

Corrigé  
Corrected

CR 2017/8

International Court  
of Justice

THE HAGUE

Cour internationale  
de Justice

LA HAYE

YEAR 2017

*Public sitting*

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

*President Abraham presiding,*

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

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VERBATIM RECORD

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ANNÉE 2017

*Audience publique*

*tenue le lundi 3 juillet 2017, à 15 heures, au Palais de la Paix,*

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

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

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COMPTE RENDU

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

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*Présents :* M. Abraham, président  
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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***The Government of Costa Rica is represented by:***

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

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

*as Agent;*

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

*as Co-Agent, Counsel and Advocate;*

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

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

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

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

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

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

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

*as Counsel;*

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

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

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

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

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

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

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

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

*comme agent ;*

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

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

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

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

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

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

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

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

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

*comme conseils ;*

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Ms Victoria Leader, Geographical and Technical Consultant,

*as Scientific and Technical Advisers;*

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

*as Administrator.*

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

*comme conseillers scientifiques et techniques ;*

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

*comme administrateur.*

Le PRESIDENT : Veuillez vous asseoir. The sitting is now open. This afternoon the Court will hear the continuation of the first round of oral argument of Costa Rica. I first give the floor to Professor Kohen. Professeur Kohen, vous avez la parole.

M. KOHEN : Merci, Monsieur le président.

**LA COUR DOIT PRÉCISER LA FRONTIÈRE ET NON ROUVRIR  
UNE QUESTION DÉJÀ TRANCHÉE**

1. Monsieur le président, Mesdames et Messieurs de la Cour, c'est un honneur et un plaisir renouvelés de comparaître devant vous pour défendre les droits du Costa Rica. Ma fonction cet après-midi consiste à préciser la portée de la tâche que le Costa Rica vous a confiée en introduisant l'instance relative à la frontière terrestre dans la partie septentrionale d'Isla Portillos.

2. L'ambassadeur Ugalde vous a déjà rappelé les circonstances qui ont imposé au Costa Rica de venir une nouvelle fois devant vous au sujet de cette frontière, tout particulièrement la revendication par le Nicaragua de la côte s'étendant de l'embouchure du fleuve San Juan jusqu'à la lagune Los Portillos (Harbor Head Lagoon) suite à l'installation d'un campement militaire sur cette côte.

3. Le Nicaragua vient une fois encore avec une revendication territoriale contre le Costa Rica par voies de fait. Une revendication, je le dis en passant, qui est en contradiction flagrante avec la frontière que ce même Etat a défendue devant vous il y a à peine deux ans. Une revendication outrancière car elle défie ouvertement une décision de votre propre Cour, celle de 2015. Une décision sur une affaire qui a coûté au Costa Rica le prix de devoir supporter pendant plus de cinq ans des violations répétées de sa souveraineté territoriale.

4. Ce qui est en jeu ici est une question capitale pour le règlement juridictionnel des différends. Je voudrais croire que les deux Parties sont d'accord pour dire que votre Cour ne saurait revenir sur ce qu'elle a déjà décidé avec caractère obligatoire et sans appel. En tout cas, c'est la ferme position du Costa Rica. Je veux aussi bien croire que les Parties sont d'accord sur le fait que certaines questions ont été tranchées par votre Cour en 2015 et pas d'autres. Reste alors à savoir ce que vous avez décidé avec force de chose jugée — et qu'il est donc exclu d'être rouvert — et ce que vous devez encore décider dans la présente affaire introduite par le Costa Rica.

5. Permettez-moi à cette fin de rappeler votre décision dans la partie qui nous intéresse et qui possède incontestablement force de chose jugée.

[Projection n° 1]

«La Cour,

1) Par quatorze voix contre deux,

*Dit* que le Costa Rica a souveraineté sur le «territoire litigieux», tel que défini par la Cour aux paragraphes 69-70 du présent arrêt ;

.....  
2) A l'unanimité,

*Dit* que, en creusant trois *caños* et en établissant une présence militaire sur le territoire costa-ricien, le Nicaragua a violé la souveraineté territoriale du Costa Rica ;»<sup>1</sup>.

6. Dans quelques instants je citerai aussi *in extenso* les paragraphes 69 et 70, qui sont eux aussi couverts par l'autorité de la chose jugée.

[Fin de la projection n° 1]

7. Je vais diviser mon exposé en deux parties : dans la première, je vais préciser que la question de la souveraineté sur la plage d'Isla Portillos a déjà été tranchée et ne peut donc pas être rouverte (A). Dans la deuxième partie, je vais très vite mentionner quel est l'objet de la présente affaire, à la lumière de notre requête et de votre arrêt de 2015 (B).

**A. Ce qui a déjà été tranché par l'arrêt de 2015 : la question de la souveraineté sur la plage d'Isla Portillos**

8. Le Nicaragua sait que sa revendication a déjà été rejetée par la Cour. Le défendeur procède alors à un petit tour de passe-passe terminologique qui ne peut pourtant tromper personne. En quoi consiste cette nouvelle manœuvre nicaraguayenne ? A revendiquer ce que la Cour a déjà considéré comme territoire costa-ricien en utilisant pour ce faire la terminologie du paragraphe 70 de votre arrêt de 2015. Alors que votre paragraphe 70 dit simplement que la Cour s'est abstenue de

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<sup>1</sup> *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua) et Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica), arrêt, C.I.J. Recueil 2015 (II), p. 740, par. 229.*

préciser la frontière par rapport à la côte, le Nicaragua revendique tout simplement l'ensemble de ce territoire.

9. En effet, je vais lire la première conclusion de son *petitum* : «1) le segment de la côte caraïbe qui s'étend entre la lagune de Harbor Head et l'embouchure du fleuve San Juan constitue territoire nicaraguayen»<sup>2</sup>. Votre arrêt de 2015 dit que les parties n'avaient pas fourni d'information détaillée sur la côte. Voici comment le Nicaragua décrit sa revendication à partir de son information prétendument «détaillée» :

[Projection n° 2]

«la frontière terrestre part de l'extrémité nord-est du banc de sable séparant la lagune de Harbor Head de la mer des Caraïbes, traverse ce banc de sable et suit le rivage de la lagune jusqu'à atteindre le chenal reliant celle-ci au cours inférieur du San Juan. Elle suit ensuite le contour d'Isla Portillos jusqu'au San Juan inférieur, le «fleuve proprement dit».<sup>3</sup>

[Fin de la projection n° 2]

10. J'écarte d'emblée deux choses concernant cette prétendue frontière. Premièrement, le soi-disant chenal reliant la lagune Los Portillos au fleuve San Juan. Utilisant la même imagination qu'en 2010, le Nicaragua vient de «découvrir» un autre *caño* qui, à l'en croire, aurait dans son lit des arbres de grande taille et serait navigable, mais uniquement avec des bateaux à papier format A4 (et ce, uniquement dans les zones inondées ou dans des lagunes). La réalité est pourtant simple : ce chenal n'existe pas. Les experts que vous avez désignés vous le confirment dans leur rapport au paragraphe 106<sup>4</sup> ainsi que dans leur réponse à la question posée par le juge Tomka<sup>5</sup>. Et si cela ne suffisait pas, c'est le Nicaragua qui vous le démontre lui-même dans sa dernière pièce de procédure, déposée il y a à peine un mois, dans son contre-mémoire sur la compensation due par ce

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<sup>2</sup> *Frontière terrestre*, CMN, p. 44, conclusions.

<sup>3</sup> *Ibid.*, p. 31, par. 4.20.

<sup>4</sup> *Délimitation maritime dans la mer des Caraïbes et l'océan Pacifique (Costa Rica c. Nicaragua)*, opinion des experts (30 avril 2017), p. 33, par. 106.

<sup>5</sup> *Délimitation maritime dans la mer des Caraïbes et l'océan Pacifique (Costa Rica c. Nicaragua)*, réponse à la question posée par le juge Tomka sur le rapport rendu le 30 avril 2017 par les experts nommés par la Cour (15 juin 2017), lettre du Greffe n° 148822.

pays pour les faits illicites constatés dans l'affaire relative à *Certaines activités*<sup>6</sup>. Voici deux photographies tirées de ce contre-mémoire :

[Projection n° 3]

La première date du 13 septembre 2013. On y voit l'un des *caños* construits par le Nicaragua (le *caño* oriental) et le campement militaire, mais pas l'ombre d'un chenal qui relierait la lagune Los Portillos au fleuve et qui couperait la plage du reste d'Isla Portillos.

[Fin de la projection n° 3. Début de la projection n° 4]

La deuxième photographie date du 10 mars 2017 et couvre à peu près la même région : on y voit que le *caño* construit en 2013 a été en grande partie recouvert par la végétation et que le campement militaire sur la plage n'y est plus, mais de nouveau, pas l'ombre du moindre chenal.

[Fin de la projection n° 4]

Je m'excuse auprès de la Cour de la mauvaise qualité de la reproduction de cette même photographie dans le dossier des plaidoiries. Quoi qu'il en soit, vous avez la référence de la source dans le dossier.

11. La deuxième chose à écarter concernant la prétendue frontière décrite par le Nicaragua est une conséquence de la première : il s'agit du prétendu «contour d'Isla Portillos jusqu'au fleuve San Juan», qui détacherait la plage du reste d'Isla Portillos, divisant ainsi, d'une manière contraire à votre décision, ce que vous avez défini comme «le territoire litigieux» dans l'affaire relative à *Certaines activités du Nicaragua dans la région frontalière*.

12. Je pourrais multiplier les preuves et développer mon argumentation à cet égard mais je ne le ferai pas. Monsieur le président, cela n'est pas nécessaire. La détermination de la frontière que le Nicaragua vous demande de faire, empiète sur un territoire que vous avez déjà défini comme costa-ricien il y a moins de deux ans. Ce défi à l'autorité de la chose jugée ne peut pas prospérer.

13. Monsieur le président, Mesdames et Messieurs de la Cour : toute revendication nicaraguayenne de souveraineté sur un territoire qui a déjà été reconnu comme costa-ricien par votre arrêt de 2015 ne peut pas être admise. Tel est le cas de la plage d'Isla Portillos, comme je l'expliquerai dans les minutes qui suivent.

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<sup>6</sup> *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)*, CMN sur l'indemnisation, fig. 2.7, annexe 2 de l'appendice A, p. 181 et 187.

**a) La Cour a décidé que la plage d'Isla Portillos fait partie du territoire costa-ricien**

14. Le paragraphe 69 de votre arrêt de 2015 est dépourvu d'ambiguïté et ne prête pas à confusion. Je le cite :

[Projection n° 5]

«la Cour a défini le «territoire litigieux» comme «la partie septentrionale [d']Isla Portillos, soit la zone humide d'environ trois kilomètres carrés comprise entre la rive droite du *caño* litigieux, la rive droite du fleuve San Juan lui-même jusqu'à son embouchure dans la mer des Caraïbes et la lagune de Harbor Head» (*C.I.J. Recueil 2011 (I)*, p. 19, par. 55). Le *caño* dont il est ici question est celui que le Nicaragua a dragué en 2010. Ce dernier n'a pas contesté cette définition du «territoire litigieux» et le Costa Rica l'a expressément adoptée dans ses conclusions finales (point 2 a)). La Cour s'en tiendra à la définition du «territoire litigieux» qu'elle a énoncée dans son ordonnance de 2011. Elle rappelle que, dans son ordonnance en indication de mesures conservatoires du 22 novembre 2013, elle a précisé qu'un campement militaire nicaraguayen «se trouv[ant] sur la plage elle-même à la lisière de la végétation», à proximité d'un des *caños* dragués en 2013, était «situé sur le territoire litigieux tel que défini par elle dans son ordonnance du 8 mars 2011» (*C.I.J. Recueil 2013*, p. 365, par. 46).»<sup>7</sup>

15. Le paragraphe 69 doit se lire avec le paragraphe premier du dispositif qui y renvoie, et son deuxième paragraphe également. Selon ces deux paragraphes du dispositif, le territoire litigieux, y compris la plage, est costa-ricien et l'installation du campement militaire nicaraguayen a constitué une violation de la souveraineté territoriale du Costa Rica. Et c'est cette même plage, pour laquelle le Nicaragua a été condamné pour violation de la souveraineté territoriale costa-ricienne, qu'il vient revendiquer de nouveau devant vous !

[Fin de la projection n° 5]

16. Permettez-moi, Monsieur le président, de rappeler pourquoi votre Cour a été obligée de faire la précision selon laquelle la plage d'Isla Portillos faisait partie du territoire litigieux. Votre ordonnance du 22 novembre 2013 l'explique de la manière suivante :

[Projection n° 6]

«le Nicaragua affirme avoir le droit de maintenir des soldats, ou toute autre personne, sur ce qu'il décrit comme un banc de sable s'étendant le long de la plage en face du territoire litigieux. A une question posée par un membre de la Cour, le Nicaragua a répondu que la plage située au nord des deux nouveaux *caños* correspondait selon lui

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<sup>7</sup> *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua) et Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica), arrêt, C.I.J. Recueil 2015 (II), p. 696-697, par. 69.*

«au banc de sable, ou [d']île, qui a[vait] toujours été considéré comme faisant partie de son territoire incontesté.»<sup>8</sup>

[Fin de la projection n° 6. Début de la projection n° 7]

17. Votre Cour a fait l'analyse suivante de cette position nicaraguayenne :

«Le Nicaragua reconnaît la présence d'un campement militaire sur la plage située au nord des deux nouveaux *caños*, qu'il estime être un banc de sable (voir paragraphe 42 ci-dessus). La Cour considère toutefois que, contrairement à ce que le Nicaragua prétend, ce campement se trouve sur la plage elle-même à la lisière de la végétation, et est donc situé sur le territoire litigieux tel que défini par elle dans son ordonnance du 8 mars 2011 (voir paragraphe 44 ci-dessus). La présence continue de ce campement est confirmée par les images satellite des 5 et 14 septembre 2013 et par la photographie du 18 septembre 2013.»<sup>9</sup>

[Fin de la projection n° 7]

18. Je me permets, Monsieur le président, Mesdames et Messieurs de la Cour, de vous montrer à l'écran les trois photographies que vous citez dans votre ordonnance.

[Projections n<sup>os</sup> 8, 9 et 10]

19. Si on récapitule, Monsieur le président, Mesdames et Messieurs les juges, le Nicaragua vient encore une fois devant vous pour revendiquer la même plage, et ce, avec les mêmes arguments que vous aviez déjà rejetés en reconnaissant la souveraineté costa-ricienne sur celle-ci : à en croire nos adversaires, la plage serait un «banc de sable», la plage serait «une île», la plage ne serait même pas Isla Portillos ! A en croire la Partie adverse, ce serait même incorrect de l'appeler «plage» ! Selon le Nicaragua, «elle reste une formation distincte, séparée du continent»<sup>10</sup>. Mais toujours selon le Nicaragua, «la frontière terrestre longe de manière ininterrompue la rive droite du fleuve San Juan dès son point de départ à Punta Castilla»<sup>11</sup>. Pour étayer cette étonnante prétention (je répète : que la rive droite du fleuve San Juan commence à Punta Castilla !), le Nicaragua prétend qu'Isla Portillos serait séparée de la plage par un chenal qui relierait la lagune Los Portillos au fleuve San Juan<sup>12</sup>. Mesdames et Messieurs de la Cour, vos experts ont confirmé qu'il n'y a pas de chenal reliant la lagune Los Portillos au fleuve San Juan et que la plage et le reste

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<sup>8</sup> *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua); Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica), mesures conservatoires, ordonnance du 22 novembre 2013, C.I.J. Recueil 2013, p. 364, par. 42.*

<sup>9</sup> *Ibid.*, p. 365, par. 46.

<sup>10</sup> *Frontière terrestre*, CMN, par. 4.12. ; cf. MCR, par. 2.26-2.29.

<sup>11</sup> *Frontière terrestre*, CMN, par. 4.2.

<sup>12</sup> *Ibid.*, CMN, figures n<sup>os</sup> 4.3, 4.4 et 4.6, p. 31-32 et 34, par. 4.9-4.12.

d'Isla Portillos constituent un ensemble territorial marécageux, parsemé de flaques d'eaux, de petites lagunes et de chenaux intermittents<sup>13</sup>.

20. La conclusion qui ressort est donc claire : dans la revendication nicaraguayenne, il y a identité des parties, d'objet et de base juridique, et cette revendication a déjà fait l'objet d'une décision dans votre arrêt de 2015. Toutes les conditions exigées pour l'application de la règle de la chose jugée selon votre dernière jurisprudence en la matière sont donc réunies<sup>14</sup>. Il vous appartient par conséquent, Mesdames et Messieurs les juges, de garantir le caractère obligatoire, définitif et sans recours de votre décision, prévu aux articles 59 et 60 de votre Statut<sup>15</sup>.

**b) Le Nicaragua fait une lecture contradictoire des paragraphes 69 et 70**

21. Monsieur le président, je passe à présent à la lecture erronée que le Nicaragua fait du paragraphe 70 de votre arrêt. Le Nicaragua prétend qu'en vertu du paragraphe 70, tout le segment de la côte caraïbe entre l'embouchure du San Juan et la lagune Los Portillos est resté en dehors du territoire litigieux reconnu par la Cour comme appartenant au Costa Rica. Permettez-moi tout d'abord d'examiner la vraie portée de ce paragraphe, que vous pouvez voir à l'écran.

[Projection n° 11]

22. Vous constatez dans ce paragraphe, *premièrement*, que votre définition du territoire litigieux mentionnée au paragraphe 69 ne traite pas spécifiquement du segment de la côte qui s'étend entre la lagune Los Portillos et l'embouchure du fleuve San Juan. En effet, vous avez défini tout d'abord de manière générale le territoire litigieux comme étant «la partie septentrionale [d']Isla Portillos». Ensuite vous avez décrit cette partie d'Isla Portillos en définissant son périmètre : «la rive droite du *caño* litigieux, la rive droite du fleuve San Juan lui-même jusqu'à son embouchure dans la mer des Caraïbes et la lagune de Harbor Head». Une interprétation élémentaire de cette description impose de relier les différents accidents géographiques entre eux. Entre le fleuve et la lagune, il y a évidemment du territoire. Autrement, ce serait une région (vous l'appellez

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<sup>13</sup> *Délimitation maritime dans la mer des Caraïbes et l'océan Pacifique (Costa Rica c. Nicaragua)*, opinion des experts (30 avril 2017), p. 33, par. 106 et p. 73, par. 189. Voir également la réponse à la question posée par le juge Tomka sur le rapport rendu le 30 avril 2017 par les experts nommés par la Cour (15 juin 2017), lettre du Greffe n° 148822.

<sup>14</sup> *Frontière terrestre*, MCR, par. 2.29.

<sup>15</sup> *Délimitation du plateau continental entre le Nicaragua et la Colombie au-delà de 200 milles marins de la côte nicaraguayenne (Nicaragua c. Colombie)*, exceptions préliminaires, arrêt du 17 mars 2016, p. 26, par. 58-59.

«la partie septentrionale d'Isla Portillos») dont on ne sait pas où elle s'achève précisément dans sa partie la plus septentrionale. Mesdames et Messieurs les juges, vous n'avez pas exclu le segment de la côte reliant l'embouchure du San Juan à la lagune Los Portillos. Vous ne l'avez pas spécifiquement mentionné, tout simplement parce que vous avez mentionné ses deux extrémités.

23. *Deuxièmement*, vous constatez que les parties ont exprimé des vues divergentes sur le segment de la côte en question. Certes. J'y reviens dans un instant.

24. *Troisièmement*, vous constatez que les parties n'ont pas abordé l'emplacement précis de l'embouchure du fleuve et n'ont pas présenté d'information détaillée concernant la côte. Dans l'affaire relative à la *Délimitation maritime*, vous avez nommé de votre propre initiative des experts, vous leur avez posé des questions précises concernant ces deux points et ils vous ont donné des informations détaillées à leur égard.

25. *Quatrièmement*, vous constatez que les parties ne vous ont pas demandé de préciser le tracé de la frontière par rapport à cette côte et donc que vous vous êtes abstenus de le faire. C'est exactement l'un des deux buts de la présente affaire portée par le Costa Rica. L'autre est l'emplacement du campement militaire nicaraguayen sur la plage d'Isla Portillos, question que M<sup>e</sup> Katherine Del Mar traitera ultérieurement.

[Fin de la projection n<sup>o</sup> 11]

26. Dans le mémoire, nous avons expliqué que le Nicaragua avait dans ses plaidoiries en 2013 et 2015 invoqué l'existence d'un territoire au large d'Isla Portillos et face à la mer<sup>16</sup>. Le contre-mémoire affirme que cela n'est que «pure imagination»<sup>17</sup>. Mesdames et Messieurs les juges, je vous ai lu il y a un moment à peine votre propre ordonnance de 2013, que votre arrêt de 2015 rappelle, et dans laquelle vous faisiez référence à la prétention nicaraguayenne de l'existence «d'un banc de sable s'étendant le long de la plage en face du territoire litigieux»<sup>18</sup>. Ce n'est pas de l'imagination. Ni de la nôtre, ni de la vôtre. Ce qui explique par ailleurs votre troisième question posée aux experts, à savoir s'il existe un banc de sable ou toute autre formation maritime entre les

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<sup>16</sup> *Frontière terrestre*, MCR, par. 2.39.

<sup>17</sup> *Ibid.*, CMN, par. 2.13.

<sup>18</sup> *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua) et Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica), mesures conservatoires, ordonnance du 22 novembre 2013, C.I.J. Recueil 2013, p. 364, par. 42.*

points de départ de la délimitation maritime proposés par les Parties<sup>19</sup>. Les experts, après avoir examiné la barrière sableuse qui ferme ou semi-ferme la lagune Los Portillos, ainsi que la plage d'Isla Portillos ensuite, ont répondu qu'il n'y en avait pas<sup>20</sup>.

27. Mesdames et Messieurs les juges, j'ai déjà expliqué la portée du paragraphe 69 et le fait que la plage d'Isla Portillos est comprise dans votre décision concernant la souveraineté costa-ricienne. Le Nicaragua, en se servant du paragraphe 70 pour revendiquer cette même plage, prive le paragraphe 69 de tout effet utile. En effet, pourquoi avoir explicitement mentionné au paragraphe 69 que la plage située en lisière de la végétation dans laquelle le Nicaragua avait installé son campement militaire faisait partie du territoire litigieux si elle n'en faisait pas ? Le paragraphe 70 ne peut pas effacer ce que le paragraphe 69 affirme de manière catégorique. Le paragraphe 70 a seulement laissé ouverte la question de la détermination précise de la frontière dans cette zone, sans contredire bien entendu ce que vous avez dit quelques lignes auparavant. La plage fait partie du territoire litigieux qui a été déclaré costa-ricien. Donc, *res judicata*. Effet obligatoire et définitif. Car nous le savons tous et toutes : une saine administration de la justice exige qu'il y ait une fin à tout litige. Il y va même du règlement pacifique des différends en général et du respect de la fonction judiciaire en particulier.

#### **B. Ce qui est resté ouvert après l'arrêt de 2015 : la détermination précise de la frontière dans la région septentrionale d'Isla Portillos**

28. Mesdames et Messieurs les juges, ayant écarté de l'exercice de votre juridiction dans la présente affaire la question de la souveraineté costa-ricienne sur la plage d'Isla Portillos, il ressort de votre arrêt de 2015 que ce que vous n'avez pas tranché à cette occasion, c'est la détermination précise de la frontière dans la région. C'est ce que le Costa Rica vous a demandé de faire en introduisant cette instance.

29. Il est paradoxal que le Nicaragua, qui prétendait que l'affaire relative à *Certaines activités* était une affaire de délimitation et non de responsabilité<sup>21</sup>, vienne maintenant prétendre

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<sup>19</sup> *Délimitation maritime dans la mer des Caraïbes et l'océan Pacifique (Costa Rica c. Nicaragua)*, ordonnance du 31 mai 2016, p. 3, par. 10 2) c).

<sup>20</sup> *Délimitation maritime dans la mer des Caraïbes et l'océan Pacifique (Costa Rica c. Nicaragua)*, opinion des experts (30 avril 2017), p. 73-74, par. 185-190.

<sup>21</sup> CR 2015/15, p. 45, par. 1 (Pellet).

que l'affaire sur la *Frontière terrestre dans la partie septentrionale d'Isla Portillos* soit une affaire de responsabilité car la tâche de la Cour serait seulement de déterminer si le campement militaire nicaraguayen se trouve en territoire appartenant à l'une ou l'autre des Parties<sup>22</sup>. Curieusement, le Nicaragua définissait la tâche de la Cour de la manière suivante en l'affaire relative à *Certaines activités* : «Bien qu'elle n'ait pas été introduite comme une affaire de délimitation par le Costa Rica, la présente affaire met en jeu un différend relatif à l'emplacement précis de la frontière dans la zone de l'embouchure du fleuve San Juan.»<sup>23</sup>

30. Le Nicaragua affirme pourtant que la présente affaire ressemble à celle de l'interprétation de l'arrêt en l'affaire du Temple de Préah Vihéar<sup>24</sup>. Il a raison sur ce point, même s'il tire de fausses conclusions. En effet, la souveraineté cambodgienne sur le temple n'était plus à discuter, seul restait à préciser l'étendue de cette souveraineté à son périmètre. Ce que la Cour a fait en précisant la frontière dans les environs du temple à partir des accidents géographiques naturels<sup>25</sup>. C'est, ni plus ni moins, ce que le Costa Rica vous demande de faire dans cette affaire : la souveraineté sur la plage étant, comme celle sur le temple, déjà établie, il ne reste qu'à préciser la frontière à ses extrémités, comme mon ami Sam Wordsworth vous l'expliquera dans un instant.

## CONCLUSIONS

31. Mesdames et Messieurs les juges, je n'ai pas besoin de m'appesantir sur d'autres considérations. Le contre-mémoire consacre de nombreuses pages, y compris de la cartographie, pour décrire la frontière comme elle l'a été dans le passé<sup>26</sup>. Le Nicaragua est dans le déni des changements naturels intervenus, malgré le fait qu'il reconnaisse du bout des lèvres que la frontière doit tenir compte de ces changements<sup>27</sup>. L'érosion marine bien connue dans la région a produit des changements naturels que le Nicaragua peut ou non regretter. Toutefois, cela ne l'autorise pas à chercher des compensations territoriales au détriment du Costa Rica.

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<sup>22</sup> *Frontière terrestre*, CMN, par. 2.23.

<sup>23</sup> *Certaines activités*, CMN, par. 8.6.

<sup>24</sup> *Frontière terrestre*, CMN, par. 2.10.

<sup>25</sup> *Demande en interprétation de l'arrêt du 15 juin 1962 en l'affaire du Temple de Préah Vihéar (Cambodge c. Thaïlande) (Cambodge c. Thaïlande), arrêt, C.I.J. Recueil 2013, p. 315, par. 98.*

<sup>26</sup> *Frontière terrestre*, CMN, p. 36-44.

<sup>27</sup> *Ibid.*, par. 2.21-2.22.

32. En conclusion, Monsieur le président, Mesdames et Messieurs de la Cour, le Costa Rica ne vous demande pas simplement de rejeter la revendication nicaraguayenne. Cette revendication faisait déjà partie de celle que vous aviez rejetée en 2015. Nous vous demandons de déclarer cette revendication comme étant simplement irrecevable car contraire au principe de l'autorité de la chose jugée. Comme mon collègue Sam Wordsworth vous l'expliquera tout de suite, ce qui reste à faire et que le Costa Rica vous prie de faire, dans le souhait de voir le Nicaragua respecter une bonne fois pour toutes l'arrangement frontalier existant, c'est de déterminer quels sont les points qui précisent exactement la frontière dans la région septentrionale d'Isla Portillos, à la lumière des titres pertinents et de la configuration contemporaine du fleuve et de la côte dans cette région.

33. Je vous prie donc, Monsieur le président, de donner la parole à M<sup>e</sup> Wordsworth et vous remercie, Mesdames et Messieurs les juges, de votre attention.

Le PRESIDENT : Merci, Monsieur le professeur. Je donne maintenant la parole à M. Wordsworth.

Mr. WORDSWORTH:

**THE LAND BOUNDARY AS DELIMITED BY REFERENCE TO THE RELEVANT LEGAL  
AND EXPERT MATERIALS**

1. Mr. President, Members of the Court, the Court has before it, from tab 76 of the judges' folder, a set of legal materials with which it may feel more than faintly overfamiliar — the 1858 Treaty of Limits, the Cleveland Award and the Alexander Awards. It now also has the benefit of expert views on the current geography of the coastal area of Isla Portillos, that is, the Expert Opinion of 30 April 2017 and the experts' response to the question of Judge Tomka sent to the Parties on 15 June 2017 — and that is at tab 84 of your judges' folder, or excerpts thereof.

2. Costa Rica's position is that, as follows from a plain reading of these legal and expert materials, the land boundary between Costa Rica and Nicaragua follows the right bank of the San Juan River to its mouth at the Caribbean Sea. The territory to the east along the shoreline belongs to Costa Rica, save for Harbor Head Lagoon and the sandbank that — at least for now — divides the Lagoon from the Caribbean Sea.

### A. The relevant legal materials

3. I turn first to the relevant legal materials, and here I can be reasonably brief as the relevant parts of the 1858 Treaty of Limits, the Cleveland Award and the Alexander Awards are all well-known to the Court, and are largely as set out at paragraphs 71 to 75 of your 2015 Judgment — excerpts are at tab 75 of the judges’ folder<sup>28</sup>.

4. [Start slide] At paragraph 71 of your Judgment, you set out the key extract from Article II of the 1858 Treaty:

“The dividing line between the two Republics, starting from the Northern Sea, shall begin at the end of Punta de Castilla, at the mouth of the San Juan de Nicaragua River, and shall run along the right bank of the said river up to a point of three English miles distant from Castillo Viejo . . .”<sup>29</sup>

5. There are, it appears, two ways of reading this provision.

6. According to Costa Rica, the intention expressed in Article II is that the boundary run along the right bank of the San Juan to the mouth of the river, then located at the “end of Punta de Castilla”. Hence the reference to “at the mouth of the San Juan”, not “near” the mouth, or some other similar formulation.

7. According to Nicaragua, however, the Treaty fixed Punta de Castilla as the starting-point of the land boundary, a position that it says is confirmed in the Cleveland Award and the Alexander Awards<sup>30</sup>. [Start slide.]

(a) Hence, it says, the land boundary does not run all the way to the river mouth, but turns sharply east just before the mouth, running along a supposed channel to the south of the beach to the point that Nicaragua considers best approximates to the former Punta de Castilla — at the east of Harbor Head Lagoon. You see that in Nicaragua’s Figure 4.16 up on your screens<sup>31</sup>.

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<sup>28</sup>*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), p. 697-700, paras. 71-75 (tab 75 of the judges’ folder).

<sup>29</sup>*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), p. 697, para. 71 (tab 75 of the judges’ folder) quoting Article II, Costa Rica and Nicaragua Treaty of Limits (Cañas-Jerez), 15 April 1858 (reproduced as *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, MCR, Ann. 1; see also *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, CMN, Ann. 1) (tab 76 of the judges’ folder).

<sup>30</sup>*Land Boundary*, CMN, para. 3.19.

<sup>31</sup>*Land Boundary*, CMN, p. 44 (Figure 4.16) (tab 77 of the judges’ folder).

(b) On this interpretation, Article II is to be understood as follows: “The dividing line between the two Republics, starting from the Northern Sea, shall begin at the end of Punta de Castilla, *near to* the mouth of the San Juan de Nicaragua River . . .” — even if the impacts of coastal erosion are such that the original Punta de Castilla is now at an unknown location more than 1 km out to sea, with the point on the coast that Nicaragua now chooses to qualify as the starting-point of the land boundary several kilometres away from the river mouth. That is neither a natural nor a workable interpretation of Article II of the 1858 Treaty.

8. And moving on through the Court’s 2015 Judgment, one sees that Nicaragua’s interpretation is not merely impracticable, it is untenable.

9. At paragraph 72 of the Judgment, there is the relevant extract from the Cleveland Award of 22 March 1888<sup>32</sup> [judges’ folder, tab 78] — the wording now up on your screen again is familiar to you.

10. In fact you can see that it adds little to Article II of the 1858 Treaty, although it is to be noted that Cleveland was alive to the possibility of geographical change, hence his reference to accretion. According to Nicaragua, Cleveland nonetheless established the starting-point of the boundary as a “*fixed unmovable* point that does not shift following any changes in the River mouth”<sup>33</sup> — that is at Nicaragua’s Counter-Memorial, paragraph 3.21. But, that is not what Cleveland said and, perhaps more to the point, it is not how General Alexander understood matters.

11. That much is established by the extracts of the First Alexander Award at paragraph 73 of the 2015 Judgment — the First Award, I should say, is also at tab 79 of your judges’ folder<sup>34</sup>. As you see at the end of the first paragraph, General Alexander’s conclusion was that the boundary

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<sup>32</sup>*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), pp. 697-698, para. 72, quoting Award of the President of the United States in regard to the Validity of the Treaty of Limits between Costa Rica and Nicaragua of 15 July 1858, Decision of 22 March 1888, United Nations, *Report of International Arbitral Awards*, vol. XXVIII, p. 208-211 (reproduced in *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, MCR, Ann. 46), at p. 209.

<sup>33</sup>*Land Boundary*, CMN, para. 3.21; original emphasis.

<sup>34</sup>*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), p. 698, para. 73, quoting First Award under the Convention between Costa Rica and Nicaragua of 8 April 1896 for the Demarcation of the Boundary between the Two Republics, 30 Sep. 1897, RIAA, vol. XXVII, pp. 215-221 (First Alexander Award) (which is also reproduced in *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, MCR, Ann. 48 and CMN, Ann. 2) (tab 79 of the judges’ folder).

line “must follow the . . . branch . . . called the Lower San Juan, through its harbor and into the sea”<sup>35</sup>, not that it must run to some “fixed unmovable point” called or approximating to Punta de Castilla as Nicaragua contends. To the contrary, you see there that Alexander was looking for what he called the “natural terminus”<sup>36</sup>.

12. And one sees from the following passage of the Award<sup>37</sup> that Alexander was struck by how Punta de Castilla did not appear on any of the maps put before him, and stated — and this is roughly half-way down the passage now before you up on the screen — that “it, [Punta de Castilla], must have been, and must have remained, a point of no importance, political or commercial”<sup>38</sup>. He saw it as the “name applied to the starting point”<sup>39</sup> of the boundary line, not as the defining feature of that line. You can see that in the first line of the excerpt up on the screen.

13. Moreover, General Alexander’s understanding of the intended scheme of the 1858 Treaty is quite inconsistent with Nicaragua’s argument that the boundary line should run along the San Juan River, approach the river mouth but then turn sharp right so that the mouth of the river, including both banks, would be Nicaraguan territory. In the passage immediately preceding that quoted by the Court at paragraph 73 of the 2015 Judgment, Alexander outlined what he saw as “the scheme of compromise” of the Treaty, which he said “stands out clear and simple”:

“Costa Rica was to have as a boundary line the right or southeast bank of the river, considered as an outlet for commerce, from a point 3 miles below Castillo to the sea.

Nicaragua was to have her prized ‘sumo imperio’ of all the waters of this same outlet for commerce, also unbroken to the sea.”<sup>40</sup>

14. Thus, as General Alexander understood the 1858 Treaty, both States were to have the benefit of a boundary running along the San Juan “unbroken to the sea”. And, as follows from the passages quoted in the remainder of the Court’s paragraph 73, this is the understanding to which he

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<sup>35</sup>*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), p. 698, para. 73, quoting First Alexander Award, p. 217.

<sup>36</sup>*Ibid.*

<sup>37</sup>First Alexander Award, pp. 217-218 (tab 79 of the judges’ folder).

<sup>38</sup>First Alexander Award, p. 217 (tab 79 of the judges’ folder).

<sup>39</sup>*Ibid.*

<sup>40</sup>*Ibid.*

then sought to give effect. As the San Juan River then reached the sea through Harbor Head Lagoon, he traced the boundary along the right bank of the river and then along the corresponding bank of the lagoon and into the sea. Up on the screen, you can see:

“Under these circumstances it best fulfills the demands of the treaty and of President Cleveland’s award *to adopt what is practically the headland of to-day*, or the northwestern extremity of what seems to be the solid land, on the east side of Harbor Head Lagoon.”<sup>41</sup>

No mention, one notes, of Punta de Castilla. Instead, he is plainly looking for the natural terminus of a line that runs unbroken into the sea.

15. And you can follow his description of that line in the remainder of the passage that is up on the screen — the Court is very familiar with that description. So, I shall just emphasize that what it does is to trace the boundary along the outlet of the San Juan, providing an unbroken line into the sea for the San Juan River.

16. Now, as appears from paragraph 74 of the Court’s 2015 Judgment, General Alexander was well aware that the boundary he fixed would be subject to natural processes such as erosion: one sees that from the extracts that the Court focused on from the Second Alexander Award, of 20 December 1897, which is also at judges’ folder, tab 80<sup>42</sup>. General Alexander recognized that the Rio San Juan would be subject to “wholesale changes”<sup>43</sup> in the delta area and that the impact of such changes could “only be determined by the circumstances of the case itself, on a case-by-case basis in accordance with such principles of international law as may be applicable”<sup>44</sup>.

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<sup>41</sup>*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, pp. 698-699, para. 73, quoting First Alexander Award; tab 79 of the judges’ folder, p. 220; emphasis added.

<sup>42</sup>Second Award under the Convention between Costa Rica and Nicaragua of 8 Apr. 1896 for the Demarcation of the Boundary between the Two Republics, 20 December 1897, *RIAA*, vol. XXVII, pp. 223-225 (*Second Alexander Award*) (also reproduced in *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, MCR Ann. 49 and CMN Ann. 2) (tab 80 of the judges’ folder).

<sup>43</sup>*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 699, para. 74, quoting Second Alexander Award (tab 80 of the judges’ folder), p. 224.

<sup>44</sup>*Ibid.*, p. 699, para. 74, quoting Second Alexander Award, p. 224.

17. At paragraph 75 of its Judgment, the Court then sets out the relevant passages from the Third Alexander Award, of 22 March 1898, which is at tab 81<sup>45</sup> of your folder. The Third Award does not get a mention in Nicaragua’s Counter-Memorial — presumably because it shows again that General Alexander was not looking to fix the boundary as an unmovable point at an approximation of the original Punta de Castilla.

(a) As follows from the longer passage quoted by the Court<sup>46</sup>, Alexander’s approach in his First Award had been based in a practical interpretation of the 1858 Treaty in which “the San Juan river must be considered a navigable river”<sup>47</sup>. He was quite clear — and this is at the end of the passage on your screen: “Every portion of land on the right bank is under Costa Rican jurisdiction”<sup>48</sup>.

(b) That is, again, inconsistent with Nicaragua’s position, which seeks to leave a part of the right bank of the San Juan — the final section that leads to the sea — in Nicaraguan territory.

18. The Court’s understanding of the Treaty and the Awards is then stated at paragraph 76 of the Judgment. There the Court — consistent with the approach of General Alexander — is referring to the need to interpret Article II of the 1858 Treaty in the context of Article VI concerning Costa Rica’s navigation rights. The Court will remember the points. The Court concluded:

“In the view of the Court, Articles II and VI, taken together, provide that the right bank of a channel of the river forms the boundary on the assumption that this channel is a navigable “outlet of commerce”. Thus, Costa Rica’s rights of navigation are linked with sovereignty over the right bank, which has clearly been attributed to Costa Rica as far as the mouth of the river”<sup>49</sup>.

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<sup>45</sup>Third Award under the Convention between Costa Rica and Nicaragua of 8 Apr. 1896 for the Demarcation of the Boundary between the Two Republics, 22 March 1898, *RIAA*, XXVIII, pp. 227-230 (*Third Alexander Award*) (also reproduced in *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, MCR Ann. 50) (tab 81 of the judges’ folder).

<sup>46</sup>*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, *Judgment*, *I.C.J. Reports 2015 (II)*, p. 700, para. 75, quoting Third Alexander Award (tab 80 of the judges’ folder), p. 230.

<sup>47</sup>*Ibid.*

<sup>48</sup>*Ibid.*

<sup>49</sup>*Ibid.*, p. 700, para. 76.

19. The same conclusion is reached at paragraph 92 of the 2015 Judgment [on screen]: “the territory under Costa Rica’s sovereignty extends to the right bank of the Lower San Juan River as far as its mouth in the Caribbean Sea”<sup>50</sup>.

20. It is not just that this conclusion is *res judicata*; it is the conclusion that follows from a plain reading of the 1858 Treaty and the subsequent Awards. It would be inconsistent with both the Treaty and the various Awards, including “Costa Rica’s rights of navigation [that] are linked with its sovereignty over the right bank”<sup>51</sup>, to find that Nicaragua was nonetheless intended — as it now claims — to have territory on the right bank of the San Juan at a very obvious point of control, i.e., the point where the River flows into the sea.

## **B. The Expert Opinion**

21. Now Nicaragua does not somehow get to that impracticable outcome through the impacts of the changes to the local geography that were anticipated at least to an extent by General Alexander and that have resulted in the progressive reduction of Harbor Head Lagoon.

22. There are three issues to address here:

- (a) first, what has in fact happened so far as concerns the coastal geography?
- (b) Second, where does that leave the boundary on Costa Rica’s case?
- (c) And third, what is Nicaragua’s position and is that position tenable?

### **(1) Changes in the coastal geography**

23. As to the first of these issues, the sketch-map attached to the First Alexander Award [on screen], reproduced above paragraph 74 of the 2015 Judgment, is now back on the screen, zoomed in to the area of coast that is now the subject of debate before the Court<sup>52</sup>.

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<sup>50</sup>*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 703, para. 92.

<sup>51</sup>*Ibid.*, p. 703, para. 91.

<sup>52</sup>*Ibid.*, p. 699.

- (a) A more precise description of this area at the time of the Alexander Awards can now be seen on the screen — a depiction that was compiled on the basis of the 1899 demarcation exercise carried out following the Second Alexander Award<sup>53</sup>.
- (b) And, at figure 86 of the Experts’ Opinion [on screen]<sup>54</sup>, one sees a depiction of the 1899 demarcation exercise overlaid onto a 2009 satellite image — and the extent of coastal erosion is striking. This shows a retreat of the coast of around 940 metres on the eastern side of Harbor Head Lagoon, according to the experts; and, as their next figure makes clear, figure 87<sup>55</sup>, this coastal retreat is continuing, in particular, along by the Lagoon. You can see the lagoon towards the right in that image. The orange line is the coastline as it stood as of 2009, the red line is the coastline as it stood just last year 2016, and the line furthest away from the shore is the coastline as it was in 1940.

24. [On screen.] Consistent with this picture, at their paragraph 192, the experts state that: “Multiple lines of evidence clearly indicate that the coast has experienced a rapid retreat in historical and contemporaneous times.”<sup>56</sup> And in their next paragraph [on screen], they predict that this will continue: “It is very likely that this trend will remain in the short and long term and that the coast will be affected by further retreat.”<sup>57</sup> And they then explain how this may result in the reduction and eventual disappearance of Harbor Head Lagoon, and also a shift eastwards in the mouth of the San Juan River of approximately 1 km.

25. None of this would have come as a great surprise to General Alexander who, after all, had seen how the original Punta de Castilla had disappeared into the sea in the 40 odd years since the conclusion of the 1858 Treaty. If one looks at the depiction from the Alexander measurements [on screen], what has happened since 1899 is that the headland of Harbor Head Lagoon has been

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<sup>53</sup>*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, MCR, p. 58 (fig. 2.6, Reconstruction of the sketch map contained in Proceedings X based on the numerical information therein contained). See Proceedings X, 2 March 1898; Proceedings of the Costa Rica-Nicaragua Demarcation Commission, 1897-1900: *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, MCR Ann. 52.

<sup>54</sup>*Maritime Delimitation in the Pacific Ocean and the Caribbean Sea (Costa Rica v. Nicaragua)*, Expert Opinion, 30 Apr. 2017 (*Expert Opinion*), p. 75 (Fig. 86).

<sup>55</sup>Expert Opinion, p. 76 (Fig. 87).

<sup>56</sup>*Ibid.*, para. 192.

<sup>57</sup>*Ibid.*, para. 193.

eroded away at its western end and likewise going eastwards (including a significant part of the Costa Rican coast to the east and there is also erosion along what used to be the southern shore of Harbor Head Lagoon). And there are now no features off the coast. As the experts stated at paragraph 190 of their report [on screen]:

“Off the coastline, there are no features above water even at low tide, as it was observed during the two site visits. Some satellite images reveal the presence of coast-parallel shoals. These are the typical submerged sand bars that develop in the nearshore zone of sandy beaches by wave action”<sup>58</sup>.

26. So of no particular relevance to the Court. In addition, one sees from the experts’ report — and indeed the Court already knows this from the *Certain Activities* case<sup>59</sup> — that the “first channel met” as depicted and referred to by General Alexander has disappeared. Up on the screen one sees the experts’ figure 43<sup>60</sup> [on screen], which shows the coastal area up to the San Juan River in December 2016. The experts describe the image as follows: “Western sector of the coast of Isla Portillos, close to the mouth of the San Juan River, where the lagoons or coastal lakes terminate before the mouth of the San Juan River.” And there is no channel of any kind — notwithstanding Nicaragua’s curious contention in its Counter-Memorial — to which I will return very shortly — that the channel as depicted by General Alexander remains<sup>61</sup>.

## **(2) The location of the land boundary**

27. So where, then, does this leave the land boundary?

28. First, as follows from the Treaty, the Arbitral Awards, and from your 2015 Judgment, the land boundary between Costa Rica and Nicaragua runs up the right bank of the San Juan River all the way to the river mouth, that is, where the river flows into the sea. This is point A on Costa Rica’s figure 2.11 to its Memorial<sup>62</sup>. In terms of a photographic image, this can be seen on the experts’ figure 46, showing (in their words) “the spit of Isla Portillos and the mouth of the San

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<sup>58</sup>Expert Opinion, para. 190.

<sup>59</sup>As follows from *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), p. 703, para. 92.

<sup>60</sup>Expert Opinion, p. 36 (fig. 43).

<sup>61</sup>Cf. *Land Boundary*, CMN, para. 4.12.

<sup>62</sup>*Land Boundary*, MCR, p. 44 (figure 2.11).

Juan River on its eastern bank”<sup>63</sup>. The land boundary runs all the way to the end of that spit, as it may be at any given moment in time, consistent with the need to obtain an unbroken line into the sea. However, Costa Rica fully recognizes that the precise location of this spit is subject to change, and so it puts forward a different point for the starting-point of the maritime boundary, in essence the experts’ Point Pv as shown as a red star on figure 46<sup>64</sup>. And Mr. Brenes will be returning to that issue later this afternoon for Costa Rica.

29. Secondly, and again as follows from the Treaty, the Arbitral Awards, and your 2015 Judgment, the territory to the east, including the beach, is Costa Rican. The sole exception to this concerns Harbor Head Lagoon, which Costa Rica has recognized as Nicaraguan, and it does not now back away from that position. For as long as the sandbar in front of the Lagoon remains above water, that sandbar and the waters behind it are to be considered as appertaining to Nicaragua. That may not, however, be for a long period of time, given the pattern of rapid coastal erosion, and the fact that the sandbar is already breached on occasion — and you can see that on your screens from figure 37 of the experts’ report, roughly halfway along the sandbar<sup>65</sup>.

30. This part of the boundary is also depicted on Costa Rica’s figure 2.11<sup>66</sup>. The land boundary separating both ends of the sandbar of the Lagoon from Isla Portillos should run from the north-eastern corner of the Lagoon by the shortest line to the Caribbean Sea — that is location C — and from the north-western corner of the Lagoon by the shortest line to the Sea, and that is location B.

31. Now given the likelihood of changes to the co-ordinates of locations B and C, Costa Rica asks the Court to give a verbal description of the boundary as opposed to a set of co-ordinates that may soon become out of date<sup>67</sup>.

32. However, the Court will recall that, in the course of both site visits, the experts gave co-ordinates to points at the eastern and western extremities of Harbor Head Lagoon, and these can

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<sup>63</sup>Expert Opinion, p. 38 (figure 46).

<sup>64</sup>*Ibid.* and p. 40 (table 1).

<sup>65</sup>*Ibid.*, p. 33 (figure 37).

<sup>66</sup>*Land Boundary*, MCR, p. 44 (figure 2.11).

<sup>67</sup>*Ibid.*, MCR, Submission (a).

now be seen on the screen, first as they stood during the high water levels of December 2016<sup>68</sup> — that is figure 84 of the experts — and then as of March 2017<sup>69</sup>. You can also see the location of Punta de Castilla as it was in Alexander’s time — now approximately 940 m out to sea. The co-ordinates of the experts’ points are to be found at page 40 of the experts’ report<sup>70</sup>. And the fact that the co-ordinates changed as between December 2016 and March 2017 offers an illustration of why Costa Rica seeks only a verbal description of the land boundary.

33. The area between these points will remain Nicaraguan territory, with the waters of the Lagoon, for so long as the sand bar separating the Lagoon from the sea remains in place as territory which is capable of appropriation. However, coastal erosion is very likely to continue in the short and long term, as the experts have said. This will impact adversely upon this enclave of Nicaraguan territory, just as it will impact adversely on the territory of Costa Rica.

### **(3) Nicaragua’s position**

34. I turn, then, to Nicaragua’s case on location of the land boundary. Nicaragua says that there is still a channel that connects the western side of Harbor Head Lagoon and the San Juan River, and it contends that the boundary follows this channel, and you can see this at Nicaragua’s figure 4.16<sup>71</sup> back on the screens.

35. And so, at paragraph 4.11 of its Counter-Memorial, Nicaragua says: “Recent photos taken from the ground [this is a reference to its figures 4.3 and 4.4] as well as drone videos confirm the existence of the channel.”<sup>72</sup> Then, at paragraph 4.12, one sees the argument developed as follows:

“This visual evidence, together with the drone footages, shows a channel flowing from the mouth of the San Juan River to Harbor Head Lagoon where the starting point of the land boundary is located. Some parts are overgrown and due to overhanging trees the channel is not always visible on aerial imagery.”<sup>73</sup>

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<sup>68</sup>Expert Opinion, p. 72 (figure 84).

<sup>69</sup>*Ibid.* (figure 85).

<sup>70</sup>*Ibid.*, p. 40 (table 1).

<sup>71</sup>*Land Boundary*, CMN, p. 44 (figure 4.16).

<sup>72</sup>*Land Boundary*, CMN, para. 4.11.

<sup>73</sup>*Ibid.*, para. 4.12.

36. So pausing there, the Court will notice that the so-called “visual evidence” is put forward as showing a channel and yet, not a little defensively perhaps, you are then told that you cannot in fact see the channel — due to overhanging trees and the like. So, we have a channel that no one can see. And the Court will, I hope, have had an opportunity to review Nicaragua’s drone footage<sup>74</sup>. Quite how this footage shows anything other than some waterlogged forest shortly after Hurricane Otto had passed through, and a few obviously disconnected bodies of water, will no doubt be revealed by Nicaragua later this week.

37. Nicaragua’s argument then continues, rather boldly one might think: “This channel corresponds to the channel identified by General Alexander, which is visible on the map attached to his First Award.” That is the sketch-map that I took you to a short while ago, that the Court may feel it knows only too well. It is at paragraph 73 of your 2015 Judgment. Nicaragua continues:

“The sand feature one finds on the left bank of this channel is referred to by Costa Rica as the ‘beach of Isla Portillos’. The name chosen by Costa Rica conveys an incorrect impression. This ‘beach’ and the sandbar are in fact part of a single sand feature. It would be best characterized as the remains of the barrier sandbar separating the lagoon from the Caribbean Sea a few miles north of where it lies today as well as the remains of the island of San Juan. The sea has pushed it back closer towards the mainland but that does not change its nature. It remains an independent feature separated from the mainland.”<sup>75</sup>

38. Well, there are three problems with this.

39. First, and most obviously, Nicaragua’s position is based on the existence of a channel connecting Harbor Head Lagoon to the lower San Juan<sup>76</sup>. And yet, there is no such channel. If there had been, the experts would have recorded its existence in their report, and they would have taken photographs of it. They did not. That is because it does not exist. And they have now confirmed this in the response to the question of Judge Tomka. They said:

“Based on the observations made during our two site visits (December 2016 and March 2017), we can assert that at the present time there isn’t any continuous water

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<sup>74</sup>*Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, CMN, drone video from December 2016 visit (joined video 6 & 7 December 2016), Ann. 4.

<sup>75</sup>*Ibid.*, para. 4.12.

<sup>76</sup>See also *Land Boundary*, CMN, para. 4.19.

channel connecting the San Juan River and Harbor Head Lagoon in the close vicinity of the Caribbean Coast.”<sup>77</sup>

The experts’ response is at tab 90 of your judges’ folder.

40. Secondly, Nicaragua’s position presupposes — quite incorrectly — that Alexander was seeking to establish a boundary by reference to a fixed immovable point on the headland of Harbor Head Lagoon, instead of by reference to the 1858 Treaty and the need for a workable boundary that followed the right bank of the San Juan River along an unbroken line into the sea.

41. Thirdly, there is no evidence to support Nicaragua’s claim that the former headland has been “pushed . . . back closer to the mainland” and that its “remains” constitute an independent feature separated from the mainland<sup>78</sup>.

(a) To the contrary, the former headland has been eroded, and it is plain from the experts’ report and from the response to the question of Judge Tomka that the channel on which this alleged independence and separation is based does not exist.

(b) Nicaragua relies on various maps derived from aerial photography of the 1960s to show that the former headland was indeed pushed inshore and that, moreover, Costa Rica depicted the boundary with such sandbars as Nicaraguan territory. But such maps could not assist Nicaragua because they do not depict the current situation. The past 50 years, even the past decade, have led to alterations in the coastal geography that remove this element to Nicaragua’s argument. The simple point is that there is no longer the offshore sandbar that these maps depicted. The experts have stated this in terms at paragraph 190 of their report in response to the specific question on the matter posed by the Court, its fourth question to the experts. Further, as the experts explain in their response to the question of Judge Tomka, and this is the second part, or the remainder of the response:

“As we indicated in the report, ‘topographic maps produced by Costa Rica and Nicaragua show that in the recent past there used to be a channel-like water gap between the spit and firm land, and that the Los Portillos/Harbor Head Lagoon was connected to the sea via the San Juan River’ (see paragraph 100 and figure 26 of the Report). The observations carried out during our site visits unambiguously revealed that such water gap or continuous channel has disappeared due to coastal recession,

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<sup>77</sup>Response to the question of Judge Tomka on the Report submitted on 30 April 2017 by the experts appointed by the Court, transmitted under cover of the letter from the Registrar of the Court (Ref.: 148822), 15 June 2017 (tab 90 of the judges’ folder).

<sup>78</sup>*Land Boundary*, CMN, para. 4.12.

and that nowadays Los Portillos/Harbor Head Lagoon is a water body commonly enclosed by a sand barrier (see figures 18, 21, 33 of the Report).”

So pausing there one sees that the experts were completely alive to the map point, they have looked at the maps and they have shown that the channel-like water gap that used to be visible on those maps has now gone. They continue:

“As we indicate in the Report, in the coastal stretch of Isla Portillos, between the beach and the area covered by tree vegetation, there is a series of discontinuous coast-parallel lagoons that are remnants of the channel-like water gap that used to exist in recent times between Isla Portillos and the spit of Los Portillos/Harbor Head Lagoon (see paragraph 106 and figures 41 and 42 of the Report).”<sup>79</sup>

(c) And you see there the reference to Figures 41 and 42 of the experts’ report and it is useful to focus very briefly on those figures

(d) Figure 41 will shortly come up on the screen; this shows in the experts’ words: “Discontinuous and elongated lagoons between the beach and the relatively stable area covered by dense vegetation of Isla Portillos.”<sup>80</sup> Now that does not help Nicaragua. It contends for a century-old channel between the beach and Isla Portillos, not a series of discontinuous and elongated lagoons. And, to note, that this is an image that was captured in December 2016, that is shortly after the exceptional rainfall associated with Hurricane Otto during the first site visit of the experts.

(e) The area looked quite different when the short-term effects of this exceptional weather event had faded away and you can see that from the experts’ Figure 42, which shows a view including the same area in March 2017. The water on the beach has all disappeared, while the experts say in their caption to this image: “Note that the lagoons were much less extensive than during the first site visit (see figure 41 for comparison).”<sup>81</sup>

Costa Rica’s position, as set out in its short written observations on the experts’ opinion, is that the elongated lagoons that one sees in Figure 41 are, in fact, best explained by reference to the exceptional rainfall associated with Hurricane Otto.

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<sup>79</sup>Response to the question of Judge Tomka on the Report submitted on 30 April 2017 by the experts appointed by the Court, transmitted under cover of the letter from the Registrar of the Court (reference 148822), 15 June 2017 (tab 90 of the judges’ folder).

<sup>80</sup>Expert Report, p. 35 (Fig. 41).

<sup>81</sup>*Ibid.*, p. 36 (Fig. 42).

42. So even if Nicaragua could make a case by reference to an alleged channel, and I emphasize that such a case is based on seeking to achieve a result *opposite* to that intended by the 1858 Treaty and the Alexander Awards, all of which sought to accord to Costa Rica a boundary along the San Juan river as an outlet for commerce, unbroken to the sea, the simple point is that the channel no longer exists — not in any form, whether navigable or otherwise. It does not assist Nicaragua to refer to Costa Rican maps based on aerial photography of the 1960s when there was some channel, and when the argument that it seeks to make<sup>82</sup> at least had some factual basis. Now that factual basis is lacking.

43. The lack of relevance of the maps to the current issue can be made visually by reference to Figures 2.7 and 2.8 of Costa Rica’s Memorial. The first figure shows specific co-ordinates on the 1988 IGN map of Isla Portillos<sup>83</sup>. Figure 2.8 shows the same co-ordinates on a 2013 satellite image<sup>84</sup>. We get the point. Or rather, in a sense, one does not get the point anymore, because the two points originally on the shore have now disappeared out to sea, while the point that was some way inland is now very close to the shoreline.

44. Even what was the southern shore of the Lagoon, which has of course always been Costa Rican territory, has eroded substantially<sup>85</sup>, and one can see from the experts’ Figures 39 and 40 how the woodland of Isla Portillos itself is now also being eroded<sup>86</sup>.

(a) Figure 39 shows the impact of erosion as of 5 December 2016;

(b) Figure 40 is taken along the same coastal stretch, in March 2017, following what the experts call “sand accumulation related to wave action under regular conditions”.

45. To emphasize, there has indisputably been some erosion along the southern shore of Harbor Head Lagoon, i.e., that is an area that has always been Costa Rican territory. And this fact cannot be reconciled with Nicaragua’s case, which posits the movement of the former headland to become the beach, divided from Costa Rican territory by this supposed channel.

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<sup>82</sup>*Land Boundary*, CMN, para. 4.31.

<sup>83</sup>*Land Boundary*, MCR, p. 30 (Fig. 2.7).

<sup>84</sup>*Ibid.*, p. 31 (Fig. 2.8).

<sup>85</sup>Compare Expert Report, p. 69 (Fig. 80) and p. 75 (Fig. 86), with p. 76 (Fig. 87).

<sup>86</sup>Expert Report, pp. 34-35 (Figs. 39 and 40).

46. In sum, Nicaragua's case is that the remains of the headland of Harbor Head Lagoon still exist but have merely been pushed back closer towards the mainland, remaining "an independent feature separated from the mainland"<sup>87</sup>. That, however, is not a case that can be made out by reference to the experts' opinion or by any other source.

47. Mr. President, Members of the Court, I thank you for your patience in looking once more at the 1858 Treaty and the Awards, that concludes Costa Rica's opening on the land boundary, and I ask you to call Ms Del Mar, at a convenient point, to the podium. Perhaps after the afternoon break.

Le PRESIDENT : Oui, merci. J'aurai plaisir à appeler Mme Del Mar à la barre après la pause de 15 minutes, que nous allons faire maintenant. La séance est suspendue pour 15 minutes.

*L'audience est suspendue de 16 h 10 à 16 h 25.*

Le PRESIDENT : Veuillez vous asseoir. Je donne maintenant la parole à Mme Del Mar.

Ms DEL MAR: Thank you, Mr. President.

## **THE VIOLATION OF COSTA RICA'S TERRITORIAL SOVEREIGNTY**

### **A. Introduction**

1. Mr. President, distinguished Members of the Court, it is an honour to appear before you once again on behalf of the Republic of Costa Rica.

2. I am tasked with addressing Nicaragua's violation of Costa Rica's territorial sovereignty in the present proceedings. Costa Rica addresses this breach in Chapter 3 of its Memorial<sup>88</sup>. Nicaragua responds in Chapter 4, section 2, of its Counter-Memorial<sup>89</sup>.

3. This is a small, but important issue in these proceedings. It is an issue that arose following a request from Costa Rica for Nicaragua to remove a military camp from Costa Rican territory<sup>90</sup>.

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<sup>87</sup>*Land Boundary*, CMN, para. 4.12.

<sup>88</sup>*Land Boundary*, MCR, Chapter 3, pp. 49-56.

<sup>89</sup>*Land Boundary*, CMN, Chapter IV, Section 2, pp. 51-58.

<sup>90</sup>*Land Boundary*, MCR, Ann. 56, letter from Costa Rica to Nicaragua, Ref.: DM-AM-584-16, 14 November 2016.

Nicaragua's response was to escalate matters, by rejecting Costa Rica's request, and by making a new territorial claim over the entirety of the Isla Portillos beach<sup>91</sup>.

4. As the Court will see from the photographs I will put on your screens, the Nicaraguan military camp is not large. The incursion into Costa Rican territory is not deep. But these factors do not excuse or mitigate Nicaragua's actions. Nicaragua's response to Costa Rica's protest note makes clear that the stationing of its military camp on Costa Rican territory was not a mistake, and that Nicaragua makes claim to territory that is indisputably Costa Rican. The issue is a serious one of principle.

### **B. Nicaragua violated Costa Rican territorial sovereignty in 2016**

5. This dispute arose in the latter half of 2016. I will show on your screens images that show the repositioning of the Nicaraguan camp from a location on the sandbar separating the Los Portillos/Harbor Head Lagoon from the Caribbean Sea, to a location on Isla Portillos beach.

(a) The first image on your screens is dated 12 December 2015<sup>92</sup>. It is taken from Nicaragua's Counter-Memorial. There is a white arrow pointing to the Nicaraguan camp. I now superimpose points B and C, which Mr. Wordsworth addressed. As the Court can see, the Nicaraguan camp is located between these two points, on the Lagoon sandbar.

(b) The next image, now on your screens, is a satellite image dated 5 July 2016<sup>93</sup>. As the Court can see, there is a Nicaraguan military camp encircled in red. Points B and C are shown. The Nicaraguan camp is located between these two points, on the Lagoon sandbar.

(c) The third image is an aerial photograph<sup>94</sup>. It provides a better view of the same Nicaraguan camp. It is dated some four months earlier, 8 March 2016. Points B and C are shown again. The Nicaraguan camp is clearly situated between these two points.

(d) The situation changed in or around the beginning of August 2016. This is a satellite image dated 4 August 2016<sup>95</sup>. Points B and C are superimposed onto this image. A white arrow points

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<sup>91</sup>*Land Boundary*, MCR, Ann. 57, letter from Nicaragua to Costa Rica, Ref.: MRE/DMC/250/11/16, 17 November 2016.

<sup>92</sup>*Land Boundary*, CMN, p. 56, fig. 4.23 (d).

<sup>93</sup>*Land Boundary*, MCR, p. 52, fig. 3.4.

<sup>94</sup>*Ibid.*, fig. 3.3.

to the Nicaraguan military camp. It is no longer between points B and C. It has been deliberately repositioned northwest of Point B, and is now located on the Isla Portillos beach.

(e) Two further photographs in Nicaragua's Counter-Memorial show that this camp has remained in place since it was repositioned in August 2016. The first of these is dated 29 November 2016<sup>96</sup>. A white arrow is pointing to the camp north of point B. The camp remains in more or less the position where it was relocated almost four months earlier.

(f) The second of these is dated 17 January 2017, and it is also provided in Nicaragua's Counter-Memorial<sup>97</sup>. A white arrow points to the Nicaraguan military camp. Again, the camp remains in more or less the same location where it was repositioned in August 2016.

6. These images show that on or around 4 August 2016 Nicaragua stationed a military camp on the Isla Portillos beach, and it has remained in more or less the same position since then. The deliberate repositioning of the Nicaraguan camp around August 2016 is also made plain by the exchange of correspondence between the Parties in November 2016 to which I have already referred. Costa Rica's protest note of 14 November 2016 stated:

“Costa Rica has recently become aware of the new positioning of a Nicaraguan military camp from its previous location on the beach separating Los Portillos Lagoon from the Caribbean Sea, to a new location on the beach of Isla Portillos to the northeast of Los Portillos Lagoon . . .”<sup>98</sup>.

Costa Rica requested Nicaragua to remove its military camp.

7. Nicaragua responded, claiming that its camp was located on “*the sandbar that separates Harbor Head Lagoon from the Caribbean Sea*”, and not the Isla Portillos beach<sup>99</sup>. It further added:

“On the other hand, as you are aware of, and as recorded in the official maps of Nicaragua and Costa Rica for a number of years now, both countries have always considered as part of Nicaraguan territory not only the sandbar in front of Harbor

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<sup>95</sup>*Land Boundary*, CMN, p. 56, fig. 4.23 (e).

<sup>96</sup>*Ibid.*, p. 57, fig. 4.23 (f).

<sup>97</sup>*Ibid.*, p. 57, fig. 4.23 (g).

<sup>98</sup>*Land Boundary*, MCR, Ann. 56, p. 149, letter from Costa Rica to Nicaragua, Ref.: DM-AM-584-16, 14 Nov. 2016.

<sup>99</sup>*Ibid.*, Ann. 57, p. 167, letter from Nicaragua to Costa Rica, Ref.: MRE/DMC/250/11/16, 17 November 2016.

Head Lagoon but also the *entire stretch of coast abutting the Caribbean Sea which lies between Harbor Head and the mouth of the river.*<sup>100</sup>

8. As Professor Kohen has already made clear, this is a gratuitous claim as it concerns territory that was declared by the Court to be Costa Rican in its Judgment on the merits of 16 December 2015. The Court is very familiar with the official maps from the *Certain Activities* case; they do not assist Nicaragua.

9. Nicaragua's contention that its repositioned military camp was located on "*the sandbar that separates Harbor Head Lagoon from the Caribbean Sea*" does not stand up to scrutiny. The sandbar that separates the Lagoon from the Caribbean is that shrinking strip of sand located between points B and C. The Court has seen that the new location of the Nicaraguan camp is clearly northwest of point B. Nicaragua's decision to move its camp in or around 4 August 2016 to a point clearly north of the most north-westerly edge of the Lagoon and the adjacent sandbar was a deliberate incursion onto Costa Rican territory.

### **C. Nicaragua has *not* maintained a military camp on Costa Rican territorial since 2010**

10. Apart from its ungrounded territorial claim of sovereignty over the Isla Portillos beach, Nicaragua's tactic is to give the impression that it has maintained a military encampment on that beach for many years, and that Costa Rica has acquiesced to that presence. I will demonstrate that that is not factually true.

11. Nicaragua contends at page 52 of its Counter-Memorial that in December 2010 it moved a military encampment — previously located on the sandbar separating the Lagoon from the Caribbean — to a point "*nearer the northwest corner of the lagoon*". Two photographs, at figure 4.21 of Nicaragua's Counter-Memorial, purport to show this<sup>101</sup>. I will refer to them as photographs 4.21 (a) and 4.21 (b). As you can see, these photographs do not prove Nicaragua's point. 4.21 (a) shows the remains of some sort of wooden structure near a body of water. 4.21 (b) shows some men moving a white marquee on a beach. In an attempt to provide some further proof, Nicaragua also includes a marked-up satellite image, entitled "Repositioning of

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<sup>100</sup>*Land Boundary*, Ann. 57, p. 167, letter from Nicaragua to Costa Rica, Ref.: MRE/DMC/250/11/16, 17 November 2016; original emphasis.

<sup>101</sup>*Land Boundary*, CMN, pp. 52-53, fig. 4.21, "Military Camp 2010".

the Military Camp in 2010”<sup>102</sup>. This purports to illustrate a military camp being relocated to the Isla Portillos beach in December 2010. It is on your screens now. This alleged move of the encampment would have occurred whilst Nicaragua deployed its presence in the “*disputed territory*” in the *Certain Activities* case at the time of the construction of the first artificial “*caño*” and the occupation of the northern part of Isla Portillos. Costa Rica not only protested these actions, it instituted proceedings before this Court in 2010.

12. It is undisputed that by at least 19 November 2010, Nicaragua had stationed a military encampment on the Lagoon sandbar. Costa Rica included a satellite image of 19 November 2010 at Figure 3.1 of its Memorial in the present proceedings, which shows that camp<sup>103</sup>. It is on your screens now. As the Court can see, the camp structures can be made out. They are encircled in red. Nicaragua contends in its Counter-Memorial that this camp was established roughly a month earlier, on 13 October 2010<sup>104</sup>. It submits no evidence in support of this contention. Nicaragua’s invective “*White Book*”, published in November 2010, includes an undated photograph of the Lagoon sandbar<sup>105</sup>. There is no sign of any military encampment in this photograph.

13. Let us now consider in greater detail the evidence that Nicaragua has put forward in support of its contention that its military camp was relocated in December 2010 to the Isla Portillos beach. First, there is Nicaragua’s marked-up satellite image at Figure 4.22 of its Counter-Memorial that I have already shown you, and which is on your screens again. This image does not assist Nicaragua. It is an image taken in December 2016, marked up by Nicaragua with little symbols of red houses to depict the alleged movement of the military camp in 2010. This is the unmarked-up version of the same image. It is dated 2 December 2016. It does not evidence the movement of a Nicaraguan military camp some six years earlier.

14. Let us consider again the two photographs Nicaragua has produced in support of its contention that in 2010 it moved its military encampment from the Lagoon sandbar to the

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<sup>102</sup>*Land Boundary*, CMN, p. 53, fig. 4.22, “Repositioning of the Military Camp in 2010”.

<sup>103</sup>*Land Boundary*, MCR, p. 50, fig. 3.1.

<sup>104</sup>*Land Boundary*, CMN, p. 52, para. 4.34.

<sup>105</sup>*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, MCR, Ann. 30, “*San Juan de Nicaragua River. The Truths that Costa Rica Hides*”, pp. 300, 317.

Isla Portillos beach. The first of these is on your screens now. It is date-stamped 2 December 2010, and timed at 06:40 a.m. (to be clear: the text of Nicaragua's Counter-Memorial makes plain that it is 2 December 2010 and not 12 February 2010). What we can see is the remains of a wooden structure next to a stream of flowing water, and behind the remains of this structure, a larger body of water that borders dense trees and vegetation. For argument's sake, let us assume the body of water in the background is Harbor Head/Los Portillos Lagoon, and the flowing water in the foreground is the breach of the Lagoon sandbar, which Nicaragua describes in that part of its Counter-Memorial<sup>106</sup>. On this basis, then, the Caribbean Sea would have to be located to the left of your screens.

15. Let us now consider the second of the two photographs. It is on your screens now. It is also date-stamped 2 December 2010, and timed six minutes after the first photograph. We can see Nicaraguan personnel carrying a white marquee. We can also see the remains of a wooden structure in the foreground. Is it the same wooden structure as in the first photograph? It looks like it could be. Both photographs are on your screens now. And we can see that the remains of the wooden structure are presumably located on the Lagoon sandbar, as the first photograph shows the Lagoon behind it, and the second photograph shows the Caribbean Sea in front of it. According to Nicaragua, these photographs evidence that "on 2 December 2010 the camp had to be moved nearer the *northwest* corner of the lagoon because of the breaking of the bar in front of the lagoon [emphasis added]". It is important to emphasize the new location as being nearer "the *northwest* corner of the lagoon" according to Nicaragua.

16. Let us look at photograph 4.21 (b) again. We can see the Caribbean Sea in the background, so we are able to orientate ourselves. North-west is roughly here. South-east is approximately here. So that would mean that the Nicaraguan personnel carrying the marquee are proceeding in a *south-easterly*, and not (as Nicaragua claims) "nearer the *northwest* corner of the lagoon". To use Nicaragua's marked-up 2016 image they are relocating the Nicaraguan military camp in this direction, and not towards the Isla Portillos beach in the direction indicted by Nicaragua. That is if they are relocating it at all. They may be removing it entirely. They may be

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<sup>106</sup>*Land Boundary*, CMN, para. 4.34.

setting up the marquee for a beach wedding. We simply do not know what they are doing from those photographs.

17. Nicaragua has not submitted any satellite images from 2010 to evidence the alleged relocation of its military camp to the Isla Portillos beach in 2010. Its photographic evidence does not support its contention that it stationed a military camp on the Islas Portillos beach in 2010. It is also peculiar that none of the ten affidavits that Nicaraguan military and police officials dated 15 or 16 December 2010, which Nicaragua filed with the Court in January 2011, before the commencement of the hearings on Costa Rica's first request for provisional measures in the *Certain Activities* case, makes reference to an encampment on the Isla Portillos beach, or indeed the Lagoon sandbar<sup>107</sup>. The only reference to some sort of a Nicaraguan camp on Isla Portillos is made in the affidavit sworn by Mr. Juan Francisco Gutiérrez Espinoza, a former member of the Nicaraguan Naval Force, who states that in the 1980s "the Border Guard Troops had a base in the swamps of Harbor Head, which was burned together with the town of Greytown, under Comander [sic] Edén Pastora's orders"<sup>108</sup>. Costa Rica submits there is no evidence that Nicaragua had a camp on the Isla Portillos beach in 2010.

18. Nicaragua further contends that at various times since 2010, it stationed a military camp on a location that Costa Rica says is the Isla Portillos beach. Nicaragua produced seven satellite images in its Counter-Memorial purportedly to evidence this point, dating from 2013 to 2017. The first four of these satellite images produced by Nicaragua in its Counter-Memorial are dated between 26 November 2013 and 12 December 2015<sup>109</sup>. In other words, they were taken during the period after the date on which the Court ~~first~~ indicated provisional measures in its further Order of 22 November 2013, and prior to Judgment on the merits being handed down on 16 December 2015 in the *Certain Activities* case. As the Court will recall, Costa Rica requested the indication of provisional measures on two occasions in the context of that case, as well as the modification of the Court's first Order on provisional measures, due to the positioning and repositioning of Nicaraguan

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<sup>107</sup>*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, CMN, Anns. 80-89.

<sup>108</sup>*Ibid.*, Ann. 85, Affidavit of Juan Francisco Gutiérrez Espinoza (MILITARY), sworn on 15 December 2010, submitted by Nicaragua to the Court on 5 January 2011 in the context of the *Certain Activities* case.

<sup>109</sup>*Land Boundary*, CMN, pp. 54-56, Fig. 4.23.

personnel in the “disputed territory”, and the sending of Nicaraguan civilians to the “disputed territory”.

19. In its Order of 8 March 2011, the Court unanimously indicated that:

“Each Party shall refrain from sending to, or maintaining in the disputed territory, including the caño, any personnel, whether civilian, police or security”<sup>110</sup>

and

“Each Party shall inform the Court as to its compliance with the above provisional measures.”<sup>111</sup>

20. In its Order of 22 November 2013, the Court unanimously: “[r]eaffirm[ed] the provisional measures indicated in its Order of 8 March 2011”<sup>112</sup>, and unanimously indicated that:

“Nicaragua shall (i) cause the removal from the disputed territory of any personnel, whether civilian, police or security; and (ii) prevent any such personnel from entering the disputed territory”<sup>113</sup>.

It further unanimously decided:

“that the Parties shall regularly inform the Court, at three-month intervals, as to the compliance with the above provisional measures”<sup>114</sup>.

It is recalled that in the same Order the Court made clear that “*the disputed territory*” included the beach of Isla Portillos<sup>115</sup>.

21. Nicaragua has been constantly moving its military camps around on Isla Portillos since the initiation of the *Certain Activities* case, requiring Costa Rica twice to request provisional measures in those proceedings. However, since Judgment on the merits was handed down in that case, a Nicaraguan camp has been located on the sandbar separating the Lagoon from the Caribbean Sea. That is, until on or around 4 August 2016 when Nicaragua deliberately repositioned

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<sup>110</sup>*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 27, para. 86 (1).

<sup>111</sup>*Ibid.*, p. 28, para. 86 (4).

<sup>112</sup>*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013*, p. 369, para. 59 (1).

<sup>113</sup>*Ibid.*, para. 59 (2) (C).

<sup>114</sup>*Ibid.*, p. 370, para. 59 (3).

<sup>115</sup>*Ibid.*, p. 365, para. 46. See also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, pp. 696-697, para. 69.

its camp on the Isla Portillos beach, and coupled that action with a territorial claim over the entirety of that beach.

#### **D. Conclusion**

22. In conclusion, Costa Rica submits that Nicaragua's most recent breaches of Costa Rica's territorial sovereignty took place on or around 4 August 2016, and have continued thereafter.

23. Thank you Mr. President, and Members of the Court, for your kind attention. Mr. President, I would ask that you please give the floor to Mr. Brenes, who will address the starting-point of the delimitation.

Le PRESIDENT : Merci, je donne maintenant la parole à Mr. Arnaldo Brenes.

Mr. BRENES:

#### **THE STARTING-POINT OF THE MARITIME DELIMITATION IN THE CARIBBEAN**

##### **A. Introduction**

1. Mr. President, distinguished Members of the Court, it is an honour to appear before you once again on behalf of Costa Rica. My task today is to explain why the maritime boundary between Costa Rica and Nicaragua in the Caribbean Sea must start at the mouth of the San Juan River, as Costa Rica has proposed. I will also explain why the starting-point proposed by Nicaragua, located on the north-eastern extremity of the spit-barrier closing Los Portillos/Harbor Head Lagoon, is inappropriate. More importantly, I will show why Nicaragua's proposed starting-point was inevitably destined to fail.

2. I will also address the Court's request made last week that Costa Rica set out its position as to the possibility of starting the maritime boundary from a fixed point in the Caribbean Sea some distance from the coast.

3. Mr. President, I turn then to Costa Rica's primary case as to the starting-point of the delimitation. The determination of the starting-point of the delimitation is a function of the land boundary. The Court has repeatedly stated the fundamental principle that the land dominates the

sea through the projection of the coasts or coastal fronts<sup>116</sup>. The task for the Court then is to determine the starting-point of the maritime boundary in the Caribbean Sea in the light of the applicable legal instruments governing the land boundary, and on the basis of the geographical situation as it stands today.

### **B. The location of Costa Rica's proposed starting-point**

4. As has already been explained by my colleagues, the changes in the geography of the mouth of the San Juan, and in the coastal front more generally, have resulted in there now being three points where the land boundary between the Parties meets the sea on the Caribbean coast. The graphic shown now on the screens and at tab 115 of your folders shows the three points labelled A, B, and C.

5. In accordance with your Judgment of 16 December 2015 in the *Certain Activities* case, “the territory under Costa Rica’s sovereignty extends to the right bank of the Lower San Juan River as far as its mouth in the Caribbean Sea”<sup>117</sup>. This plainly includes the area in the north-western part of Isla Portillos near the mouth of the river, which formed part of the “disputed territory” as defined by the Court<sup>118</sup>.

6. The sand spit located at the mouth of the San Juan River which extends to the northwest from Isla Portillos constitutes the final part of the right bank of the San Juan at its mouth, and is likewise Costa Rican territory. The experts have referred to this sand spit in their report as the “spit of Isla Portillos”<sup>119</sup>. The tip of the spit of Isla Portillos constitutes the land boundary terminus. We have designated this point “Point A”.

7. Points B and C, on the other hand, correspond to the western and eastern ends of the sand spit-barrier that separates Nicaragua’s Harbor Head Lagoon from the sea, and constitute the

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<sup>116</sup>*Maritime Delimitation on the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 89, para. 77 and see pp. 96-97, para. 99. See also *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, p. 51, para. 96; and *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 61, para. 73.

<sup>117</sup>*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), p. 703, para. 92.

<sup>118</sup>*Ibid.*, p. 697, para. 69.

<sup>119</sup>Expert Opinion, 30 April 2017, paras. 107-110.

two other points at which the land boundary intersects the coast in the area. Point C coincides with the maritime delimitation starting-point proposed by Nicaragua.

8. Although Point A is located on Costa Rican territory and constitutes the land boundary terminus, Costa Rica in good faith recognizes that, as confirmed by the experts, this spit is prone to significant variations in its length and configuration as a result of natural processes.

9. Indeed, the Court's experts visited the area twice, and their descriptions of the features match those provided by Costa Rica. With respect to the Isla Portillos spit at the end of the right bank of the San Juan River at its mouth, the experts describe it as "ephemeral", a "sensitive feature", and a "loose sand deposit" which had grown from 210 m to 880 m long in the three months between their visits<sup>120</sup>.

10. Because of the variability in length and shape of the spit of Isla Portillos, and thus the variability of the location of the land boundary terminus at Point A, Costa Rica had proposed in its Memorial a more stable point, which is that shown on the screen marked as "SP-C". That point corresponds to the solid ground at the base of the spit of Isla Portillos, at the mouth of the San Juan River. I recall that Costa Rica had noted in its Memorial that the precise co-ordinates of this point might "require correction in accordance with more accurate mapping"<sup>121</sup>. During the December 2016 site visit, the experts and the topographical teams from both Parties measured another point very close to Point SP-C, labelled by the experts as "Point Pv"<sup>122</sup>. As described in the experts' report, now shown on the screen and at tab 116 of your folders, you will see a photograph of that point, located at the limit of the vegetation growing on slightly higher ground at the base of the sand spit, where the loose sand of the spit starts<sup>123</sup>. Costa Rica is content to adopt the co-ordinates of that point, as measured by its technical team during the site visit, as Costa Rica's proposed starting-point for the maritime boundary in the Caribbean Sea, Point SP-C.

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<sup>120</sup>Expert Opinion, 30 April 2017, paras. 107-110.

<sup>121</sup>*Maritime Delimitation in the Pacific Ocean and the Caribbean Sea (Costa Rica v. Nicaragua)*, MCR, para. 4.15.

<sup>122</sup>Expert Opinion, 30 April 2017, para. 109 and table 1 (p. 40).

<sup>123</sup>*Ibid.*, paras. 14 and 109, and figs. 45 and 46 (p. 38).

11. The experts' report confirms that, in contrast to the marked changes in the sand spit of Isla Portillos over the same period<sup>124</sup>, there were no changes to Point Pv as between the first and second site visits<sup>125</sup>. Costa Rica's proposal of this point as the starting-point for the maritime boundary is intended to provide stability and avoid future controversies as a result of rapid changes in the configuration of the sand spit of Isla Portillos.

**C. Costa Rica's proposed starting-point accords with the applicable legal instruments governing the land boundary**

12. Besides providing a physically stable solution that is appropriate in light of the changing geography of the area, Costa Rica's proposed starting-point for the delimitation is also appropriate because it is consistent with the legal instruments that define the boundary between the Parties in the area. As a matter of fact, it is the only solution that complies with both the letter and the spirit of these instruments.

13. As Mr. Wordsworth has explained, the terminal point of the land boundary on the Caribbean coast was fixed in Article II of the 1858 Treaty of Limits as being located "at the end of Punta de Castilla, at the mouth of the San Juan de Nicaragua river".

14. Mr. Wordsworth also recalled how this Court has held that Article II of the 1858 Treaty is to be interpreted in the light of its Article VI, in the sense that, "the right bank of a channel of the river forms the boundary on the assumption that this channel is a navigable 'outlet of commerce'"<sup>126</sup>. In other words, Costa Rica's right to use the San Juan River as an outlet for commerce requires that it has access to the sea from the San Juan, and vice versa.

15. You have also heard how, by the time that the Costa Rica-Nicaragua Demarcation Commission started its work under General Alexander in 1897, the area had undergone significant changes compared to 1858, and that Alexander's decision as to the location of the starting-point of the land boundary in his First Award in 1897 was premised on that point being at the mouth of the San Juan. This can be seen from the sketch-map that Alexander attached to his First Award, which

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<sup>124</sup>Expert Opinion, 30 April 2017, paras. 109-110 and 118.

<sup>125</sup>*Ibid.*, para. 109.

<sup>126</sup>*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), p. 700, para. 76.

Mr. Wordsworth showed you earlier, and which is now on the screen and at tab 117 of your folders. One can see how, by that time, the San Juan River flowed into the sea via Harbor Head, which served as the San Juan's mouth. Alexander's choice of that point was not because Punta de Castilla was located on the headland of Harbor Head Lagoon, but rather because at that time that was where the mouth of the San Juan was.

16. As much is clear from his statement that what the drafters of the 1858 Treaty had in mind was that the terminus of the land boundary should be located on "the eastern headland *at the mouth of the harbor*"<sup>127</sup>. It is also apparent in his conclusions (highlighted by the Court in *Certain Activities*), that the boundary line "must follow the . . . branch . . . called the Lower San Juan, through its harbor and into the sea"<sup>128</sup>, and that "The natural terminus of that line is the right-hand headland of the harbor mouth"<sup>129</sup>.

17. As the Court is well aware, however, the coast has undergone further important changes since 1897 as a result of erosion and coastal retreat. It is clear, including from the experts' report, that there is no longer any channel through which the San Juan River flows into Harbor Head Lagoon, and then into the sea<sup>130</sup>. The River and what is now Harbor Head Lagoon are no longer linked. Furthermore, the lagoon is separated from the sea by a spit-barrier. As a consequence, the lagoon is no longer San Juan's outlet to the sea<sup>131</sup>. Instead, the San Juan River flows directly into the Caribbean Sea, as Nicaragua has acknowledged<sup>132</sup>.

18. A review of the pertinent instruments that define the land boundary in the area, in light of the current geographical circumstances, leads one to conclude that the starting-point for the maritime boundary proposed by Costa Rica, that is, the current mouth of the San Juan River, is the only terminal point of the land boundary consistent with the requirements of the 1858 Treaty of

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<sup>127</sup>First award under the Convention between Costa Rica and Nicaragua of 8 Apr. 1896 for the demarcation of the boundary between the two Republics, 30 Sept. 1897, *RIAA*, Vol. XXVIII, p. 216.

<sup>128</sup>*Ibid.*, p. 217, quoted in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, *Judgment*, *I.C.J. Reports 2015*, p. 698, para. 73.

<sup>129</sup>*Ibid.*

<sup>130</sup>Expert Opinion, 30 Apr. 2017, para. 106.

<sup>131</sup>*Ibid.*, para. 100.

<sup>132</sup>*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, CMN, Vol I, para. 6.152.

Limits, the Alexander Awards and the Court's Judgment in *Certain Activities*. By contrast, the point proposed by Nicaragua at the eastern corner of today's Harbor Head Lagoon is not consistent with the 1858 Treaty of Limits or the Alexander Awards, or the Court's 2015 Judgment, as that location is not the mouth of the San Juan River.

**D. Nicaragua has presented no valid justification for its proposed starting point**

19. In its Counter-Memorial, despite undertaking a long and convoluted review of Article II of the 1858 Treaty of Limits, Article 3 (1) of the 1888 Cleveland Award and the work of the Costa Rica-Nicaragua Demarcation Commission presided over by General Alexander<sup>133</sup>, Nicaragua has been unable to present a coherent or credible justification for its proposed starting-point at the eastern corner of the Harbor Head Lagoon. And, because the San Juan River no longer flows through Harbor Head on its way to the sea, it will not be able to do so.

20. What appears to be the real justification for Nicaragua's starting-point was not explicitly articulated in its Counter-Memorial, and this for readily comprehensible reasons. We can, however, find a clue as to the real motivations underlying Nicaragua's claim in a figure included in Nicaragua's Counter-Memorial, which is now projected on the screens and which you will find at tab 118 of your folders. This graphic is entitled "Caribbean Land Boundary Terminus and Starting Point of the Maritime Boundary", and that title is significant. As the title suggests, it shows Nicaragua's proposed starting-point at the eastern corner of Harbor Head Lagoon. However it also depicts not only the supposed "terminus", but also a purported "land boundary", starting at the right margin of the San Juan River.

21. That purported boundary will be familiar to the Court, as it is the one that Nicaragua claimed in the *Certain Activities* case. There Nicaragua argued that the *caño* excavated by Nicaragua in 2010 represented the first channel met and that it connected the San Juan River to Harbor Head Lagoon up to the eastern end of the spit-barrier. The short point is that Nicaragua is in effect still trying to achieve, by other means, the result it sought (and failed) to obtain by militarily occupying Costa Rican territory and excavating the *caño* in 2010.

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<sup>133</sup>*Maritime Delimitation in the Pacific Ocean and the Caribbean Sea (Costa Rica v. Nicaragua)*, CMN, paras. 3.38-3.47.

22. Nicaragua's underlying reason to propose the eastern corner of Harbor Head Lagoon was defeated when the Court issued its Judgment for the *Certain Activities* case on 16 December 2015, which confirmed that "the territory under Costa Rica's sovereignty extends to the right bank of the Lower San Juan River as far as its mouth in the Caribbean Sea". In the graphic now on screen and at tab 119, we have replaced Nicaragua's hoped for "land boundary" with the Court's line along the right bank of the river to its mouth. The actual land boundary leads directly to Costa Rica's proposed starting-point.

23. Nicaragua has attempted to rely on a statement in an unsigned document, which it suggests represents the "Minute" of the Fourth Technical Meeting of the Sub-Commission on Limits and Cartography that took place from 24 to 27 November 2003<sup>134</sup>, to claim that Costa Rica agreed that Marker I (i.e., the Initial Marker) would "be the initial point for maritime delimitation in the Caribbean Sea"<sup>135</sup>.

24. This purported "Minute" relied upon by Nicaragua is a document unilaterally prepared by Nicaragua. Costa Rica does not dispute that the meeting took place, however, no jointly approved Minutes of that meeting were ever produced.

25. The introductory paragraph of this Nicaraguan document purports to summarize an agreement which had already been reached. However, there is no indication of such a settlement in the agreed minutes of the previous meetings of the Sub-Commission on Limits and Cartography including, in particular, the Third Meeting which took place in San José on 4 September 2003<sup>136</sup>, where the mandate for the Fourth Technical Meeting was agreed. That is because no such agreement was ever made.

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<sup>134</sup>Minute of the Fourth Technical Meeting of the Sub-Commission on Limits and Cartography, 24-27 November 2003: *Maritime Delimitation in the Pacific Ocean and the Caribbean Sea (Costa Rica v. Nicaragua)*, CMN Ann. 15.

<sup>135</sup>*Maritime Delimitation in the Pacific Ocean and the Caribbean Sea (Costa Rica v. Nicaragua)*, CMN, para. 3.51.

<sup>136</sup>Minute of the Third Meeting of the Sub-Commission on Limits and Cartography, 3 September 2003: *Maritime Delimitation in the Pacific Ocean and the Caribbean Sea (Costa Rica v. Nicaragua)*, MCR Ann. 33 and CMN Ann. 14.

26. The only thing that was agreed at previous meetings of the Sub-Commission on Limits and Cartography was to carry out an on-site inspection of the markers on the coasts as part of the preparatory work for the ensuing negotiations<sup>137</sup>.

27. As Ambassador Ugalde has noted, Nicaragua accepts that the delegations never reached agreement on the location of the marker<sup>138</sup>. The contention of Nicaragua that it was agreed to start the delimitation at the location of Marker I has no basis, is not supported by the record, and therefore must be rejected.

### **E. The inappropriateness of Nicaragua's proposed starting-point**

28. Besides being contrary to the letter and the spirit of the instruments that define the border régime, and lacking any clear logical justification, Nicaragua's proposed starting-point is inappropriate for many reasons. The graphic on screen and at tab 120 of your folders again shows both Costa Rica's proposed starting-point at the mouth of the San Juan, and the point proposed by Nicaragua, at the eastern corner of Los Portillos/Harbor Head Lagoon<sup>139</sup>. As can readily be appreciated, Nicaragua's proposed starting-point disregards a substantial stretch of coastal frontage of Costa Rican territory on Isla Portillos. This gives rise to a number of further, very important practical reasons to reject Nicaragua's proposed starting-point.

29. First, placing the starting-point of the maritime boundary at any point other than the current mouth of the San Juan River would be inconsistent with Costa Rica's right to use the San Juan River as an outlet for commerce, as determined in Article VI of the 1858 Treaty of Limits. In accordance with this right, Costa Rican vessels must be entitled to access Costa Rican territorial sea from the San Juan River and vice versa, that is, to enter the San Juan from the sea. Nicaragua's starting-point would place Costa Rica's territorial sea far away from the mouth of the river.

30. The second reason is that if the starting-point of the maritime boundary were placed where Nicaragua proposes, Costa Rica would be deprived of access from the sea to its sovereign

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<sup>137</sup>Minute of the Technical Meeting of the Sub-Commission on Limits and Cartography, 16 January 2003: *Maritime Delimitation in the Pacific Ocean and the Caribbean Sea (Costa Rica v. Nicaragua)*, MCR, Ann. 31.

<sup>138</sup>*Maritime Delimitation in the Pacific Ocean and the Caribbean Sea (Costa Rica v. Nicaragua)*, CMN, para. 3.51.

<sup>139</sup>*Maritime Delimitation in the Pacific Ocean and the Caribbean Sea (Costa Rica v. Nicaragua)*, CMN, para. 3.48.

territory extending to the north-western tip of Isla Portillos. As the Court is well aware, this is an area that has already been subjected to repeated unlawful incursions by Nicaragua's armed forces, including the establishment of military camps manned by its troops, felling of trees and other works. This is particularly relevant in a context in which Costa Rican official vessels are not permitted by Nicaragua to navigate the San Juan, and even Costa Rican civilian navigation is hindered by Nicaragua, as this Court has previously found<sup>140</sup>. Access by land to the north-western portion of Isla Portillos is extremely difficult because of the swampy terrain, and access via the beach of Isla Portillos is curtailed by Nicaragua's control of the spit-barrier separating Harbor Head Lagoon from the sea. Thus, access by sea is the only practical possibility for Costa Rica to reach its territory in the northern sector of Isla Portillos.

31. Third, placing the starting-point of the maritime boundary in any other location east of that proposed by Costa Rica would result in the coast of an extensive area of Costa Rican coastal territory not being taken into account for the purpose of generating maritime areas. By contrast, the spit-barrier that encloses Harbor Head Lagoon, which Costa Rica has recognized as Nicaraguan, is described by the experts as being a "ribbon-shaped... accumulation essentially devoid of vegetation" and "mainly consist[ing] of loose sand"<sup>141</sup>, and as being an "accumulation of easily erodible loose sand"<sup>142</sup>. Furthermore, the experts emphasize that the spit-barrier is "a labile feature highly susceptible to coastal erosion and the development of inlet channels"<sup>143</sup>, and, as their report documents, the spit-barrier is periodically breached, thus connecting the lagoon with the sea<sup>144</sup>. On screen now and at tab 121 of your folders you see two photographs of the breached spit-barrier. If and when the spit-barrier is permanently breached, the lagoon will cease to exist, and the brackish water contained therein will disappear into the Caribbean Sea, along with any Nicaraguan claim to

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<sup>140</sup>*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, p. 740, para. 229 (4)

<sup>141</sup>Expert Opinion, 30 April 2017, para. 99.

<sup>142</sup>*Ibid.*, para. 131.

<sup>143</sup>*Ibid.*, para. 102 and Fig. 37.

<sup>144</sup>*Ibid.*, para. 102.

territory to the east of the mouth of the San Juan River. The spit-barrier thus should not be treated as a coastal frontage capable of generating maritime areas.

#### **F. Conclusion on the starting-point of the delimitation in the Caribbean**

32. Mr. President, distinguished Members of the Court, to sum up Costa Rica's case as to the start of the delimitation in the Caribbean, the point proposed by Costa Rica as a starting-point is the only one that conforms with the instruments that define the land border in the area. In marked contrast, the starting-point proposed by Nicaragua finds no support in any of the instruments that define the land boundary in the region. Further, Costa Rica's proposed starting-point is the only one that fully ensures Costa Rica's rights to coastal projection, its ability to access its territory in the northern part of Isla Portillos, and enjoyment of its right to use the San Juan River as an outlet for commerce. Nicaragua knows very well that the boundary follows the right margin of the San Juan River up to its mouth in the Caribbean; this is the reason why it sought to modify the boundary when it constructed its artificial *caño* in 2010. And, of course, the logic underlying Nicaragua's proposed starting-point was rejected by this Court's Judgment of 16 December 2015.

#### **G. Costa Rica's answer to the Court's question**

33. Allow me, Mr. President, to now address the Court's question raised last week. I will present Costa Rica's primary position in this regard; tomorrow, whilst explaining Costa Rica's case on the course of the maritime boundary in the Caribbean, Mr. Lathrop will also set out Costa Rica's position as to the appropriate approach in the event that the Court were to conclude that the maritime boundary should commence from a point offshore.

34. Costa Rica's primary position continues to be that the maritime delimitation should commence from the mouth of the San Juan River, in particular from point SP-C as corrected in the light of the measurements made in the field.

35. That is on the basis that the circumstances of the present case are not such as to require commencing the maritime boundary at a point at some distance from the coast. Costa Rica considers that point SP-C and other points on the coast are sufficiently stable to be used as base points for the delimitation, and that the prospects of changes in the coast are not such as to create problems of the type faced by the Court in *Nicaragua v. Honduras*.

36. In *Nicaragua v. Honduras*, the Court was asked to delimit a maritime boundary starting at the mouth of the Rio Coco, at the tip of Cape Gracias a Dios: a delta characterized by “very active morpho-dynamism”<sup>145</sup>, resulting in the formation of new islands in the mouth of the river and a “continuing [seaward] accretion . . . as a result of alluvial deposits”<sup>146</sup>. In addition to the constant formation of new islands precisely at the starting-point of the maritime boundary, the Court faced unresolved sovereignty disputes over certain of the islands in the mouth of the river<sup>147</sup>, and was concerned by the unusually protruding banks of the Rio Coco, base points on which it would derive the course of the entire length of an equidistance line. Faced with these problems of physical instability and legal uncertainty, the Court found it impossible to identify viable base points from which to construct a provisional equidistance line<sup>148</sup>. It was these factors which contributed to the Court’s decision to adopt a bisector method of delimitation, and to start the delimitation 3 nautical miles offshore<sup>149</sup>.

37. By contrast, in the present case, the Court does not face the same problem. The rate of change is nowhere near as rapid as that at issue in *Nicaragua v. Honduras*, which involved the mouth of the river “shift[ing] considerably, even from year to year”<sup>150</sup>, nor is the situation one involving the creation of new land seawards. Instead, the situation is one of gradual coastal retreat, and the instability is primarily along the coast in the form of an extending and retreating coast-parallel sand spit. As a result, there is no difficulty in establishing the location of the starting-point and appropriate base points on the Parties’ respective coasts as at the date of the delimitation. Nicaragua has not suggested the contrary. Costa Rica’s proposed starting-point on stable land at the vegetation line further mitigates the problem of instability. Additionally, and again in contrast to the situation in *Nicaragua v. Honduras*, in light of the configuration of the

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<sup>145</sup>*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007 (II), p. 673, para. 32 and p. 742, para. 277.

<sup>146</sup>*Ibid.*, p. 755, para. 307.

<sup>147</sup>*Ibid.*, p. 743, para. 279 and p. 744, para. 280.

<sup>148</sup>*Ibid.*, paras. 278-280.

<sup>149</sup>*Ibid.*, pp. 743-744, para. 280.

<sup>150</sup>*Ibid.*, p. 742, para. 274.

coast, any changes as a result of coastal retreat in the near future are unlikely to have any major impact upon the course of the provisional equidistance line.

38. The experts have identified the possibility of the mouth of the San Juan River eventually shifting eastwards. Costa Rica's position is likewise that that possibility is not such as to prevent the Court from carrying out the delimitation on the basis of the current configuration of the coast, using base points located on the coast as it currently exists. As the Court emphasized in the *Black Sea* case, it is necessary to "use as base points those which the geography of the coast identifies as a physical reality *at the time of the delimitation*"<sup>151</sup>. The Annex VII tribunal in *Bangladesh v. India* considered the prospects of coastal change as a result of sea level rise, reasoning that "the issue is not whether the coastlines of the Parties will be affected by climate change in the years or centuries to come. It is rather whether the choice of base points located on the coastline . . . is feasible in the present case and *at the present time*."<sup>152</sup>

39. The instability at the mouth of the San Juan River is inconsequential when compared to the instability and other complicating factors at the mouth of the Rio Coco. Costa Rica contends that it is feasible to identify a starting-point and base points on the coast and to construct an equidistance boundary therefrom, and this remains Costa Rica's primary position. As I stated earlier, Mr. Lathrop will deal with the matter of the location of a starting-point of the boundary at some distance from the coast tomorrow.

40. Mr. President, distinguished Members of the Court, I thank you for your kind attention. This brings to a close Costa Rica's interventions for today.

The PRESIDENT: Thank you. The Court will meet again tomorrow from 10 a.m. to 1 p.m., in order to hear the remainder of Costa Rica's first round of oral argument. L'audience est levée.

*The Court rose at 5.20 p.m.*

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<sup>151</sup>*Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009*, p. 103, para. 131 (emphasis added).

<sup>152</sup>UNCLOS Annex VII Tribunal, *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award of 7 July 2014, para. 214 (emphasis added).