua's coast, blocking its seaward projection.

34. At 20 miles, the Nicaraguan base points at the northern end of the concavity begin to partially counterbalance the base points on Costa Rica's convexity, and both equidistance lines turn to the east. At and beyond Point A on Nicaragua's provisional equidistance line, base points on two of Nicaragua's fringing islands — Paxaro Bovo and Palmenta Cay — come into play. There can be no serious dispute that these are both fringing islands, located 3 miles and 1 mile, respectively, from the Nicaraguan coast. As such, there should be no dispute, as a legal matter, that they form an integral part of Nicaragua's coast and cannot be ignored, as Costa Rica has done. As the Court determined in its *Nicaragua v. Colombia* Judgment, at paragraph 201:

“[T]he islands adjacent to the Nicaraguan coast are part of the relevant coast and contribute to the baselines from which Nicaragua's entitlements to a continental

³⁹See CR 2017/9, pp. 46-47, paras. 36-37 (Lathrop).

shelf and exclusive economic zone are to be measured . . . Since the islands are located further east than the Nicaraguan mainland, they will contribute all of the base points for the construction of the provisional median line . . .⁴⁰.

Yet, Costa Rica ignores these fringing islands and gives them no base points.

35. The Parties appear to agree, however, that the impact of Paxaro Bovo and Palmenta Cay is not disproportionate. As Mr. Lathrop said, they do not alter the equidistance line significantly⁴¹. And, as you can see here, at this scale, the two lines are barely distinguishable from one another between Point A and Point B, which lies approximately 55 miles from the coast.

36. Ignoring Nicaragua's fringing islands was not Costa Rica's only, or even its greatest, sin of omission in constructing its provisional equidistance line. Costa Rica also ignored both of Nicaragua's Corn Islands. As you can see here, and at our tab 22, Costa Rica treats the Corn Islands as though they do not exist. It places no base points on them, and draws no control lines from them in constructing its equidistance line. That is why the two equidistance lines begin to diverge, at Nicaragua's Point B, which roughly corresponds to Costa Rica's point 19. The difference between the two lines, which affects their trajectories from there to their outer limits, is attributable to Costa Rica's complete elimination of the Corn Islands from the relevant geography.

37. Now, it is a separate issue whether, in the second step of the three-step process, a correctly-drawn provisional equidistance line should be adjusted in Costa Rica's favour because of the influence of the Corn Islands on that line, on the grounds, alleged by Costa Rica, that they constitute a relevant circumstance. Nicaragua strongly disagrees with Costa Rica on this point, and I will show you why Nicaragua is right when I get to the second step. But in the first step of the three-step process, the appropriate question is whether the Corn Islands are part of Nicaragua's relevant coast⁴², and, if so, whether Nicaragua is entitled to the base points on those features that the CARIS software objectively gives them.

38. The answer can only be "yes", based on the Court's own precedent in the *Nicaragua v. Colombia* case. In paragraph 201 of the Judgment, the Court explained that it "will use base points located on Edinburgh Reef, Muerto Cay, Miskitos Cays, Ned Thomas Cay, Roca Tyra,

⁴⁰*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012 (II), pp. 698-699, para. 201.

⁴¹CR 2017/9, p. 47, para. 36 (Lathrop).

⁴²See CMN, para. 3.65.

Little Corn Island and Great Corn Island”⁴³. This sketch-map, for the Court’s convenience, is at our tab 23 and it is attached of course to the Judgment. We have highlighted the base points on both Corn Islands and their control lines.

39. Mr. President, the location of the Corn Islands is undisputed, as is their relation to Nicaragua’s mainland coast and other islands. They have not moved since the Judgment in *Nicaragua v. Colombia*. Nor have their size — 9.6 sq km for Great Corn Island and 3 sq km for Little Corn Island — or their permanent population of more than 7,000 inhabitants, or their economic significance to Nicaragua — changed. They remain significant insular features, and, as such, they are entitled to similar treatment in this case as was given them in *Nicaragua v. Colombia*.

40. In the Memorial, Costa Rica conspicuously made no mention of the Court’s treatment of the Corn Islands in the *Nicaragua v. Colombia* case. Nor did they mention it this week. They chose to ignore that very pertinent precedent. Instead of addressing it, they invoked the *Black Sea* case, in which the Court determined that Ukraine’s Serpents’ Island should not have a base point for the construction of the provisional equidistance line between Ukraine and Romania⁴⁴, and they cited to the *Bay of Bengal* case, in which ITLOS considered that Bangladesh’s St. Martin’s Island should have no influence on the line delimiting the EEZ and continental shelf between Bangladesh and Myanmar⁴⁵.

41. But Costa Rica derives no help from either case. Unlike the Corn Islands, Ukraine’s Serpents’ Island was a tiny feature measuring a mere 0.17 sq km, with no indigenous population or economic life of its own⁴⁶. The Court itself justified the distinction between its treatment of Serpents’ Island and that of the Corn Islands. In paragraph 202 of its *Nicaragua v. Colombia* Judgment, immediately following its determination to “use base points on . . . Little Corn Island

⁴³*Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 699, para. 201.

⁴⁴*Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009*, p. 109, para. 149.

⁴⁵*Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 86, para. 319.

⁴⁶*Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009*, p. 70, paras. 16, 180, 184.

and Great Corn Island” in the construction of the provisional equidistance line⁴⁷, the Court expressly distinguished its earlier treatment of Serpents’ Island: “When placing base points on *very small* maritime features would distort the relevant geography, it is appropriate to disregard them in the construction of a provisional median line.”⁴⁸

42. Equally unhelpful to Costa Rica is the *Bay of Bengal* case. As ITLOS explained, St. Martin’s Island was denied a base point for the construction of the provisional equidistance line to which it otherwise would have been entitled solely because of its peculiar location, which was not adjacent to Bangladesh’s coast but directly opposite, and only 5 miles removed, from Myanmar’s coast. It thus significantly blocked Myanmar’s coastal projection well to the south — that is, on Myanmar’s side — of the land boundary terminus. In the Tribunal’s own words, it determined that no base points should be placed on St. Martins Island “because it is located immediately in front of the mainland on Myanmar’s side of the Parties’ land boundary terminus”, such that any base point placed on that feature would have caused “an unwarranted distortion of the delimitation line”⁴⁹.

If I may proceed for just another minute or minute-and-a-half it would be appropriate, with your permission, Mr. President, to suspend.

43. On Tuesday, Costa Rica rattled off a number of other insular features that were disregarded by the Court or other arbitral tribunals⁵⁰. It was an impressive exercise in name-dropping. But, there was no explanation, analysis or depiction of any of the features that were named. That is because the examples given are even farther off the mark than Serpents’ Island or St. Martin’s. At tab 24 you will find a photograph of Filfla, a tiny uninhabited islet off the coast of Malta measuring no more than 0.06 sq km. It is best known for having been used by the Royal Navy for target practice during World War II. From all the rubble, it appears they had very good aim.

⁴⁷*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012 (II), p. 699, para. 201; emphasis added.

⁴⁸*Ibid.*, p. 699, para. 202; emphasis added.

⁴⁹*Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, p. 73, para. 265.

⁵⁰See CR 2017/9, p. 28, para. 59 (Kohen).

44. Sable Island was an uninhabited and uninhabitable feature more than 88 miles off the Nova Scotia coast⁵¹, which, despite its own insignificance, caused a major change of direction or distortion in the equidistance line, which led the Arbitral Tribunal to disregard it in drawing the final boundary line⁵².

45. Finally, Abu Musa — you will see this at tab 26 — caused the equidistance line between Dubai and Sharjah to veer sharply in front of Dubai's coast, cutting it off almost completely a short distance seaward⁵³. The Corn Islands do not cause any such effect, as you will see after the break. They cannot therefore be analogized to Filfla, to Sable Island or to Abu Musa.

46. In sum, Mr. President, there is no justification for Costa Rica's omission of Nicaragua's fringing islands, or the larger and more significant features of Great and Little Corn Island, from its definition of Nicaragua's relevant coast. Nor is there any legal or factual justification for its tactical decision to ignore them in the construction of the provisional equidistance line. Costa Rica's provisional equidistance line is therefore incorrectly drawn. Nicaragua's line takes account of all relevant features, both Nicaraguan and Costa Rican, and is therefore drawn correctly.

47. In consequence, Mr. President, Nicaragua submits that the Court should adopt Nicaragua's line as the outcome of the first step of the three-step process.

Le PRESIDENT : M. Reichler, avant d'aborder la deuxième étape, faisons maintenant une pause et reprenons, si vous le voulez bien, à 11 h 40.

Mr. REICHLER: Mr. President, that is exactly what I was about to propose. I thank you very much and I wish you a good coffee.

Le PRESIDENT : Merci. L'audience est suspendue.

L'audience est suspendue de 11 h 20 à 11 h 40.

⁵¹See *Arbitration between Newfoundland and Labrador and Nova Scotia concerning Portions of the Limits of Their Offshore Areas (Newfoundland and Labrador/Nova Scotia)*, Award of the Tribunal in the Second Phase (26 Mar. 2002), para. 4.32

⁵²*Ibid.*, p. 83, fig. 7.

⁵³See *Dubai-Sharjah Border Arbitration*, Award (19 Oct. 1981), *International Law Review (ILR)*, 1993, Vol. 91, No. 543, p. 677.

Le PRESIDENT : Veuillez-vous asseoir. M. Reichler, je vous invite à poursuivre votre plaidoirie.

Mr. REICHLER : Merci beaucoup.

48. Mr. President at step two of the three-step process, as I have indicated, the Parties disagree about relevant circumstances and corresponding adjustments to the provisional equidistance line. Costa Rica claims there are two relevant circumstances that require an adjustment of the line in its favour. They are wrong about both. I have already addressed their first claim in this regard, that Costa Rica's alleged location in the middle of a three-State concavity, in which converging equidistance boundaries in the north and south purportedly combine to cut them off short of 200 miles, is a relevant circumstance requiring adjustment of the line. That claim, as I have shown, is bogus. Costa Rica itself demonstrated this in its submissions to the Court in 2011. If the 1977 Treaty is out of the way, Costa Rica has no impediment to extending its reach all the way to the limit of its 200-mile entitlement. South of the equidistance line with Nicaragua, it does not even have any serious competitors.

49. The other relevant circumstance invoked by Costa Rica is what it calls the disproportionate impact of the Corn Islands. This is Costa Rica's alternative argument. As expressed by Mr. Lathrop, if the Corn Islands are not disregarded in the first step of the three-step process, and they are used in the construction of the provisional equidistance line, then they should be disregarded in the second step, and the line should be adjusted to eliminate their influence⁵⁴. There is no basis for this claim either. In fact, the Corn Islands do not exert a disproportionate influence on the equidistance line, and there is no reason to disregard them or adjust the line in Costa Rica's favour on their account.

50. This is clear from a close examination of the actual impact of the Corn Islands on the equidistance line, something that Costa Rica's counsel conspicuously did not do for you. They preferred to deal in abstractions and generalities. Here again are the two equidistance lines out to approximately 55 miles from the coast. Up to this point, the major influence on them is still the combination of Costa Rican coastal convexity and Nicaraguan concavity. The Nicaraguan base

⁵⁴See CR 2017/9, p. 47, para. 37 (Lathrop).

points at Gorda Point and Monkey Point, which enter the picture at 20 miles, operate to stop the continued movement northward of the line, in front of Nicaragua's coast, but they do not in any way reverse the line's direction. From 20 to 55 miles the corresponding Nicaraguan and Costa Rican base points are in relative equipoise, and the line moves due east. But Nicaragua still suffers the effects of the sharp northward movement of the line in its first segment.

51. Beyond 55 miles, the Corn Islands come into play, but only on Nicaragua's equidistance line, because Costa Rica ignores them. As you will see, they partially compensate Nicaragua for the prejudicial effects of the equidistance line in the first segment of the line. The first change of direction that they cause is between points B and C, which lie, respectively, 55 miles and 80 miles from the coast. This segment of the line reflects the combined influence of Great Corn Island on the Nicaraguan side and base points on the Costa Rican side which include Costa Rica's base points on the convex portion of its coast just south of the land boundary terminus. The effect is to cause the equidistance line to move gradually to the south-east for a distance of 25 miles, and ultimately reposition itself along the course it would have followed if the Costa Rican convexity and the Nicaraguan concavity were not present. In other words, the Corn Islands influence the line in this segment in a manner that partially compensates Nicaragua for the prejudice it suffers in the prior segments. But their impact is diluted by the counterpart base points on Costa Rica's convex coast.

52. Beyond point C, the effect of the Corn Islands are largely equalized and offset by Costa Rica's base points at Puerto Limon and Punta Mona. With the corresponding base points in relative equipoise, the line again moves due east. Actually, it moves slightly north of due east, reflecting a slightly greater influence of Costa Rica's base points.

53. Do the Corn Islands exert an influence on the equidistance line? Yes, of course they do. That is what all base points do. The Corn Islands are a significant part of the relevant geography. They merit base points here, just as they did in the delimitation between Nicaragua and Colombia.

54. The question is whether they exert a *disproportionate* influence on the line. And this question cannot be answered in the abstract, as Costa Rica would have you do. To the contrary, it can only be answered by examining the actual influence of the islands in the specific geographical context of this case — that is, by studying the true and real impacts of the base points on the Corn Islands and the corresponding base points on the Costa Rican side. It would be one thing if

the Costa Rican base points that serve as counterparts to those on the Corn Islands failed to push back sufficiently, and the equidistance line veered sharply to the south for a considerable distance, across the seaward projection of Costa Rica's coast. That would be a sign, perhaps, of distortion or disproportionate influence. And you will see an example of precisely that when we get to delimitation on the Pacific side. But it is definitely *not* the case here. Here, the influence of the Corn Islands is substantially offset by Costa Rica's own base points. The line is not distorted in a way that prejudices Costa Rica.

55. Now, in considering whether an island has a disproportionate effect on an equidistance line, location is critical — location is critical. Where the delimitation is between adjacent States, if the island is closer to the mainland coast, it will steer the direction of the line in its initial segment, which, absent offsetting elements on the other side, will influence the line over its entire length. That was true of St. Martin's Island, for example, which, as I said, was situated just 5 miles off the coast, and, therefore, would have had a dramatic impact on the equidistance line throughout its length, imposing a significant cut-off on Myanmar. Costa Rica thus has it backwards when it attempts to justify its disregard of the Corn Islands because they are some 30 miles off the Nicaraguan coast⁵⁵. If they were closer, their influence on the equidistance line would be more pronounced.

56. The other key aspect of location is distance between the island and the equidistance line. The closer the island is to the line, the greater will be its influence. St. Martin's Island again is a good example. It was right up against the equidistance line, and, in fact, on the opposite side of it. Its impact on the line would have been enormous. Serpents' Island was also very close to an equidistance line, which is why it would have caused the line to veer sharply in front of Romania's coast, significantly cutting off Romania's seaward projection. In contrast, the Corn Islands lie more than 50 miles from the equidistance line at their closest point. This causes their influence to be to be diluted, if not completely counterbalanced, by the corresponding base points on Costa Rica's coast.

⁵⁵See CR 2017/9, p. 28, para. 57 (Kohen).

57. There is plainly no disproportionate effect here. The location of the Corn Islands, combined with the effects of counterbalancing base points on the Costa Rican side, including on the convex portion of Costa Rica's coast, prevent the islands from having such an impact. Accordingly, to ignore or disregard them would be seriously and unjustifiably prejudicial to Nicaragua, and would bestow an undeserved windfall on Costa Rica.

58. It would also be inconsistent with Costa Rica's long-standing treatment of smaller and less significant islands in the same vicinity. My old and dear friend Professor Kohen — by old I am simply referring to long-standing not to age I should point out — described the 1977 boundary Treaty with Colombia as a delimitation between Colombia's islands and the Costa Rican mainland⁵⁶. In that respect, it might be a model for delimitation between Nicaragua's islands in the same vicinity, and Costa Rica's mainland. In the 1977 Treaty, Colombia's Albuquerque Cays were given full effect by Costa Rica in the construction of the boundary line. This is self-evident from the location of that boundary, and it was pointed out by Charney and Alexander in their text on *International Maritime Boundaries*⁵⁷. The Albuquerque Cays, which consist of Cayo Norte and Cayo Sur, are truly miniscule, comprising 0.04 sq km and 0.02 sq km, respectively. Cayo Norte is “home” only to only a few Colombian marines. Cayo Sur has no population whatsoever⁵⁸. Moreover, they lie more than 330 miles from the Colombian mainland. Yet, Costa Rica agreed to accord them full effect in the construction of its maritime boundary with Colombia. This fact alone removes all vestiges of credibility from Costa Rica's argument for any less favourable treatment, let alone the complete discounting, of Nicaragua's Corn Islands.

59. There are thus no relevant circumstances that warrant adjusting the provisional equidistance line, adopted at the end of the first step of the process, in Costa Rica's favour. But there are two circumstances that justify adjustments in Nicaragua's favour. The first one is necessary to ameliorate the prejudice to Nicaragua caused by the unique geographic circumstance of Costa Rican convexity and Nicaraguan concavity near the land boundary terminus, which cause the equidistance line to angle sharply and directly in front of Nicaragua's coast for the first

⁵⁶CR 2017/9, p. 11, para. 3; p. 19, para. 29 (Kohen).

⁵⁷Charney and Alexander, *International Maritime Boundaries*, Vol I. (1993), pp. 468-469.

⁵⁸CMN, para. 3.108.

20 miles. This is at tab 29. It is well recognized in the case law and the scholarly literature that, to quote from the Court's Judgment in *Libya/Malta*: "since an equidistance line is based on a principle of proximity and is therefore controlled only by salient coastal points, it may yield a disproportionate result where a coast is markedly irregular or markedly concave or convex"⁵⁹. Under this standard, the present case is uniquely conducive to disproportionality because it has both a markedly concave coast on the Nicaraguan side and a markedly convex coast on the Costa Rican side, in combination. And we see the results: a significant cut-off of Nicaragua's seaward projection.

60. We submit that this cut-off calls for an adjustment of the provisional equidistance line. Not the one that Costa Rica advocates, which would compensate it for a non-existent cut-off of its own. But an adjustment in favour of Nicaragua, to relieve it, at least in part, of the very real cut-off of its maritime entitlements. This is at tab 30. It is the adjustment proposed by Nicaragua. It would change the direction of the provisional equidistance line between the land boundary terminus and a point 65 miles seaward. The adjustment would still leave the equidistance line running to the north/north-east, but it would eliminate the bump and partially ameliorate the cut-off of Nicaragua. And it would do so without imposing a significant cut-off on Costa Rica.

61. Nicaragua considers such an adjustment to be consistent with the Court's task, under Articles 15, 74 and 83 of UNCLOS, to achieve an equitable delimitation between the two Parties. As my very good friend, Mr. Wordsworth, acknowledged, some cut-off is inevitable in a delimitation between two adjacent States; what equity requires is that the cut-off be mutual and balanced⁶⁰. Nicaragua's proposed adjustment achieves that result.

62. This is the only adjustment of the provisional equidistance line that is justified by considerations of coastal geography. However, there is one other, non-geographical circumstance that Nicaragua considers relevant, and that justifies a further adjustment of the provisional equidistance line. In Nicaragua's view, Costa Rica's 1977 Treaty with Colombia is a relevant circumstance, and should be taken into account by the Court in delimiting the boundary between Nicaragua and Costa Rica. This is a different, but complementary, contention in relation to the one

⁵⁹*Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 44, para. 56.

⁶⁰CR 2017/7, p. 66, para. 35 (Wordsworth).

you heard yesterday from my distinguished colleague, Professor Remiro, who presented Nicaragua's case that Costa Rica is precluded from claiming maritime areas beyond the limits established in that treaty. This remains Nicaragua's main argument on the effects of the 1977 Treaty. But, in the alternative, even if the Court were to consider Costa Rica free as a legal matter to claim areas beyond the limits established by the treaty, Costa Rica's acceptance of that treaty and consistent conduct under it for more than 30 years would constitute a relevant circumstance to be taken into account in this delimitation.

63. The principle is not a new one. It was recognized by the Court in the *Tunisia/Libya* Judgment in 1982. In that case, as the Court explained: the parties had manifested their recognition and respect for a particular boundary line by their consistent conduct over a ten-year period⁶¹. The line was not the subject of any formal agreement. Nevertheless, the Court found that the conduct of the parties was a circumstance of "great relevance" that was "proper to be taken into account" in delimiting the boundary. A circumstance of great relevance proper to be taken into account in delimiting the boundary. In other words, a relevant circumstance because it constituted "indicia . . . of the line or lines which the Parties themselves may have considered equitable . . ."⁶². Thus, even in the absence of an agreement, conduct that is consistent and long-standing may be a relevant circumstance to be taken into account in the delimitation of the boundary because it is evidence of what the parties themselves considered an equitable solution.

64. The facts here are even more compelling than they were in *Tunisia/Libya*. In this case, it is undisputed that for more than three decades Costa Rica manifested, by its conduct and its express statements, that it considered its boundary delimitation with Colombia to be equitable. Indeed, throughout this long period, Costa Rica repeatedly affirmed its official position that its boundary agreement with Colombia was of a "beneficial character"⁶³. It was only in 2013 that Costa Rica's legal position changed⁶⁴. But the geographical circumstances rendering Costa Rica's arrangement

⁶¹See *Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Judgment*, I.C.J. Reports 1982, p. 35, para. 21, p. 83, para. 117.

⁶²*Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Judgment*, I.C.J. Reports 1982, p. 84, para. 118, p. 87, para. 125.

⁶³Diplomatic Note No. DM 073-2000 from the Costa Rican Minister for Foreign Affairs to the Colombian Minister for Foreign Affairs, 29 May 2000 (CMN, Ann. 24). See also CMN, paras. 3.117-3.122.

⁶⁴MCR, Ann. 18.

with Colombia “beneficial” and equitable, in Costa Rica’s view, have not changed. What is an equitable boundary line for Costa Rica cannot be affected by the identity of the State on the other side of the line. If it did not consider itself to be inequitably cut off by its boundary with Colombia, then any claim that it is cut off by the same boundary with Nicaragua rings hollow. On the basis of this “relevant circumstance”, Nicaragua has proposed that the equidistance line be adjusted so that it meets and follows the outer limit of Costa Rican maritime space under the 1977 Treaty.

65. Accordingly, as the outcome of the second step in the three-step process, Nicaragua proposes that its provisional equidistance line, which results from the first step of the process, be adjusted in two places — this is at tab 31: in the first segment, an adjustment to ameliorate the cut-off of Nicaragua from its maritime entitlements caused by Costa Rica’s convex coast and Nicaragua’s concave coast in the vicinity of the land boundary terminus; and in its final stage, so that it meets and extends along the Costa Rica/Colombia boundary, in reflection of Columbia’s 30-year acceptance of that boundary as equitable and beneficial to Costa Rica.

66. To be sure, Mr. President, the Costa Rica/Colombia boundary terminates Costa Rica’s seaward projection within some 80 miles of its coast. But this is not a cut-off caused by a so-called third-State concavity, or by converging equidistance boundary lines. If this is a cut-off, it is one of Costa Rica’s own making. It was Costa Rica’s sovereign decision to accept this boundary with Colombia, and to respect it in practice as an international boundary for over 30 years, and to call it “beneficial” to Costa Rica, in full knowledge and appreciation that it significantly limited its seaward projection to the east and the north-east. Costa Rica cannot reasonably ask Nicaragua to compensate it for a self-imposed cut-off. And this was made clear by the distinguished arbitral tribunal in *Barbados v. Trinidad & Tobago*: “Barbados cannot be required to ‘compensate’ Trinidad and Tobago for the agreements [Trinidad and Tobago] has made [with other States] by shifting Barbados’ maritime boundary in favour of Trinidad and Tobago”⁶⁵.

67. I come now to the third and final step in the three-step process — the test for disproportionality. My outstanding colleague, Professor Oude Elferink, has already demonstrated and explained how Nicaragua determined the relevant coasts and the relevant area. I do not think

⁶⁵*Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Decision of 11 Apr. 2006, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVIII 147 (2008), para. 346.

his presentation can be improved upon, and certainly not by me. So it only remains for me to compare the ratio of the Parties' relevant coastal lengths, to the ratio of the relevant area distributed to them by Nicaragua's proposed adjusted equidistance boundary line, and demonstrate the equitableness of Nicaragua's proposed boundary. This is at tab 32 and is a reproduction of what is in our Counter-Memorial.

68. The coastal ratio, using Professor Oude Elferink's relevant coasts, is 1.02:1 in favour of Nicaragua. The area ratio, resulting from the drawing of Nicaragua's adjusted equidistance line across the relevant area described by my colleague, is 1.04:1 in favour of Nicaragua⁶⁶. The disproportionality test is performed only to determine whether there is a gross disparity between the two ratios. Nicaragua's proposed delimitation easily passes the test.

69. Mr. President, Members of the Court, this concludes my presentation, and Nicaragua's case on maritime delimitation in the Caribbean Sea. I thank you for your kind courtesy and patient attention, and I ask that you call upon my esteemed colleague, Professor Lowe, to begin our submissions on delimitation of the boundary in the Pacific Ocean.

The PRESIDENT: Thank you, I now give the floor to Professor Vaughan Lowe.

Mr. LOWE:

**STARTING POINT AND DELIMITATION OF THE TERRITORIAL SEA
IN THE PACIFIC**

1. Thank you, Mr. President, Members of the Court. My task at this point is to address you on the question of the territorial sea boundary in the Pacific Ocean.

2. This task is more simple than its equivalent in the Caribbean. There is an agreed starting-point, at the middle of the closing line across Salinas Bay. That was fixed in the 1888 Cleveland Award, and confirmed in the Fifth Alexander Award in March 1900, and effectuated by the Parties in a delimitation exercise in 2003⁶⁷.

3. [Slide] Using that starting-point, the Court's equidistance/special circumstances methodology can be applied. The provisional, strict equidistance line is depicted on Figure Ic-1 on

⁶⁶CMN, para. 3.137.

⁶⁷Counter-Memorial of Nicaragua (CMN), paras. 2.5-2.10.

page 33 of the Counter-Memorial, where it is marked in black. You will see the 12-nautical-mile territorial sea limit is marked in blue, and the provisional equidistance line in the territorial sea is, broadly speaking, a line with a kink in it. It travels west-south-west for half its distance, around 6 nautical miles, and is then deflected and changes to a west-north-west direction.

4. [Slide] Looking more closely at the effect of the base points, you can see that for approximately the first 6 miles the provisional equidistance line is controlled by the base points on either side of Salinas Bay. They produce the first seven turning points, which are not controversial. They are shown on this map as points P-1 to P-7, with the starting-point on Salinas Bay as Point 0. But at Point 7, the two base points on the Santa Elena Peninsula at Punta Blanca take over, deflecting the line northwards.

5. The deflection is caused by a relatively short stretch of the coastline of Costa Rica whose orientation is markedly different from the general direction of most of Costa Rica's Pacific coast. [Slide] And that can be seen by looking at this map from Volume 111 of the United States State Department's *Limits in the Seas* series, which is available online⁶⁸. It illustrates the straight baselines claimed in Costa Rica's Decree No. 18581 of 1988.

6. The Court will recall that UNCLOS Article 7 (3) — like Article 4 (2) of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone before it — stipulates that the straight baselines “must not depart to any appreciable extent from the general direction of the coast”. And that is relevant, because it means that Costa Rica's own baselines must, by definition, depict what Costa Rica itself considers to be the general direction of its coast.

7. It can be seen that Punta Blanca and Punta Santa Elena face north-west, in contrast to the general direction of most of Costa Rica's coastline, which faces west or south-west. The base points located on Punta Blanca, and subsequently, as Mr. Reichler will explain, the base point on Cabo Santa Elena, push the equidistance line northwards, across in front of the coast of Nicaragua.

8. [Slide] Sketch-map 3.6 in Costa Rica's Memorial makes the point clearly. The northwards deflection of the equidistance line after turning Point 7 is caused by a short stretch of coast at

⁶⁸Available at: <https://www.state.gov/documents/organization/58378.pdf>, p. 8.

Punta Blanca which does not follow the general direction of the coast of Costa Rica but faces north — not even north-west, like Santa Elena.

9. Nicaragua submits that Punta Blanca, a relatively small feature on Santa Elena, is a good example of a special circumstance which requires an adjustment of the strict equidistance line.

[Slide off]

10. I made the point earlier this morning, quoting the *Guyana/Suriname* Award, that there is no finite list of special circumstances, and that there is support for the view that the notion of special circumstances “generally refers to equitable considerations”. Well, that may be putting the matter in rather wide terms, but the case of anomalies in the general direction of the coast created by promontories is within the mainstream of geographical considerations that may warrant — or indeed, require — adjustment of the provisional equidistance line.

11. The well-respected expert hydrographer and adviser to the United Kingdom UNCLOS delegation, Peter Beazley, wrote in his 1994 study entitled *Technical Aspects of Maritime Boundary Delimitation* that: “In the case of adjacent coasts quite small coastal promontories close to the land terminal, as well as the presence of islands, may cause marked diversions of the equidistant line.”⁶⁹

12. Both parties in the *Guyana/Suriname* arbitration took the position that a coastline may be rendered extraordinary by “major promontories, islands, or other coastal features”, or “features such as peninsulas, major bays, island fringes or other such configurations”⁷⁰; and one of the experts in that case referred to “large peninsulas or protrusions from one of the coastlines that dramatically skew the course of an equidistance line”⁷¹. The *Guyana/Suriname* Tribunal looked for such features but, not finding them in that case, decided not to shift the equidistance line. The *Croatia/Slovenia* Tribunal, on the other hand, found such a feature, and did shift the equidistance line.

13. But again, it is unnecessary to multiply the references, because the proposition is not really controversial in the context of the delimitation of the territorial sea in this case. It is not the

⁶⁹Available at: <https://www.dur.ac.uk/ibru/publications/download/?id=225>, p. 7.

⁷⁰*Guyana/Suriname*, para. 375.

⁷¹At para. 376.

presence of a promontory per se that requires adjustment of a median line. It is where a promontory bears upon a provisional equidistance line in such a way as to push it across in front of the coast of an adjacent State so as to produce a cut-off, that an adjustment to the line may be necessary. It is, I think, common ground that a cut-off is a special circumstance warranting an adjustment to the line.

14. The strict equidistance line proposed by Costa Rica produces a cut-off beyond the Punta Blanca turning point. [Slide] When it reaches about 6 nautical miles off the coast of Nicaragua, the strict equidistance line turns to follow a course that is not very far from parallel with the coast of Nicaragua — it is something like 20° off the parallel with the general direction of the Nicaraguan coast. That can be seen on Figure Id-4, at page 50 of the Counter-Memorial. The encroachment on the territorial sea generated by the Nicaraguan coast is obvious. [Slide off]

15. Non-encroachment was described as “one of the pillars of the law of maritime delimitation”, by Prosper Weil⁷²; and it has been applied in the line of case law following the Court’s seminal Judgment in the *North Sea Continental Shelf* cases⁷³, notably in the recent *Bay of Bengal* cases⁷⁴.

16. Accordingly, Nicaragua submits that an adjustment of the provisional equidistance line in the territorial sea is necessary, and that the appropriate adjustment can be achieved by discounting the base points on the Santa Elena peninsula that cause the deflection, when constructing the equidistance line. [Slide] The result of this approach is illustrated on Figure Ic-2, at page 34 of the Counter-Memorial. Costa Rica’s unadjusted equidistance line is shown in black, and Nicaragua’s proposed adjusted equidistance line is shown as a dotted green line. That adjustment avoids the encroachment on the territorial sea generated by Nicaragua’s coast.

17. [Slide] For a short distance — maybe 6 nautical miles — it is true that this adjusted line does run across in front of the coast of Santa Elena. But that is a minor and localized effect resulting from the anomalous orientation of the coastline of Santa Elena. The overall result, as

⁷²*St Pierre & Michelon*, 31 *ILM* 1145, para. 17.

⁷³*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, *I.C.J. Reports* 1969, p. 3.

⁷⁴*Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, *ITLOS Reports* 2012, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/published/C16_Judgment.pdf.

shown on Figure Id-7 of the Counter-Memorial, is to produce a maritime boundary that approximately bisects the sea area between the Parties.

18. Moreover, like the result of the adjustment in the Caribbean, the result is to generate a line that can be continued seawards so as to produce an equitable result in the delimitation of the EEZ and continental shelf, and a harmonious application of UNCLOS Articles 15, 73 and 84.

[Slide off]

19. That, Mr. President, completes my brief intervention at this stage of the first round and unless I can help you further, I would ask you to call on Mr. Reichler again.

The PRESIDENT: Thank you. I now give the floor to Mr. Reichler.

Mr. REICHLER:

DELIMITATION OF THE MARITIME BOUNDARY IN THE PACIFIC OCEAN

1. Mr. President, Members of the Court, I am back for my return engagement. I fear the Court will regard me as the man who came to dinner and then took up residence in the household. I apologize for that, but I can only carry out the instructions that the Agent has given me to make these respective presentations on delimitation in the Caribbean and the Pacific. And I will do so. I will now address delimitation of the exclusive economic zone and the continental shelf in the Pacific Ocean. I trust it will please the Court that I will be much briefer in my discussion of delimitation on the Pacific side than on the Caribbean side. That is not because the area is less important, only because the disagreements between the Parties are fewer in number, and less complex.

2. In the Pacific, like the Caribbean, the Parties agree that the maritime boundary should be delimited by means of the three-step process, and each of them begins by constructing a provisional equidistance line. In contrast to the Caribbean, however, the provisional equidistance lines drawn by Nicaragua and Costa Rica in the Pacific are very similar. There are no significant differences. You can see this at tab 39 and on your screens now. This is an overlay of Nicaragua's provisional equidistance line on top of Costa Rica's. The similarity between the two lines reflects the Parties' usage of the same coastlines, the same CARIS software, and similar coastal base points derived

from the application of that software to their coastlines. The disagreement between Nicaragua and Costa Rica in the Pacific plainly is not in the *first* step of the three-step process.

3. It is in the *second* step of that process. Costa Rica contends that there are no special or relevant circumstances on the Pacific side, and therefore that there is no need or justification for adjusting the provisional equidistance line. For Costa Rica, the boundary should be delimited along a strict equidistance line, without any changes to it. And this is precisely where the disagreement between the Parties lies. Nicaragua considers that there *are* special and relevant circumstances of a geographical nature here, which cause the provisional equidistance line to swerve in front of Nicaragua's coast and cut it off from a significant portion of its maritime entitlement. On this basis, Nicaragua submits that there should be an adjustment of the provisional equidistance line to ameliorate the line's cut-off effects, and produce a boundary that is more equitable to both States.

4. As always, the specific geographical context is key, and a close examination of it is necessary and unavoidable. At tab 40, you see that Nicaragua's Pacific coast is straight, and that it runs in a north-west to south-east direction so that, as a result, it projects seaward to the south-west. And here is Costa Rica's coast. As you can see, the *general* direction of the Costa Rican coast is, like Nicaragua's, from north-west to south-east. But, unlike Nicaragua's coast, Costa Rica's is marked, in the north, by two peninsulas — the Santa Elena Peninsula, that juts out from the coast just south of the land boundary terminus — and the Nicoya Peninsula, below it.

5. It is Nicaragua's contention that both of these peninsulas — and especially the Santa Elena Peninsula, because of its unique configuration and very close proximity to the land boundary terminus — exercise a distorting or disproportionate impact on the equidistance line, and that this is why the cut-off occurs. The impact of these coastal features on the line is easily demonstrated.

6. This is from tab 41. What you see here is a comparison of the provisional equidistance line drawn by both Parties, which gives full effect to the two peninsulas, and an equidistance line, almost perpendicular to the coast, that does not take them into account. As you can also see, the line influenced by the peninsulas causes a cut-off of Nicaragua; the line without their influence does not.

7. Earlier this week, our friends on the other side feigned horror at the sight of this illustration. They were shocked, shocked by what they called a “mutilation”⁷⁵ of their territory, and an attempt by Nicaragua to “erase” it from the map⁷⁶. But all this professed outrage was just for show. They know we do not purport to erase their territory. In fact, we do not even purport to deny effect to it, as you will have seen in our Counter-Memorial⁷⁷. At this point, our intention is merely to illustrate what the effect of these features is and the best way to do that is by comparing the equidistance line where they are taken into account with one where they are not.

8. So let us look more closely at what it is about these features that causes them to influence the equidistance line in the way that they do. We start with the Santa Elena Peninsula at tab 43. As you can see, the Santa Elena Peninsula is located in very close proximity to the land boundary terminus. It lies only 14 km to the south, where it juts sharply out to the west, into the ocean, for approximately 30 km. It is a prominent projection — an elongated coastal convexity — located very close to both the land boundary terminus and the equidistance line. The combination of its configuration and its location result in an extraordinarily strong effect on the equidistance line.

9. I will demonstrate this first by reference to some schematics, before showing it to you on the map. We start with two perfectly straight coasts for States A and B. In this geographical situation, the equidistance line would run at a right angle to the coast. You can see here the effect of the peninsula, or convexity, which on this scale would lie approximately 50 km south of the land boundary terminus. You can now see what happens if the convexity, or peninsular, is moved closer to the land boundary terminus, here approximately 25 km to the south. And you can now see that the longer the convexity or peninsula extends into the sea, the more pronounced will be its effect on the equidistance line.

10. We can now return to the Santa Elena Peninsula. And you can see, here and at tab 45, that its effects are as pronounced as what we might have expected from the schematics. Because of its particularly elongated configuration, and its fortuitous location adjacent to the land boundary terminus, the Santa Elena Peninsula alone controls the equidistance line from a point that is 6 miles

⁷⁵CR 2017/7, p. 25, para. 22 (Ugalde).

⁷⁶CR 2017/7, p. 60, para. 16; p. 65, para. 32 (Wordsworth).

⁷⁷See Counter Memorial of Nicaragua (CMN), paras. 2.52-2.55 (Santa Elena), 2.73 (Nicoya).

from shore all the way out to 120 miles. More precisely, just two base points, each one located at the end of a promontory at the western tip of the peninsula, control the equidistance line all the way out to 120 miles. And these remote base points have a very exaggerated — and we submit — disproportionate effect both because of their extreme locations and because there are no corresponding convexities or promontories or peninsulas along Nicaragua's almost perfectly straight coast to counterbalance them or reduce their effect.

11. The result is a cut-off of Nicaragua. Let us take a closer look at Santa Elena. This is at tab 46. As Professor Lowe showed you, for the first 6 miles, the equidistance line is balanced by offsetting base points on each side of the land boundary terminus, three on the Costa Rican side and five on the Nicaraguan side. This is because the base points at the western end of the Santa Elena Peninsula have not yet come into the picture.

12. After the line reaches 6 miles, Costa Rica's base point at Punta Blanca, which is located at the end of a promontory extending off the Santa Elena Peninsula's north-west coast — a projection attached to a projection, so to speak — pushes the equidistance line to the north-west, across the seaward projection of Nicaragua's coast, due to the absence of any similarly protruding features on the Nicaraguan side that might counter-balance that base point. The base point at Punta Blanca controls the equidistance line out to the 12-mile territorial sea limit. The result, as Professor Lowe showed you, is that Nicaragua is significantly cut-off in the territorial sea.

13. But that is just the beginning of it. At 12 miles, the other base point on the Santa Elena Peninsula, located at Cabo Santa Elena, a promontory at the westernmost tip of the peninsula, takes over. This is at tab 47. That solitary and remote base point, at the end of a convexity attached to the end of a convexity, controls the equidistance line, alone on the Costa Rican side, for the next 108 miles, out to 120 miles from the coast. The effect is to lock in and extend the cut off that originates in the territorial sea, all the way out to 120 miles. To that distance, by virtue of the lone base point at the extremity of Cabo Santa Elena on the Santa Elena peninsula, the equidistance line continues to cut off Nicaragua.

14. In their first round, Costa Rica barely mentioned the Santa Elena Peninsula. They said nothing at all about the base points located there, or any other base points for that matter, or their impact on the equidistance line. My good friend Dr. Parlett told you only that cut-off in the

territorial sea is irrelevant, and that it cannot justify an adjustment to equidistance as a special circumstance — just as she acknowledged it would in the EEZ or continental shelf⁷⁸ — because, in her words, equidistance has a “primacy” in the territorial sea that it does not have in the other maritime zones⁷⁹. But that is simply wrong as a matter of law, including this Court’s own jurisprudence, as Professor Lowe has explained. In fact, as the Court has observed, the equidistance/special circumstances principle in the territorial sea and the equidistance/relevant circumstances principle in the zones beyond are quote, “closely interrelated”⁸⁰, and, in practice, they have become one and the same.

15. The other argument that we heard earlier this week was that size matters, and that the Santa Elena Peninsula and, especially, the Nicoya Peninsula, are much larger than the Corn Islands, which Nicaragua submits should be given full effect in the construction of the equidistance line. They accuse us of inconsistency in that regard. Our response is that, if size alone determined whether a coastal or insular feature should be given full effect, they would have a point about giving full effect to their two peninsulas. But size is not the only, or even the most critical, factor. As the jurisprudence developed by...

16. As the jurisprudence developed by this Court and other international tribunals makes clear, the impact of a feature, and whether it is disproportionate, can only be determined by examining it in the specific geographical context of the particular delimitation that is being performed⁸¹. In this examination, the location and configuration of the feature will always be critical.

17. As we have seen, where adjacent States are concerned, an insular or coastal feature that is distant from both the land boundary terminus and the equidistance line — like the Corn

⁷⁸See CR 2017/7, pp. 41-42, paras. 19-21 (Parlett).

⁷⁹CR 2017/7, p. 42, para. 21 (Parlett).

⁸⁰*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, p. 111, para. 231.

⁸¹See, e.g., *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, Judgment, ITLOS Reports 2012 (hereinafter “*Bangladesh v. Myanmar*”), para. 317; *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Decision of 11 Apr. 2006, RIAA, Vol. XXVIII, p. 147, para. 242; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, p. 290, para. 81. See also *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, pp. 116-118, paras. 164-168 (evaluating whether coastal disparity should be considered a relevant circumstance in a case-specific manner); *ibid.*, p. 89, para. 78 (noting that identifying the relevant coasts is a case-specific activity); *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012 (II), para. 141 (same).

Islands — is unlikely to have an exaggerated effect on the line. Conversely, an island or irregular coastal feature — like a convexity, promontory or peninsula — that is close to the land boundary terminus and the equidistance line — like Santa Elena — will have an exaggerated effect on that line that is much greater even than that of a larger feature that is located farther away, like the Nicoya Peninsula.

18. But both in terms of size and significance, no one would question the importance, or the entitlement to base points, of features such as St. Martin's Island or Abu Musa. If size or population or economic activity mattered most, they would have to be taken into account. But what mattered most to the International Tribunal for the Law of the Sea (ITLOS) and to an international arbitral tribunal, was the location of each of these features, and, as a consequence of their locations, the distorting influences they had on the equidistance line. As I explained earlier this morning, St. Martin's was excluded from the construction of the equidistance line beyond 12 miles, because lying so close to the land-boundary terminus and the equidistance line, it would have caused the line to cut off Myanmar⁸². Abu Musa, although farther out to sea, would have caused the equidistance line to severely cut off Dubai⁸³. The Santa Elena Peninsula causes the equidistance line to cut off Nicaragua in similar fashion.

19. While most of the prejudice to Nicaragua is caused by the Santa Elena Peninsula, some of it is caused by the Nicoya Peninsula, as well. The influence of the Santa Elena Peninsula, and specifically the base points at the remote extremities of Punta Blanca and Cabo Santa Elena, finally ends at 120 miles. At tab 48 you see that from that point to the 200-mile EEZ limit, a distance of 80 miles, the equidistance line is controlled by a single Costa Rican base point located at the westernmost end of the Nicoya Peninsula, at Cabo Velas. The impact of this point is to maintain and extend the cut-off of Nicaragua. As you can see here, only Nicaragua is cut off by the provisional equidistance line. Costa Rica is not significantly cut off. This is not the kind of mutual and balanced sharing of a cut-off that the law requires in a delimitation between adjacent States.

⁸²*Bangladesh v. Myanmar*, paras. 318-319.

⁸³*Dubai-Sharjah Border Arbitration*, Award (19 Oct. 1981), 91 *International Law Reports (ILR)*, Vol. 91, 543, p. 677.

20. Costa Rica's main response to this, which we heard and saw on Monday, was to present a slide purporting to show that Nicaragua is not cut off. We have reproduced it at our tab 49. And this is what they presented. It is an unfortunate manipulation. In the first place, the arrows purporting to show the seaward projection of the coast are not drawn perpendicular to Nicaragua's coastal façade. They are drawn in a manner not to illuminate but to hide the cut-off effect of the provisional equidistance line, especially the arrow at the bottom, which is drawn over top of the line. Mr. President, I don't think this type of chart is helpful to the Court. It is one thing to argue that a cut-off should be ignored, or that it is not prejudicial enough to justify an adjustment to the equidistance line, or the particular adjustment that Nicaragua seeks. But it is misleading to present an image designed to make it appear that no cut-off exists, when it plainly does.

21. Costa Rica emphasizes in its Memorial that there are no offshore features in the Pacific that distort the equidistance line⁸⁴. That is true, but it is irrelevant. We might even call it a diversion. Offshore features are not the problem here. The problem here is one of coastal promontories, convexities, jutting out into the sea in opposite directions from the coast at large, and the distorting and prejudicial effects they have on the equidistance line. Costa Rica had absolutely nothing to say about this in its Memorial. Not one word from them until these hearings. Our friends have now adopted the indefensible position that, while offshore features may be discounted or disregarded, mainland irregular features such as peninsulas, promontories and projections and other convexities must always be given full effect⁸⁵.

22. That is not the law. The jurisprudence draws no such distinction between insular and coastal features that have distorting effects on the equidistance line. Rather, the case law teaches us that it is the impact of the feature — and specifically whether it exerts its influence in such a manner as to cause the equidistance line to inequitably cut off the other State — that determines whether it should be discounted, regardless of whether it is an island or a peninsula.

23. As far back as the *North Sea* cases, the Court recognized this. Our Costa Rican friends are quick to point to that seminal case on the subject of coastal concavity, but they glide over the Court's other observations on the potential drawbacks of equidistance, especially where the Court

⁸⁴Memorial of Costa Rica (MCR), para. 3.19.

⁸⁵CR 2017/7, pp. 52-53, paras. 48-49 (Parlett).

said that “the presence of islets, rocks and minor *coastal projections*” may have a “disproportionally distorting effect” on an equidistance line which may require correction⁸⁶.

24. In the *Continental Shelf* arbitration between France and the United Kingdom, the Court of Arbitration delimited the boundary between the two States both in the English Channel and in the Atlantic Ocean. In the Atlantic, the Court of Arbitration found that the Scilly Isles, which were “geologically a natural prolongation of the Cornish peninsula and an integral part of the land mass of the United Kingdom”⁸⁷, distorted the equidistance line by pushing it to the south so that it cut across the seaward projection of France’s Atlantic coast, as depicted here and at tab 50⁸⁸. The tribunal decided to adjust the equidistance line in France’s favour, by giving half effect to the United Kingdom’s base points⁸⁹, observing that the “further projection westwards of the Scilly Isles” had “the same tendency to distort” the equidistance line as a “projection of an exceptionally long promontory, which is generally recognized to be one of the potential forms of ‘special circumstance’” to be taken into account in the delimitation of a maritime boundary⁹⁰.

25. In its Judgment in *Qatar v. Bahrain*, the Court cited this very aspect of the *Anglo/French* arbitral award approvingly. In the Court’s language, what is to be avoided is a situation in which “a remote projection of . . . [the] coastline . . . which, if given full effect, would ‘distort the boundary and have disproportionate effects’”⁹¹. That is the case here.

26. Based on the jurisprudence, learned commentary has been consistent in pointing out the distorting effects of coastal features that depart from the general direction of the coast, and the inequitable results that ensue if strict equidistance is used to delimit the maritime boundary on the basis of such features. In his treatise on maritime delimitation, Prosper Weil observed that

“courts will seek to ascertain whether a minor geographical feature, which is out of line with the general configuration of the coast, has a disproportionate effect on the

⁸⁶*North Sea Continental Shelf (Federal Republic of Germany v. Netherlands)*, Judgment, I.C.J. Reports 1969, para. 57; emphasis added.

⁸⁷*Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (France v. United Kingdom)*, RIAA, Vol. XVIII, para. 4.

⁸⁸*Ibid.*, para. 243.

⁸⁹*Ibid.* paras. 249-251.

⁹⁰*Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic (France v. United Kingdom)*, para. 244.

⁹¹*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, I.C.J. Reports 2001, para. 247.

equidistance line, by comparison with the line which would have been produced had this feature not existed, and is therefore unreasonable and inequitable”⁹².

27. Coastal promontories are widely recognized as the type of feature that can produce such a disproportionate effect. Professor Lowe read a passage from the paper delivered by Commander Peter Beazley, an adviser to the British delegation to the Third United Nations Conference on the Law of Sea, in which he emphasized that even “quite small coastal promontories close to the land terminal . . . may cause marked diversions of the equidistant line”⁹³. And, beyond the passage cited by Professor Lowe: “[a] promontory can be seen to have a distorting effect and to produce an inequitable result if equidistance is used. A similar situation may result from islands off shore . . . One solution to the general problem is to give the feature causing the inequity only partial effect.”⁹⁴

28. Mr. President, this principle takes on even more significance in light of the very recent award in the *Croatia/Slovenia* arbitration. The very distinguished arbitral tribunal in that case, under the leadership of Judge Guillaume, who is no stranger to the law of maritime delimitation, found that an adjustment to equidistance had to be made, in the territorial sea, because Croatia’s elongated Savudrija Peninsula, whose coast ran in a different direction than that of the rest of the Croatian coast, caused the equidistance line to “box in” — or cut off — Slovenia⁹⁵. This sketch-map from the arbitral award is at tab 51.

29. Croatia’s Savudrija Peninsula, like the Santa Elena Peninsula, runs from east to west, contrary to the general direction of the Croatian coast below it, which, like Costa Rica, runs from north-west to south-east. The Croatian base points at the end of the peninsula pushed the equidistance line to the north, to the prejudice of Slovenia. The tribunal considered this a “special circumstance” requiring adjustment of the equidistance line, which you see here, in the territorial sea:

“That special circumstance is the fact that very close to [the land boundary terminus] the coastline of Croatia turns sharply southwards around Cape Savudrija, so

⁹²Prosper Weil, *The Law of Maritime Delimitation — Reflections* (1989), pp. 226-227.

⁹³Peter Beazley, *Technical Aspects of Maritime Boundary Delimitation* (1994), p. 10.

⁹⁴*Ibid.*

⁹⁵*Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009*, PCA Case No. 2012-04, Final Award (29 June 2017), paras. 1011-1014.

that the Croatian basepoints that control the equidistance line are located on a very small stretch of coast whose general (north-facing) direction is markedly different from the general (southwest-facing) direction of much the greater part of the Croatian coastline . . . and deflect the equidistance line very significantly towards the north, greatly exaggerating the ‘boxed-in’ nature of Slovenia’s maritime zone.”⁹⁶

The provisional equidistance line was not drawn on the sketch-map by the arbitral tribunal, but would be very easy for the Court and its experts to recreate. What you see here is the boundary after the adjustment made by the tribunal.

30. The tribunal did not go to the extreme of disregarding the Savudrija Peninsula, or ignoring [Croatia’s] base points there. But it did not give them full effect either. As it explained:

“[T]he equidistance line must be modified in order to attenuate the ‘boxing in’ effect that results from the geographic configuration. There is no question of ‘compensating’ Slovenia for that ‘boxed-in’ condition: the Tribunal seeks only to ensure that in the drawing of the maritime boundary the particular configuration of Cape Savudrija in relation to the Slovenian coast does not disproportionately exacerbate Slovenia’s boxed-in condition.”⁹⁷

31. Mr. President, that is precisely the solution to the problem that Nicaragua has proposed. The Santa Elena and Nicoya peninsulas may be irregular in so far as they diverge sharply from the general direction of the Costa Rican coast, but Nicaragua understands and accepts that they cannot be wished off the map or ignored entirely. Accordingly, following the example of the Court of Arbitration in the *Anglo/French* case and the arbitral tribunal in *Croatia/Slovenia*, Nicaragua proposes giving Costa Rica’s peninsulas what amounts to half effect in the exclusive economic zone and continental shelf. At tab 52, our adjusted equidistance line is drawn approximately halfway between the provisional equidistance line and a line that would represent equidistance in the absence of these features.

32. Nicaragua submits that this is an equitable solution. It does not eliminate the cut-off effects of the equidistance line on Nicaragua, but it reduces them to the degree that both States’ coasts are permitted to project seaward in a mutually balanced way, without either State being cut off from its maritime entitlements to any greater extent than the other.

⁹⁶*Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009*, PCA Case No. 2012-04, Final Award (29 June 2017), para. 1011.

⁹⁷*Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009*, PCA Case No. 2012-04, Final Award (29 June 2017), para. 1014.

33. Costa Rica's response to this is, unfortunately, yet another rather unhelpful slide. We have reproduced it at our tab 53 — you see it here. It is another cartographic manipulation. The arrows are deliberately drawn so as to intersect with the equidistance line, and thus give the appearance of a cut-off of Costa Rica. Drawn properly, they would be perpendicular to Costa Rica's coastal façade, so as to accurately reflect the seaward projection of the coast. If this were done, there would be no significant cut-off. Neither Costa Rica nor Nicaragua is significantly cut off by the adjusted equidistance line that Nicaragua proposes as the boundary in this case. To the extent that there is any cut-off — which is inevitable in the case of adjacent States — it is shared and mutually balanced.

34. And this solution easily passes the disproportionality test in the third step of the three-step process. This is from tab 54 and it is a reproduction of a chart in our Counter-Memorial. As Professor Oude Elferink has demonstrated, the correct ratio of the Parties' relevant coastal lengths is 1.65 to 1 in favour of Nicaragua. The ratio of portions of the relevant area attributed to each of the Parties by Nicaragua's adjusted equidistance line is 1.86 to 1 in favour of Nicaragua. This is demonstrably an equitable solution⁹⁸. Accordingly, Nicaragua requests that the Court adopt its adjusted equidistance line as the maritime boundary between Nicaragua and Costa Rica in the Pacific Ocean.

35. Mr. President, Members of the Court, this concludes my presentation on delimitation of the maritime boundary in the Pacific Ocean, as well as Nicaragua's submissions in this morning's session. I thank you once again for your kind courtesy and especially patient attention. Nicaragua will conclude its first round presentations in this afternoon's session, most likely before the coffee break. I wish you all a delicious lunch and bon appétit!

The PRESIDENT: Merci, M. Reichler. The Court will meet again this afternoon at 3 p.m., to hear the conclusion of Nicaragua's first round of oral argument.

Thank you. L'audience est levée.

The Court rose at 12.50 p.m.

⁹⁸CMN, para. 2.77.