

## SEPARATE OPINION OF JUDGE XUE

1. Notwithstanding my vote on subparagraph (4) of the operative part of the Judgment, I wish to place on record my disagreement with the reasoning in relation to the location of the starting-point of the land boundary between the Parties and the way in which this issue is treated in the *Maritime Delimitation* case.

2. First of all, I am of the view that, under the 1858 Treaty of Limits, the Cleveland Award and the Alexander Awards, the starting-point of the land boundary should be located on the north-eastern end of the Harbor Head Lagoon rather than at the end of the sandspit of Isla Portillos at the mouth of the San Juan River (right bank).

3. In this joint case, identification of the starting-point of the land boundary is an essential issue, both for the determination of the territorial sovereignty of the coast in dispute and for the maritime delimitation between the Parties in the Caribbean Sea. The Parties do not disagree that the 1858 Treaty of Limits, the Cleveland Award and the Alexander Awards constitute the legal basis for the determination of the land boundary between the two countries. Notwithstanding the continuous geographical changes in the Isla Portillos in the course of the last one and half centuries, the provisions of the 1858 Treaty and the terms of the arbitral awards remain applicable. In other words, the starting-point of the land boundary has to be determined on the basis of these legal documents.

4. By its Order of 31 May 2016, the Court decided to appoint two experts to conduct site visits to the coast of the northern part of Isla Portillos and to advise the Court regarding the state of the coast between the point suggested by Costa Rica and the point suggested by Nicaragua in their pleadings as the starting-point of the maritime boundary in the Caribbean Sea. The Court put the following questions for the experts to answer:

- “(a) What are the geographical co-ordinates of the point at which the right bank of the San Juan River meets the sea at the low-water line?
- (b) What are the geographical co-ordinates of the land point which most closely approximates to that identified by the first Alexander Award as the starting-point of the land boundary?
- (c) Is there a bank of sand or any maritime feature between the points referred to in subparagraphs (a) and (b) above? If so, what are their physical characteristics? In particular, are these features, or

some of them, permanently above water, even at high tide? Is Los Portillos/Harbor Head Lagoon separated from the sea?

(d) To what extent is it possible, or probable, that the area concerned will undergo major physical changes in the short and long term?" (*Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, Order of 31 May 2016, *I.C.J. Reports 2016 (I)*, pp. 237-238.)

5. In their report, the Court-appointed experts located the original starting-point of the land boundary, now submerged under the sea, in accordance with the terms of the 1858 Treaty and the arbitral awards, and marked the geographical co-ordinates of the land point which most closely approximates to that identified by the first Alexander Award as the starting-point of the land boundary.

6. The experts' report demonstrates that the initial segment of the land boundary, including its starting-point, remains identifiable and actually identified. What is left of Harbor Head Lagoon and the accreted sandbar separating the lagoon and the sea is a broken part of the land boundary, now enclaved within Costa Rica's territory. The experts' answer to the first question in fact identified the current location of the point at which the San Juan River reaches the sea, in other words, the place where the original land boundary breaks.

7. In the present Judgment, the Court considers that it has determined the starting-point of the land boundary in its 2015 Judgment in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area*, where it interpreted the 1858 Treaty as providing 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" (*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). A closer perusal of the relevant paragraphs of the 2015 Judgment shows that this interpretation of the said Judgment is questionable.

8. In the first place, the location of the starting-point of the land boundary did not fall within the scope of the jurisdiction of the Court in that case. That issue depends on the determination of the sovereignty over the coast of the northern part of Isla Portillos. If the coast belonged to Nicaragua, the land boundary should extend eastward to Harbor Head Lagoon; otherwise, the boundary would start at the mouth of the river on the western side of Isla Portillos. In the present case, the question whether the watercourse that channelled the San Juan River and Harbor Head Lagoon still bears on who has the sovereignty over the coast of the northern part of Isla Portillos. By interpreting paragraphs 69 and 70 of the

2015 Judgment, the Court states that, “no decision was taken by the Court in its 2015 Judgment on the question of sovereignty concerning the coast of the northern part of Isla Portillos, since this question had been expressly excluded”. This conclusion means that the status of the last segment of the land boundary including its starting-point, as determined by General Alexander, was yet to be determined.

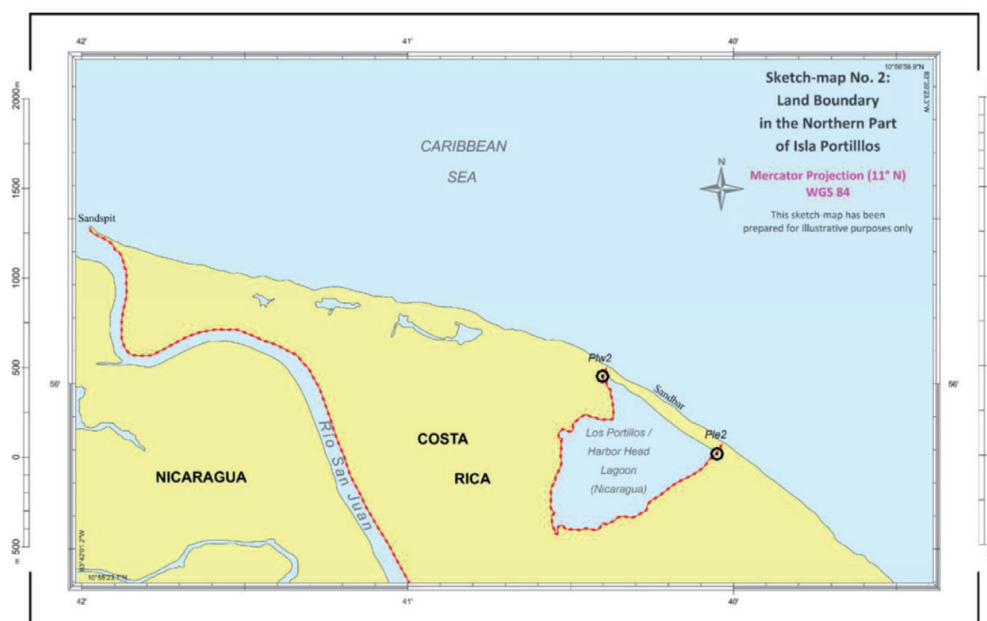
9. Moreover, should the Court have determined the starting-point of the land boundary as at the mouth of the San Juan River in the 2015 Judgment, it would not have been reasonable for the Court to instruct the experts to relocate the original starting-point of the land boundary and to find the geographic co-ordinates of the land point that most closely approximates to the original starting-point identified by General Alexander, because the boundary would follow the natural course of the San Juan River to the sea and it would be pointless to identify these points.

10. Although the drafters of the 1858 Treaty and the arbitral awards well anticipated that the land boundary would necessarily be affected by gradual or sudden coastal changes in the future, they did not specifically spell out what principles of international law would apply in the event of such changes. Although it was mentioned that “[t]he ownership of any accretion to said Punta de Castilla is to be governed by the laws applicable to that subject” (see 1888 Cleveland Award, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVIII, p. 209), the situation of what now stands as partial disappearance of the watercourse was not envisaged.

11. It is true that General Alexander made it clear that in the practical interpretation of the 1858 Treaty, the San Juan River must be considered a navigable river. However, if the starting-point of the boundary is to be automatically determined by the river’s outlet to the sea, it would be difficult to explain why both Parties agree that Harbor Head Lagoon belongs to Nicaragua rather than Costa Rica; since the watercourse has now reached the Caribbean Sea at the mouth of the San Juan River, what is on the right bank of the River, including Harbor Head Lagoon, should automatically be merged with Costa Rica’s territory.

12. When the Court, on the basis of the experts’ report, determines that there is no longer any water channel connecting the San Juan River with Harbor Head Lagoon and therefore the coast of the northern part of Isla Portillos belongs to Costa Rica, it virtually states that the land boundary is disrupted at the mouth of the San Juan River by the natural change of the coast (see sketch-map No. 2 of the Judgment, reproduced below, p. 234).

13. The Court’s decision that Harbor Head Lagoon and the sandbar separating it from the Caribbean Sea are under Nicaragua’s sovereignty (Judgment, para. 73) cannot simply be attributed to the agreement of the Parties; the underlying reason is Costa Rica’s recognition that the line



around Harbor Head Lagoon still constitutes part of the land boundary, albeit disconnected with the rest of the land boundary.

14. Situations with water boundaries vary from case to case. There is no established rule of customary international law governing the legal impact of watercourse change on boundaries (e.g. Anzilotti, Bardonnnet, Bouchez, Caffisch)<sup>1</sup>. In the present case, so far as the land boundary is concerned, there are two relevant factors that should be taken into account. First, the starting-point of the land boundary, even after being relocated, remains in an unstable situation. As the experts pointed out in their report,

“the position of the mouth of the San Juan River experiences continuous variations, mainly related to changes in the spit of Isla Portillos, i.e., westward growth by accumulation of sand and destruction by erosion (. . .). The growth of the spit by sediment accretion is a progressive process, whereas its destruction, including the opening of channels, may occur rapidly by strong waves (e.g., hurricanes) and floods of the San Juan River. Consequently, the mouth of the San Juan

<sup>1</sup> D. Bardonnnet, “Frontières terrestres et frontières maritimes”, *Annuaire français de droit international*, Vol. 35, 1989, pp. 10-11, citing D. Anzilotti’s 1914 study of State practice published in the *Rivista italiana di diritto internazionale*; L. J. Bouchez, “The Fixing of Boundaries in International Boundary Rivers”, *International and Comparative Law Quarterly*, Vol. 12, 1963, p. 807; L. Caffisch, «Règles générales du droit des cours d’eau internationaux», *Recueil des cours de l’Académie de droit international de La Haye*, Vol. 219, 1989, p. 82.

River and its right bank are *highly mobile*.” (Report of the Court-Appointed Experts, 30 April 2017, p. 42, para. 117; emphasis added.)

To maintain stability and certainty of the boundary, more weight should be given to its legal title than to the factual change on the ground. Secondly, the enclave resulting from the break-up of the land boundary is not a self-standing geographical feature as such; until the Court’s present decision on the sovereignty of the coast of the northern part of Isla Portillos, it formally constituted part of the land boundary. Whether Harbor Head Lagoon and its frontal sandbar would eventually disappear as a result of coastal recession, as claimed by Costa Rica, the enclave, as it currently stands, should form part of the geomorphological circumstances of the coast for the maritime delimitation, a point I now turn to.

15. The location of the starting-point of the land boundary is not a hard issue. So far as the land boundary is concerned, it does not matter where to locate its starting-point; whether it is identified at the eastern headland of Harbor Head Lagoon, or at the mouth of the San Juan River as a result of the disappearance of the water channel, the boundary continues to serve its purposes well despite the break-up of the initial segment of the boundary. What matters in this case is the impact of the coastal change on the maritime delimitation. Although the Court takes cognition of the great instability of the coastline in the area of the mouth of the San Juan River, it does not give sufficient consideration to the coastal relationship between the Parties. With Costa Rica’s coast now situated between Nicaragua’s territories, Harbor Head Lagoon on the eastern side and the river mouth on the western side, it would be difficult, if not impossible, to choose a starting-point on land that would genuinely reflect a median point. Either way, there would be some cut-off effect to the detriment of one Party. That is to say, to use the point suggested by Nicaragua as the starting-point of the maritime boundary, Costa Rica’s coast would be cut off from the sea. To use the point suggested by Costa Rica, on the other hand, there would also be some cut-off effect on Nicaragua’s enclave.

16. The Court stated in the *Nicaragua v. Honduras* case that,

“[n]othing in the wording of Article 15 suggests that geomorphological problems are *per se* precluded from being ‘special circumstances’ within the meaning of the exception, nor that such ‘special circumstances’ may only be used as a corrective element to a line already drawn” (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007 (II), p. 744, para. 280).

In the present case, the geomorphological conditions of the coast of the northern part of Isla Portillos and the break-up of the land boundary constitute such special circumstances.

17. I agree with the majority that given the prevailing circumstances of the coast and the current location of the mouth of the San Juan River, it is reasonable and equitable to draw the provisional median line from the coast on the western side of Isla Portillos near the mouth of the San Juan River. I doubt, however, the wisdom to select as the starting-point of the maritime boundary a point on the solid land closest to the mouth of the river, currently identified as point Pv. This is because, first, that point is equally unstable and secondly, little consideration is given to Nicaragua's access to Harbor Head Lagoon.

18. In paragraph 105 of the Judgment, the Court recognizes that the situation of the enclave is a special circumstance and calls for "a special solution". It nevertheless considers that "[s]hould territorial waters be attributed to the enclave, they would be of little use to Nicaragua, while breaking the continuity of Costa Rica's territorial sea". Therefore, the delimitation in the territorial sea between the Parties will not take into account any entitlement which might result from the enclave. In my opinion, this is not a convincing reasoning to ignore Nicaragua's entitlement from the enclave, no matter how small it is.

19. The prevailing geographical phenomenon of the coast is instability. In considering the special circumstances in the delimitation of the territorial sea, the Court does not attach much importance to the experts' advice that the overall coast will undergo continuous changes due to coastal erosion and whether the mouth of the San Juan River would move further westwards or eastwards is unpredictable. Indeed, the Court cannot base its decision on the prediction of future changes, but on the factual situation of today. To treat the enclave as negligible, however, in my view, cannot be regarded as "a special solution".

20. In order to overcome the difficulty arising from the repositioning of the starting-point of the land boundary at the mouth of the San Juan River as a result of the disappearance of the watercourse along the coast, the starting-point of the maritime delimitation, in my opinion, can be detached from the starting-point of the land boundary. To provide access to Harbor Head Lagoon for Nicaragua, in light of the geographical situation of the coast, the maritime boundary may start from a fixed point (the same as the hinge point) on the median line at a distance of 2 nautical miles from the coast without being connected with a mobile line to a point on land. Although with 2 nautical miles' territorial sea undelimited, this approach would place the Parties in a better position to manage their coastal relations, particularly in respect of navigation. It would not be the first time that a delimitation begins at some distance out to the sea; the judicial and arbitral practices support such a resolution where there is an uncertain land boundary terminus (see, for example, *Territorial and Mar-*

*itime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007 (II), p. 756, para. 311; Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau, Award of 14 February 1985, United Nations, RIAA, Vol. XIX, pp. 149-196).*

(Signed) XUE Hanqin.

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