

CR 2017/15

International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 2017

Public sitting

held on Thursday 13 July 2017, at 10 a.m., at the Peace Palace,

President Abraham presiding,

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

VERBATIM RECORD

ANNÉE 2017

Audience publique

tenue le jeudi 13 juillet 2017, à 10 heures, au Palais de la Paix,

sous la présidence de M. Abraham, président,

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

COMPTE RENDU

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

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

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

as Agent;

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

as Co-Agent, Counsel and Advocate;

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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 morning the Court will hear the opening of Nicaragua's second round of oral argument. I now give the floor to Professor Oude Elferink.

Mr. OUDE ELFERINK:

THE RELEVANT COASTS AND THE RELEVANT AREA

1. Thank you, Mr. President. Mr. President, Members of the Court, today I will be addressing the argument Dr. Parlett made this Monday in respect of the relevant coasts and the relevant area.

General points

2. I agree with counsel for Costa Rica that the main issue that divides the Parties continues to be whether the applicable law implies looking at the seaward or radial projection of the relevant coasts to determine the relevant area¹. Dr. Parlett started out by claiming that I had not cited any authority for the claim that "seaward" means frontal protection². As a matter of fact I did do so, when I referred to the observation of the Arbitral Tribunal in *Bangladesh v. India* to the effect that: "there is a margin of appreciation in determining the projections generated by a segment of coastline and a point at which a line drawn at an acute angle to the general direction of the coast can no longer be fairly said to represent the seaward projection of that coast"³.

3. As I explained last Thursday, and there was no response on the part of Dr. Parlett this Monday, this observation of the tribunal indicates that it rejected the idea of radial projection and instead adopted frontal projection to determine the relevant coasts and the relevant area⁴. As a matter of fact, the tribunal discussed the matter of acute angles in light of the observation that, and I quote, it, "recognizes that a radial line drawn to the north-east from a point south of Sandy Point

¹CR 2017/13, p. 16, para. 16.

²*Ibid.*, para. 17, referring to CR 2017/10, p. 26, para. 21 (Oude Elferink).

³UNCLOS Ann. VII Tribunal, *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, para. 302.

⁴CR 2017/10, p. 27, para. 26.

would also overlap with the projection of the coast of Bangladesh beyond 200 nautical miles”⁵. End of quote. Sandy Point being the southern terminus of India’s mainland relevant coast.

4. In view of what Dr. Parlett said about Nicaragua’s definition of the relevant coasts and the relevant area in Caribbean Sea and the Pacific Ocean — a matter to which I will return shortly — it is pertinent to highlight one other implication of Nicaragua’s reliance on this observation from *Bangladesh v. India*. Dr. Parlett submitted that frontal projection implies a projection at an angle of 90 degrees only⁶. However, what should be excluded are projections at too acute an angle. The law does not require to only include overlapping projections that extend perpendicularly from the relevant coast into the relevant area.

5. Dr. Parlett submitted that Nicaragua ignored the fact that the Court in its 2012 Judgment in *Territorial and Maritime Dispute* used a radial projection in determining the projection of the Colombian islands of San Andrés and Providencia⁷. I indeed ignored that aspect of the Court’s Judgment, and with good reason. In the present case, the Court is not faced with a delimitation involving mid-ocean islands, and there is no reason why the Court should depart from the standard approach for determining the relevant area seaward from mainland coasts.

6. Dr. Parlett complained that instead of focusing on San Andrés and Providencia, I discussed the treatment of the Andaman Islands in *Bangladesh v. India*⁸. I did so in reply to Dr. Parlett’s reliance on the Arbitral Tribunal’s treatment of the Andaman Islands in support of Costa Rica’s view that coasts project radially⁹. Instead of rebutting my argument, counsel for Costa Rica is now telling the Court that the tribunal’s approach “is difficult to reconcile with the Court’s approach in *Nicaragua v. Colombia*”¹⁰. There actually is no conflict between the two cases, and no need for reconciliation. As I just mentioned, the Court in *Territorial and Maritime Dispute* was faced with a delimitation involving mid-ocean islands located within the relevant area¹¹. The

⁵UNCLOS Ann. VII Tribunal, *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, para. 302.

⁶CR 2017/13, pp. 18-19, para. 20; judges’ folder for Costa Rica of 10 July, figs. at tabs 173 and 174.

⁷CR 2017/13, p. 17, para. 18.

⁸*Ibid.*

⁹CR 2017/10, pp. 27-28, para. 26.

¹⁰CR 2017/13, p. 17, para. 18.

¹¹See *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012 (II)*, p. 687, sketch-map No. 7.

Andamans are to the east of the relevant area defined by the arbitral tribunal, facing that area in a westerly direction¹².

7. Counsel of Costa Rica was critical of my using a reference to the Bench to illustrate the meaning of the verb “to face”¹³. I have to admit that her description — in which she referred to individual members of the Court — was a much more elegant explanation of what the verb *to face* means. We seem to be in agreement that when you face someone, you look her or him in the eyes. That indeed implies a frontal relationship. In focusing on the Bench, Dr. Parlett lost view of the larger point at issue. Last Thursday, I discussed three examples she had invoked in support of radial projection. As I argued, those examples only make sense if one adopts the view that a frontal seaward projection was employed to exclude parts of the coasts of the Parties from the relevant coasts¹⁴. You heard nothing on that point this Monday.

The relevant coasts and the relevant area in the Caribbean Sea and the Pacific Ocean

8. Mr. President, the last part of my presentation is concerned with the two figures counsel for Costa Rica used this Monday to refer to the supposed shortcomings of Nicaragua’s approach to the relevant coasts and the relevant area in the Caribbean Sea and the Pacific Ocean¹⁵. It is entirely proper to characterize those figures as a caricature of Nicaragua’s position. This qualification is not meant to be only negative. A caricature may draw attention to what is essential to an issue. Costa Rica’s caricatures help to highlight Nicaragua’s actual approach to the definition of the relevant coasts and the relevant area. [Fig. AOE2-1] Let me start with Costa Rica’s depiction of the relevant area in the Pacific Ocean. That is Figure AOE2-1 in today’s judges’ folder. A first thing to note is that in the figure Costa Rica’s relevant coast [Fig. AOE2-2a] between Punta la Flor and Cabo Santa Elena projects all the way to the Corinto point, which defines the northern limit of Nicaragua’s relevant coast¹⁶.

¹²See UNCLOS Ann. VII Tribunal, *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014; see also CR 2017/10, pp. 27-28, para.26.

¹³CR 2017/13, p. 19, para. 21.

¹⁴CR 2017/10, pp. 28-30, paras. 27-32.

¹⁵Judges’ folder for Costa Rica of 10 July, figs. at tabs 173 and 174.

¹⁶CMN, para. 2.18.

9. Mr. President, I am not going to speculate about the reasons why Costa Rica may have taken this approach, but limit myself to noting that Costa Rica is wrong. As is also apparent from Costa Rica's depiction of the seaward projection of the other parts of Costa Rica's relevant coast, Nicaragua used perpendiculars to their general direction to determine their lateral limits. The same has been done for Nicaragua's relevant coast¹⁷. If Costa Rica would have applied the same methodology to determine the projection of the coast between Punta la Flor and Cabo Santa Elena, that projection would have extinguished itself well before reaching the Corinto point.

10. This of course raises the question why Nicaragua used perpendiculars to the coast to determine the extent of the relevant area. As the case law of this Court and other tribunals indicates, there is no rule prescribing the use of these specific lateral limits. However, Nicaragua believes that the application of the same methodology to both Parties results in an outcome that is balanced and fair to both Parties. As far as the relevant area itself is concerned there is no similar justification for using perpendicular projections only [Fig. AOE2-2b on] and the relevant area should be all of the area bounded by the lateral limits identified by Nicaragua.

11. There is one further point concerning Costa Rica's caricature of Nicaragua's relevant coast in the Pacific Ocean. Costa Rica's view as included in the figure at tab 173 of this Monday's judges' folder implies that the relevant area only includes those seaward projections of the Parties that overlap. That is plainly wrong. As that point is even more clearly illustrated by the figure at tab 174 of this Monday's judges' folder, I would like to turn to a discussion of the latter figure [Fig. AOE2-2b off][Fig. AOE-3].

12. As is apparent, Costa Rica considers that the maritime areas landward of the overlapping projections should not have been included in the relevant area. That, however, is not in accordance with the approach of this Court and other tribunals on this matter. [Fig. AOE2-3 off] [Fig. AOE2-4 on]. On screen we again have sketch-map 4 included in the Award in *Bangladesh v. India*. This time I would like to draw the Court's attention to the part of the relevant area that is now highlighted on screen. As may be observed, this area is beyond the overlapping 200-nautical-mile entitlements of Bangladesh and India. Costa Rica would say "to be excluded from the relevant

¹⁷See CMN, paras. 2.35-2.38.

area”. However, as may be noted, the area concerned is landward of the overlapping continental shelf entitlements of the Parties beyond 200 nautical miles *and* the frontal projections of the relevant coast of India extend into this area. [Fig. AOE2-4 off].

13. Another example is provided by the *Jan Mayen* case. [Fig. AOE2-5] This is sketch-map No. 1 from the Judgment in that case. The Court in this instance not only included the overlapping 200-nautical-mile entitlements in the relevant area, but also the areas landward of these overlapping entitlements¹⁸. [Fig. AOE2-5 off]

14. Let me return to the Caribbean Sea. [Fig. AOE2-6] Apart from including areas that are landward from the area of overlapping entitlements, Nicaragua in the Caribbean Sea has determined the lateral limits of the relevant area in large part with reference to delimitation treaties with third States in accordance with the approach of this Court and other tribunals¹⁹. [Fig. AOE2-6 off]

15. Mr. President, I agree with Dr. Parlett’s closing statement on the relevant coasts and the relevant area²⁰. And let me quote her. “There is some degree of discretion and flexibility, but that discretion need not be unprincipled: it can be applied in a consistent and predictable way.” In Nicaragua’s view that is best achieved by applying the standard methodology of the Court and not turning to radial projections where that is not called for.

16. Mr. President, Members of the Court, that concludes Nicaragua’s presentation on the relevant coasts and the relevant area. I thank you for your attention. Mr. President, I ask that you give the floor to Professor Remiro Brotóns.

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

¹⁸*Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, p. 47, paras. 19-20 and pp. 69-70, paras. 71-72.

¹⁹See, e.g., *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012 (II), pp. 683-685, paras. 160-162.

²⁰CR 2017/13, p. 19, para. 21.

M. REMIRO BROTONS :

**LES DÉLIMITATIONS CONVENUES PAR LE COSTA RICA DANS
LA MER DES CARAÏBES**

I. Introduction

1. Monsieur le président, vendredi dernier à la fin du premier tour d'audiences, vous avez rappelé aux Parties que l'objet du second tour était de permettre à chaque Partie de répondre aux arguments oraux de l'autre et non de répéter des arguments déjà exposés. Donc, je vous propose d'aborder directement les points relevés par la Partie adverse sous le prétentieux titre «Les vains efforts du Nicaragua pour faire jouer un rôle à des traités conclus par des Etats tiers»²¹.

2. Monsieur le président, Mesdames et Messieurs les juges, il conviendrait de rappeler que le Nicaragua s'est battu pour défendre ses droits au-delà des murs que la Colombie avait élevés avec la série des traités souscrits avec tous ses voisins, une politique expansive qui était même présentée comme une «pratique régionale»²². Le Costa Rica s'est impliqué dans cette politique. Le Nicaragua n'a pas de mal à admettre les espaces maritimes attribués au Costa Rica par le traité signé avec la Colombie en 1977. Ce qui a toujours été fermement contesté fut son implication dans la politique colombienne pour forger des titres sur de grandes surfaces qui, conformément aux règles du droit international de la mer, pouvaient seulement être — et ils sont — nicaraguayens.

II. L'application de traités non ratifiés

3. Monsieur le président, le Costa Rica prétend vous faire croire que le traité de 1977 n'a aucun rôle à jouer car il s'agit d'un traité qui n'est pas entré en vigueur à raison de sa non-ratification. Or, il s'agit d'une lecture un peu trop simpliste de la situation.

4. Votre Cour n'a pas hésité à interpréter et appliquer des traités non ratifiés, tirant tous les indices et les effets juridiques qu'ils produisent. Ainsi on trouve le rôle central que la convention de

²¹ CR 2017/13, p. 63 (Kohen).

²² Voir, par exemple, Colombia's Rejoinder on the Merits, 18 June 2010. Chapter 7, Nicaragua's Enclave Theory), C (Small Islands Have Frequently Received Full Effect in Maritime Delimitation), (2) (Regional Practice in the Southwest Caribbean, para. 7.61).

1892 souscrite entre la Belgique et les Pays-Bas, mais non ratifiée par ce dernier, a joué dans l'affaire relative à la *Souveraineté sur certaines parcelles frontalières*²³.

5. D'ailleurs, dans le *Différend frontalier terrestre, insulaire et maritime* entre El Salvador et le Honduras, El Salvador n'avait pas ratifié certaines clauses qu'il avait acceptées *ad referendum*. La Cour a pris en considération ces dispositions constatant que, même si El Salvador ne les avait pas ratifiées, il ne les avait pas dénoncées non plus, et le Honduras n'avait donné aucun signal d'avoir pris en compte le consentement de El Salvador comme retiré²⁴.

6. On pourrait encore citer la convention anglo-ottomane relative au golfe Persique et aux territoires environnants, signée le 29 juillet 1923, mais jamais ratifiée, dans le cadre de l'affaire relative à la *Délimitation maritime et questions territoriales entre Qatar et Bahreïn*. La Cour a fondé sa décision pour établir l'étendue de la frontière sur la base de cet instrument, un traité, qui n'avait pas été ratifié²⁵.

III. La force obligatoire des termes du traité de 1977

7. Monsieur le président, contrairement à ce que le Costa Rica voudrait vous faire croire, la non-ratification du traité de 1977 ne saurait se construire comme une cause automatique derrière laquelle il peut se cacher librement des effets qu'il a donnés.

8. Le traité de 1977 a un rôle à jouer. Le traité de 1977 a été respecté par le Costa Rica pendant près d'une quarantaine d'années. Ce comportement doit dire quelque chose. Le scénario juridique demande un traitement beaucoup plus élaboré. On sait bien que le contenu d'un traité non ratifié peut créer, dans certaines circonstances, des obligations opposables aux signataires, même au-delà des prévisions des articles 18 et 25 de la convention de Vienne.

9. Cela a été précisément la position défendue par la Colombie, qui a systématiquement et fortement insisté sur la force obligatoire du contenu essentiel du traité de 1977 pour le Costa Rica. Une position soutenue même avant sa requête à fin d'intervention dans l'affaire relative au

²³ *Souveraineté sur certaines parcelles frontalières (Belgique/Pays-Bas)*, arrêt, C.I.J. Recueil 1959, p. 229-230.

²⁴ *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras ; Nicaragua (intervenants))*, arrêt, C.I.J. Recueil 1992, p. 421-422, par. 99-100.

²⁵ *Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn)*, fond, arrêt, C.I.J. Recueil 2001, p. 68, par. 88-89.

Différend territorial et maritime entre le Nicaragua et la Colombie²⁶. Une position réitérée au cours de la procédure ouverte par cette requête, dont la seule mention semble agacer maintenant notre contradicteur²⁷.

10. La Colombie a mentionné jusqu'à quatre raisons différentes pour signaler que le Costa Rica y était contraint à la suite de son propre comportement : 1) les déclarations de ses plus hauts représentants ; 2) le respect du traité pendant plus d'une trentaine d'années ; 3) l'existence d'un *tripoint* entre la Colombie, le Costa Rica et le Panama, en vertu de l'article I^{er} du traité de 1980, comme une reconnaissance implicite du traité de 1977 ; 4) la référence au traité de 1977 dans le traité de 1984 entre la Colombie et le Costa Rica sur la délimitation dans l'océan Pacifique, dans lequel on dit que la frontière maritime entre les deux Etats dans la mer des Caraïbes a déjà été fixée²⁸.

IV. La confirmation de la force obligatoire des termes du traité de 1977 par la pratique diplomatique du Costa Rica

11. Monsieur le président, notre contradicteur s'étonne «de voir autant de références au comportement costa-ricien et aucune preuve concrète de ce comportement»²⁹. Or, la pratique diplomatique est assez claire en confirmant l'application du traité de 1977 par le Costa Rica. C'est ainsi que son ministre des affaires étrangères s'adresse à son homologue colombien le 14 mai 1997 en l'informant que :

*«the Treaty on Maritime Delimitation between Colombia and Costa Rica has been complied with, is being complied with and will continue to comply with, as a show of good faith of the Parties. The terms of the Treaty are clear, unequivocal and the absence of incidents or difficulties between both countries in this matter evidences the beneficial character of that legal instrument...»*³⁰

12. Quelques années après, le 29 mai 2000, il s'est produit un échange de notes entre le ministre des affaires étrangères du Costa Rica (Roberto Rojas) et celui de la Colombie (Guillermo

²⁶ Exceptions préliminaires de la Colombie en date du 21 juillet 2003, par. 1.5 ; contre-mémoire de la Colombie en date du 11 novembre 2008, par. 4.149-4.159.

²⁷ CR 2017/13, p. 64, par. 2 (Kohen).

²⁸ CR 2017/10, p. 39, par. 14 (Remiro Brotóns).

²⁹ CR 2017/13, p. 66, par. 8.

³⁰ Les italiques sont de nous ; voir CMN, annexe 22, p. 297, Diplomatic Note N° DM 172-96 from the Costa Rican Minister of Foreign Affairs to the Colombian Minister of Foreign Affairs, 14 May 1996 ; voir également *Différend territorial et maritime (Nicaragua c. Colombie)*, contre-mémoire de la Colombie, vol. II-A, annexe 67.

Fernández de Soto), déliant l'avenir des traités de 1977 et de 1984, jusqu'à cette date liés en vertu de l'article 3 de ce dernier.

13. En ce qui concerne le traité de 1977, la note du ministre costa-ricien exprime que le Costa Rica

«always observing of the principles and rules of international law and in particular those framing the conclusion of international treaties, has *complied with and will continue to comply with* ... the Treaty on Delimitation of Maritime and Submarine Areas and Maritime Cooperation of 17 March 1977».

Et continue-t-il :

«it is evident that *throughout the years* both treaties [1977 and 1984] *have shown their beneficial character, have facilitated* cooperation and *contributed to* mutual understanding, the preservation of peace and trust between our two States, becoming an example for the region and the continent»³¹.

14. Dans la note de réponse, le ministre de la Colombie affirme :

«I am pleased to convey to Your Excellency that the fact that, *for 23 years* ... there has never been an incident, despite the intense and continuous activities of control, fishing and commercial navigation that ships from our respective States carry out in those areas, is testimony of the *beneficial character and efficacy* of the aforesaid instruments.»³²

15. Si nous tenons compte de l'autorité de ceux qui font ces déclarations, la plainte du conseil du Costa Rica affirmant qu'«aucune activité concrète, ni de pêche, ni d'exploration ou exploitation des ressources du plateau continental, n'a été répertoriée, d'un côté ou de l'autre de la ligne du traité de 1977»³³, manque de toute pertinence.

16. A l'occasion de l'acte d'échange des instruments de ratification du traité de 1984 en février 2001, le ministre des affaires étrangères du Costa Rica, M. Rojas, affirmait en ce qui concerne le traité de 1977 que :

«Costa Rica also wishes to reiterate to Colombia *its decision to continue complying, as it has up to now*, in accordance with the provisions of international law,

³¹ Les italiques sont de nous ; voir CMN, Annex 24, p. 305, Note N° DM 073-2000 from the Costa Rican Foreign Minister to the Colombian Foreign Minister, 29 May 2000, et *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Rejoinder of the Republic of Colombia, Vol. II, Annex 2, p. 73.

³² Les italiques sont de nous ; voir Diplomatic Note N° DM 14082-2000 from the Colombian Foreign Minister to the Costa Rican Foreign Minister, 29 May 2000, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Rejoinder of the Republic of Colombia, Vol. II, Annex 1, p. 71.

³³ CR 2017/13, p. 67, par. 10 (Kohen).

*with the terms of the Facio-Fernández Treaty, concluded for the maritime delimitation of both countries in the Caribbean Sea.»*³⁴

17. Monsieur le président, Mesdames et Messieurs les juges, ce n'est pas le langage qu'on attend d'un signataire d'un traité pas encore ratifié qui seulement veut se montrer respectueux de l'obligation prévue dans l'article 18 de la convention de Vienne. Ainsi qu'un commentateur de la convention l'a observé, les Etats concernés «are not bound to comply with the treaty, but not to destroy its very essence»³⁵. L'obligation *secundum* l'article 18 «cannot amount to full compliance with its provisions»³⁶.

18. En l'espèce, le Costa Rica non seulement «comply with» ; il prend l'engagement de «to continue to comply with» jusqu'à la date où on échangera les instruments de ratification du traité. Ces termes, hautement contraignants, ne font que constater qu'il s'agit d'un engagement pris par le Costa Rica et accepté par la Colombie, un accord ayant une force obligatoire pour les parties. On ne «comply with» un traité pendant des décennies si ce n'est pas parce que les parties se sont engagées dans une application systématique, constante du traité dans le passé, dans le présent et dans l'avenir. D'ailleurs, il ne peut s'agir simplement d'une application provisoire, institution interdite par les Constitutions respectives des Parties.

19. Le Costa Rica s'étant exprimé d'une manière explicite, il a assumé une obligation qui l'empêcherait plus tard de manifester une intention de ne pas ratifier le traité. En d'autres termes, les déclarations et les assurances renouvelées du ministre des affaires étrangères du Costa Rica constitueraient un engagement irrévocable de ratification une fois que toutes les exigences parlementaires auraient été conformes. Cette ratification viendrait formaliser l'accord déjà existant et en application.

20. Si c'est le cas, si l'obligation est déjà née, la défense fondée sur l'impraticabilité du traité ne sert plus à justifier auprès de la Colombie, après quasiment une quarantaine d'années d'application ininterrompue, une décision de non-ratification. Pour se débarrasser de ses

³⁴ Les italiques sont de nous ; voir Report to the Congress by the Minister of Foreign Affairs and Worship of Costa Rica, 2000-2001, Ministry of Foreign Affairs and Worship of Costa Rica, p. 1, paras. 11-15; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Rejoinder of the Republic of Colombia, Vol. II, Annex 3, p. 78, paras. 74-79.

³⁵ O. Dörr, and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, Heidelberg [etc.]: Springer, 2012, p. 220.

³⁶ *Ibid.*, p. 231.

obligations, la seule carte que le Costa Rica peut jouer ne porte que sur le plan de la «survenance d'une situation rendant l'exécution impossible», c'est-à-dire invoquant une cause extrinsèque de la cessation de l'accord.

21. Monsieur le président, le Costa Rica préfère ignorer tout cela ; à tel point qu'il semble confondre l'application provisoire d'un traité signé et, en conséquence, authentifié, et les arrangements provisoires de caractère pratique dans l'attente de la conclusion d'un accord définitif dont les articles 74 et 83 de la convention sur le droit de la mer parlent³⁷. Ou encore lorsqu'il affirme qu'«un traité soumis à ratification n'est pas un arrangement définitif tant qu'il n'est pas ratifié»³⁸. Or, on sait bien que le caractère définitif d'un arrangement dépend de son authentification, et non de sa ratification³⁹.

V. Conclusions

22. Partant de la prémisse que le Costa Rica est obligé face à la Colombie de respecter la délimitation prévue à l'article I^{er} du traité, est-il vrai que l'arrêt de 2012 l'a rendu impraticable et sans effet ? On a déjà souligné que l'impraticabilité du traité est liée à la reconnaissance de la juridiction du Nicaragua sur les espaces situés au nord et à l'est de la ligne tracée en conformité avec l'article I^{er} de ce traité. Si ce n'est pas le cas, la Colombie serait bien placée pour réclamer au Costa Rica la restitution des espaces que le Costa Rica avait reconnus comme appartenant à la Colombie. Dans les circonstances de la présente espèce, le «fairy tale» ne serait pas celui du Nicaragua, comme le conseil du Costa Rica le suggère⁴⁰, mais celui du Costa Rica.

23. Le conseil du Costa Rica accuse le Nicaragua de «spéculation», de «spéculations infondées», même «spectaculaires»⁴¹. Or, le seul qui alimente la spéculation, le seul responsable est le Costa Rica, qui a occulté et continue à occulter des informations de toute pertinence pour la Cour concernant ses relations avec la Colombie. Et on ne pourrait pas dire que cela appartient au domaine réservé de ses relations. Le Nicaragua est en droit de réclamer que le Costa Rica lève le

³⁷ CR 2017/13, p. 66, par. 7 (Kohen).

³⁸ *Ibid.*

³⁹ Article 10 de la convention de Vienne sur le droit des traités.

⁴⁰ CR 2017/7, p. 30, par. 38 (Ugalde).

⁴¹ CR/2017/13, p. 64, 65, 68, par. 1, 6, 13 (Kohen).

voile concernant ces relations dans la mesure où elles concernent notre affaire. La Cour doit recevoir cette information afin de disposer de tous les éléments requis pour une meilleure et plus complète motivation de son arrêt. Le Costa Rica ne respecte pas le principe de coopération avec la Cour, entravant ainsi l'exercice adéquat de l'administration de la justice.

24. Quatre ans se sont écoulés depuis la note du 27 février 2013 envoyée par l'ambassadeur du Costa Rica à Bogotá à une fonctionnaire subalterne du ministère des affaires étrangères colombien, et le Costa Rica a ignoré cavalièrement son devoir de vous fournir des informations additionnelles, malgré les invitations faites par le Nicaragua dans son contre-mémoire ou au cours du premier tour de ces audiences⁴². Maintes questions ont été formulées et sont toujours restées sans réponse. Faudrait-il attendre des nouvelles fuites de *wikileaks* ? Le Costa Rica ne doit pas profiter de ce manque d'assistance maladroit. Seules la note de la Colombie envoyée au greffier en 2016 et la réaction du Costa Rica à cette note semblent suggérer que la situation n'est pas celle que le Costa Rica voudrait.

25. Le Nicaragua prie la Cour de prendre en compte les conséquences de ses possibles décisions. Il n'est pas nécessaire d'insister sur le scénario d'instabilité, qui nous mènerait à confronter des situations véritablement absurdes dont on a déjà fait mention au cours du premier tour de ces audiences⁴³. Si le Costa Rica a reconnu un meilleur titre à la Colombie sur les espaces situés au nord et à l'est de la ligne prévue à l'article I^{er} du traité de 1977 — et la Cour a rejeté la juridiction de la Colombie sur ces mêmes espaces sur la base d'un meilleur titre nicaraguayen —, alors quel serait le fondement du Costa Rica pour réclamer comme propres les mêmes espaces qu'il avait reconnus vis-à-vis de la Colombie jusqu'à votre arrêt de 2012 ? Le Costa Rica prétend repartir de zéro. Comme si de rien n'était ou comme si le traité était juridiquement non pertinent. Le Costa Rica doit répondre de ses propres actes.

26. Monsieur le président, Mesdames et Messieurs les juges, ici se termine mon intervention ; je vous remercie de votre attention et, Monsieur le président, je vous prie d'appeler à la barre l'ambassadeur Carlos Argüello Gómez pour la suite de la présentation de la position du Nicaragua.

⁴² CMN, p. 67-68, par. 3.19-3.21 ; CR 2017/10, p. 42-43, par. 28-33 (Remiro Brotóns).

⁴³ CR 2017/10, p. 47-49, par. 49-54 (Remiro Brotóns).

Le PRESIDENT : Merci, Monsieur le professeur. Je donne à présent la parole à S. Exc. M. Argüello Gómez, l'agent du Nicaragua.

Mr. ARGÜELLO GÓMEZ:

1. Thank you, Mr. President. Mr. President, Members of the Court in this presentation I will briefly address the question of the starting-point of the delimitation and some other points that have been raised by counsel of Costa Rica.

Starting-point

2. The question of the starting-point of the delimitation was exhaustively addressed in Nicaragua's first round of oral pleadings. There has been no real attempt to contradict what was then stated on this point and I will not tax the patience of the Court by giving an encore.

3. Therefore, I will limit what follows to a short summary of the propositions stated and proven during the first round on the question of the starting-point of the delimitation.

- i. The position of Costa Rica before the arbitrator was that the starting-point was a fixed and immovable point located at Punta de Castilla as it was at the signing of the Treaty of 1858.
- ii. The arbitrator determined an exact location for the starting-point and proceeded to erect a monument on the spot and, in case of mishap to the marker he referenced it to Plaza Victoria, the centre of the only town in the area.
- iii. When this marker was washed over by the sea, he calculated the exact position where it had been located so that it would continue to mark the starting-point of the boundary.
- iv. At Costa Rica's request, additional auxiliary markers were placed in order to be able to quickly and with certainty locate the starting-point.
- v. This position fixed by General Alexander was accepted by the Parties for more than 100 years and was only contested by Costa Rica, for the first time, four years ago in the final stages of the *Certain Activities* case.

- vi. In the three prior cases⁴⁴ before this Court in which the location of the border set by General Alexander was brought into question, Costa Rica had recognized the starting-point as set by General Alexander.
- vii. The Bilateral Nicaragua/Costa Rica Sub-Commission on Limits and Cartography that met between 2002 and 2006 with the objective of initiating negotiations on the maritime delimitation in the Caribbean, dedicated its efforts to determining the location of the marker set by General Alexander.
- viii. All the official maps of Costa Rica up to the year 2013 indicated that the starting-point of the boundary was Punta Castilla, as determined by General Alexander.

4. Mr. President, out of these eight propositions, the only point contested by Costa Rica is whether the arbitrator established a fixed and immovable starting-point⁴⁵. This is a question for which the Court has all the elements necessary to answer. To help the Court in this endeavour, during the first round of oral proceedings I went into detail on all the points necessary for the interpretation of the Award and understanding the procedure followed by the arbitrator. These main points are:

- the position of the parties on the question submitted to arbitration⁴⁶,
- the clear meaning and text of the Award⁴⁷,
- how the parties contemporaneously understood the meaning of the Award⁴⁸,
- the subsequent practice of the parties for over 100 years on the basis of the Award⁴⁹.

5. Costa Rica, for its part, had no relevant comments on these points, save for its interpretation of the text of the Award in order to read it as deciding that the starting-point of the delimitation must follow the changing mouth of the river.

⁴⁴*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* and the *Certain Activities (Costa Rica v. Nicaragua)*.

⁴⁵CR 2017/8, pp. 21-26, paras. 3-20 (Wordsworth); p. 46, para. 15 (Brenes). See also CR 2017/13, p. 58, para. 24 (Brenes).

⁴⁶CR 2017/10, pp. 12-13, paras. 9-14; p. 16, paras. 23-25 (Argüello).

⁴⁷CR 2017/10, pp. 13-14, paras. 15-18; p. 62, paras. 46-47; pp. 64-66, paras. 52-56 (Argüello).

⁴⁸CR 2017/10, p. 66, paras. 62-64 (Argüello).

⁴⁹CR 2017/10, pp. 65-68, paras. 59-71 (Argüello).

6. To validate its new and very recent interpretation that the starting-point of the boundary determined by Alexander was not fixed and immovable, Costa Rica's counsel states that, "this position is directly contrary to the clear terms and logic of the Alexander Award, as interpreted" end of quote, in the 2015 Judgment of the Court in the *Certain Activities* case⁵⁰.

7. Mr. President, Members of the Court, it has surprised me that several counsel for Costa Rica have spent a great deal of time — the Court's time — explaining to you the meaning and scope of your 2015 Judgment⁵¹. This in spite of the fact that the exact same Members and composition of this Court decided that case. For my part I will not attempt to lecture you on what you decided.

8. But I will make some comments on the statement made and not made by counsel for Costa Rica on the question of the starting-point of the boundary as determined by General Alexander.

9. First of all, Costa Rica attempts to invoke the Judgment of the Court in the *Certain Activities* case in support of its new interpretation of the Alexander Award⁵². But the question of the starting-point fixed by Alexander was not at issue in the *Certain Activities* case. Both Nicaragua and Costa Rica at that time (Costa Rica in its 2011 Memorial) agreed that the starting-point was that fixed by Alexander in 1897⁵³. The disagreement involved the direction followed by the line starting at that point towards the "river proper".

10. Secondly, it is incorrect for counsel for Costa Rica to claim that Alexander did not determine a fixed point because, "the relevant consideration for the determination of the boundary was the mouth of the river as an 'outlet for commerce'"⁵⁴. And that this implied that the starting-point was to follow the changes in the mouth of the river.

11. Mr. President, as I explained in my previous presentation⁵⁵, General Alexander took great pains to identify the location of Punta de Castilla — three pages of his five-page Award — and not so with the location of the mouth of the river. He was compelled to address this last

⁵⁰CR 2017/13, p. 55, para. 14 (Brenes).

⁵¹CR 2017/7, pp. 32, 34, paras. 48, 50 (Ugalde); CR 2017/8, paras. 48-50 (Wordsworth); CR 2017/8, pp. 44, 49, paras. 5, 22 (Brenes); CR 2017/8, pp. 11-20, paras. 5-33(Kohen).

⁵²CR 2017/8, pp. 21-26, paras. 3-20 (Wordsworth).

⁵³CR 2017/10, pp. 66, paras. 62-63 (Argüello).

⁵⁴CR 2017/13, p. 56, para. 17 (a) (Brenes).

⁵⁵CR 2017/10, pp. 13-15, paras. 17-20 (Argüello).

point — the location of the mouth of the river — because Nicaragua’s position at that time — in contradistinction with Costa Rica’s position — was that the starting-point must be located on the mouth of the river.

12. General Alexander stated in his Award that:

“Without attempting to reply in detail to every argument advanced by either side in support of its respective claim, all will be met and sufficiently answered by showing that those who made the treaty mutually understood and had in view . . . [that the starting-point was] the eastern headland at the mouth of the harbor.”⁵⁶

13. And General Alexander proceeded to explain his decision. He was not looking for the mouth of the River San Juan, he was looking for a harbor precisely to be an “outlet for commerce”. As he points out in his Award, the boundary could not follow, for example, the San Juan River branches of the Colorado or of the Taura, “for neither has a harbor at its mouth”⁵⁷. Both these branches emptied out to sea and, naturally had river mouths, but none of them had a harbor. Not even the Colorado branch had a harbor even though it was by then the largest water system of the San Juan River — much larger than the “river proper” itself. The only harbor was located at Harbor Head that was bounded on its eastern side or shore precisely by Punta de Castilla.

14. There was no doubt in General Alexander’s mind that that was the precise location, “that those who made the treaty mutually understood and had in view”⁵⁸.

15. That was the situation and the understanding 120 years ago. The record shows that the river, in fact, has not been used as an “outlet for commerce” since Alexander’s time. In particular, the current mouth of the river has never been used as an outlet for commerce. Costa Rica cannot claim that the purported criteria applied by Alexander in 1897 to identify the starting-point of the boundary should be translated nowadays to mean that the starting-point he affixed has moved and must now follow the current mouth of the river.

16. Furthermore, the mouth of the river has not been located in Harbor Head since even before the time of Alexander. That is why he provided in his Award that the border was to follow a *caño* or channel from Harbor Head until it reached the river proper; that is, the river proper was not

⁵⁶Award of 30 Sept. 1897, United Nations, Reports of International Arbitral Awards (*RIAA*), Vol. XXVIII, p. 216.

⁵⁷Award of 30 Sept. 1897, *RIAA*, Vol. XXVIII, p. 217.

⁵⁸Award of 30 Sept. 1897, *RIAA*, Vol. XXVIII, p. 216.

located in Harbor Head even in 1897. In more recent times, the mouth of the river has been located more than a mile distant from Harbor Head. In one of the early images of the area [slide 1 on] it can be appreciated that the mouth of the river was not located at Harbor Head, and that Harbor Head was not an outlet for the river since its only connection out to sea was through the channel connecting it to the river proper. The image on the screen is from 1940. And yet Costa Rica never claimed at that time, or ever before 2013, that the starting-point had followed the mouth of the river and was no longer at Punta de Castilla in Harbor Head. That is, the change of Costa Rica's position did not come about because of changes in the outlet of the river or the partial sedimentation of the channel connecting Harbor Head with the river proper since this channel had not been used for commercial purposes for over 100 years. This claim only came after Costa Rica considered that it could try to interpret to its advantage the description of the area in dispute given by the Court in its Order on Provisional Measures in 2011, a description which did not coincide with what Costa Rica was claiming at that time. [Slide 1 off]

17. Mr. President, counsel for Costa Rica have attempted to read into the Second and Third Awards of General Alexander some sort of change in his position on the question of the starting-point fixed in his first award⁵⁹. This is not the case and a quick reading of these awards leaves no room to doubt.

18. The Second [Alexander] Award was rendered on the request of Costa Rica and against the opposition of Nicaragua that considered the request unnecessary and costly. As the award makes clear: "The Costa Rican Commission proposed that we proceed to the measurement of the line that ran from the starting point . . . to a point three miles below Castillo Viejo and that a map should be made of such a line . . ." ⁶⁰

19. As indicated in my first presentation⁶¹, this request and procedure followed did not involve the starting-point, where marker I had been placed, or the point where the boundary left the river and entered land three miles below Castillo Viejo where the second marker was located. No markers were placed along the more than 80 miles between marker I and marker II. The intention

⁵⁹CR 2017/13, pp. 56-58, para. 19-24 (Brenes).

⁶⁰Award of 20 Dec. 1897, *RIAA*, Vol. XXVIII, pp. 223-224.

⁶¹CR 2017/10, p. 10, para. 40 (Argüello).

as requested by Costa Rica was only to leave a historical record of the course followed by the river at that moment. If there were any doubt on this intention, it should be recalled that a few months before this request was made by Costa Rica, it was claiming before Alexander that the starting-point was immovable.

20. The Third [Alexander] Award is totally irrelevant. It addressed the question posed by Nicaragua whether the border line should be determined according to the water line of the river at any given moment. I will not tax the Court's time elaborating further on this point.

21. Costa Rican counsel also claims that "the historic location of marker I, has nothing to do with the current starting-point of the land boundary. Still less is it relevant for the purposes of the maritime delimitation"⁶². The reason he gives for this is that the Cleveland and Alexander Awards, I quote, "were only concerned with the terminus/starting point of the land boundary in the Caribbean . . ."⁶³. Costa Rican Counsel adds that the fact that the marker has disappeared under the sea "does not somehow transform it from a land boundary point into a maritime boundary starting-point"⁶⁴.

22. The reasoning behind this contention is patently untenable since in the normal course of events, maritime delimitations start from the boundary fixed on land. If a maritime boundary had also been required of General Alexander's arbitration it would have started in the same spot he had fixed for the land boundary. The only thing that makes the present case somewhat unusual is that the starting-point that had been fixed for the land boundary is now located out at sea.

23. Apart from the comments just indicated, Costa Rica has made no response to the other issues I pointed out at the beginning of this presentation. One particular silence is telling. Costa Rica completely ignored the report of the experts appointed by the Court and their findings.

24. Mr. President, the experts spent 84 paragraphs answering all the four questions asked by the Court. Out of those 84 paragraphs, 64 focus exclusively on answering the second question; that is, determining the co-ordinates of the starting-point of the boundary. One wonders why Costa Rica did not say a word — one single word — about this aspect of the report.

⁶²CR 2017/13, p. 59, para. 29 (Brenes).

⁶³CR 2017/13, p. 59, para. 30 (Brenes).

⁶⁴CR 2017/13, p. 60, para. 33 (Brenes).

Costa Rica's starting-point

25. Costa Rica claims that the starting-point of the boundary is at the present mouth of the river⁶⁵. I must state clearly that this claim goes against the finality of the Alexander Award and Nicaragua cannot accept this proposition.

26. Professor Kohen took pains to explain to you the meaning of your 2015 Judgment and how Nicaragua was asking you, and I quote, “d’adopter une position en contradiction flagrante avec ce que vous aviez décidé en 2015”⁶⁶. He took delight in explaining to you “Ce qui est final, Mesdames et Messieurs les juges, est final et ne doit pas être rouvert, au péril de transformer la justice internationale en un exercice interminable de pérennisation des différends. *Res judicata pro veritate habetur*”⁶⁷. Pour notre part, Mesdames et Messieurs les juges, le Nicaragua demande le même respect pour la décision du général Alexander.

27. Mr. President, apart from its intended violation of the Alexander Award, I must point out that — using some peculiar logic that escapes me — Costa Rica apparently considers that the mouth of a river that has been continually changing its course for more than a century and will continue to do so in the future, as foreseen by the experts appointed by the Court, will afford some form of stability that they claim the Alexander Point does not provide. Perhaps if Costa Rica had paid more attention to the report presented by the experts, it could have presented a more cogent position.

28. On the question posed by the Court with respect to the possibility of starting the maritime delimitation at a point located out at sea, there is no comment by Costa Rica on the answer given by Nicaragua to this question or on the comments made by Nicaragua to the response given by Costa Rica during the first round. In fact, counsel for Costa Rica simply reiterates the proposal made in the first round and generally dismisses the appropriateness of starting the delimitation at sea by stating that the situation faced in the present maritime delimitation is “clearly

⁶⁵CR 2017/13, p. 62, para. 43 (Brenes).

⁶⁶CR 2017/13, pp. 41-42, para. 17 (Kohen).

⁶⁷CR 2017/13, p. 42, para. 18 (Kohen).

distinguishable from that which faced you in *Nicaragua v. Honduras*⁶⁸. That is the extent of his analysis. Mr. Lathrop goes no further⁶⁹.

29. Although I do not want to repeat my comments on this point, I would recall that the response of Nicaragua to the question of the Court was essentially:

- i. that the Alexander Award and the starting-point he fixed is law for the parties and is not subject to revision.
- ii. That the location of the Alexander point that has been out at sea for nearly 120 years, is known and knowable and has been identified by the experts appointed by the Court.
- iii. That apart from this location being required by the award, it is an adequate starting-point for the maritime delimitation since its location out at sea does not subject it to the instability of the coast.

30. Mr. President, for its part, the proposal of Costa Rica, apart from overturning the Alexander Award, was based on the current mouth of the river, a point subject to constant variation, as pointed out by the Court's experts. Worse, Costa Rica would use this present-day variable point to establish a point out at sea that will not suffer any variations, but would remain the same for all time, even if the mouth of the river moves back to Harbor Head as predicted by the Court's experts.

31. Mr. President, Members of the Court, this concludes my remarks on the fundamental issue of the location of the starting-point of the delimitation, be this the maritime or the land boundary, since both have to be calculated from the one and only starting-point fixed by Alexander.

32. It remains for me to respond to a few miscellaneous arguments made by Costa Rica that are indirectly — if at all — with the starting-point.

Source and quality of the water of Harbor Head Lagoon

33. Professor Kohen, among the very many differing questions he addressed, claimed that there was at present no connection between Harbor Head Lagoon and the San Juan River. The

⁶⁸CR 2017/13, p. 62, para. 42 (Brenes).

⁶⁹CR 2017/14, pp. 12-13, paras. 5-7 (Lathrop).

proof he offered was an image, [slide 2 on] which is now on the screen, in which the colour of the water of the lagoon and the river appear different. It is true that the river rolls into this area with a heavy load of sediment deposited along the way by the Costa Rican tributaries of the river. In a moment I will provide a scientific explanation but, in fact, I would point out that the image itself holds the answer. The lagoon is to the right side of the image and to the left we see other rivulets and streams of the same colour as the water of the lagoon. All of these receive their waters from the river, as does the lagoon, but these waters are filtered in their crossing overland.

34. The following scientific observation on the quality of the water supplied by the river to the lagoon and the channels that feed it is in the Ramsar Report that was part of the Costa Rican report filed with the Court on 22 August 2014. The Report indicated that in March 2014, Ramsar did an *in situ* visit to the area of Harbor Head Lagoon/Isla Portillos or Punta de Castilla where the second *caño* that was in dispute during the *Certain Activities* case was located; that is, the north-western section of the area then in dispute. Ramsar identified four natural channels, just in this limited area. One of them heading in the direction of Harbor Head Lagoon⁷⁰.

35. The description of the area by Ramsar is extensive. They:

“observed several natural *caños*, directly on foot, by boat and from the air on a helicopter . . . The *caños* that we were able to access by boat have depths ranging from 1.5 to 2 metres . . . Where possible, the water in the natural *caños* was tested, and it was fresh water . . . In and around the area . . . we observed at least four natural *caños*, most with convergent flow in the direction of the Caño Este lagoon; one of them toward Laguna Portillos. We consider that these *caños* are natural and represent the phreatic aquifer’s discharge areas during the dry period or surface waters during the rainy season.”⁷¹

36. So, the quick response to Professor Kohen is that the waters of the Lagoon, as seems self-evident, are provided by the waters from the San Juan River — the only source of fresh water in the area — and that there are many *caños* flowing from the river in the area of Harbor Head.
[Slide 2 off]

⁷⁰Costa Rica’s Report on Compliance with Provisional Measures 22 Aug. 2014, Report by the Ramsar Secretariat No. 77, p. 11.

⁷¹Costa Rica’s Report on Compliance with Provisional Measures 22 August 2014, Report by the Ramsar Secretariat No. 77, p. 11.

Bay of San Juan del Norte

37. This topic was raised by Costa Rica during the first round of oral pleadings⁷². For this reason, I addressed the point, not because it is an issue presently before the Court, but in order to set the record straight. In the course of the written pleadings in the *Certain Activities* case, Nicaragua filed several counter-claims among which was the question of the Bay of San Juan. Since the Court decided not to entertain this claim, no decision on its merits was taken⁷³. The position of Nicaragua, as may be read in the Counter-Memorial in which the counter-claim was filed, is based not solely or mainly on the use or not use of the Bay by Costa Rica or the physical changes it has undergone. The claim is based on the Cleveland and Alexander Awards. The attempts made to compare the physical changes in Harbor Head to those of the San Juan del Norte Bay to equalize the situations have no basis. There is *nothing* in the Awards to sustain this claim.

Island of Bolaños in the Bay of Salinas

38. This question was raised in the Nicaraguan Counter-Memorial in this case⁷⁴. There was no response offered by Costa Rica in writing or during the first round of oral pleadings. This is why Nicaragua in its first oral pleading simply made a cross reference to this point which is not presently at issue. Therefore, apart from reiterating and reserving the position of Nicaragua on this question, I will make no further remarks.

39. Mr. President, Members of the Court, thank you for your kind attention, this ends my presentation and may I please ask you, Mr. President, to give the floor to Professor Lowe.

Le PRESIDENT: Merci, Monsieur l'ambassadeur. Je donne maintenant la parole au professeur Vaughan Lowe

Mr. LOWE: Thank you, Sir.

⁷²CR 2017/9, p. 26, para. 52 (Kohen).

⁷³*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)*, Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013, p. 200.

⁷⁴CMN, para. 2.41.

**DELIMITATION IN THE TERRITORIAL SEA: CARIBBEAN SEA
AND PACIFIC OCEAN**

1. Mr. President, Members of the Court: my task is to respond to the points made in relation to the applicable law and the delimitation of the territorial sea, and I will start with the starting-point in the Caribbean.

Delimitation in the territorial sea

Starting-point

2. The Parties disagree on the starting-point for maritime delimitation in the Caribbean. We say it is the point determined by General Alexander; they say it is the present mouth of the San Juan River.

3. Professor Lathrop rejected the Alexander Point on the basis that it was not logical or equitable, but none of Costa Rica's counsel have explained how Costa Rica avoids the fact that the Court is constrained by the 1858 Treaty, which is acknowledged by Costa Rica to remain in force, and by the Cleveland and Alexander Awards, which we have pointed out have the force of *res judicata*— a proposition that Costa Rica has not questioned. Nor did they explain their understanding of precisely what they are bound by in the Treaty and the Cleveland and Alexander Awards.

4. To turn to specifics. On the question of what is binding, Nicaragua says that the following matters relevant to this case are binding:

- (a) the starting-point of the dividing line between the two Republics, at the end of Punta de Castilla, at the mouth of the San Juan river, under Article II of the 1858 Treaty;
- (b) the location of that point, confirmed by paragraph 3.I of the 1888 Cleveland Award, and identified in the First Alexander Award in 1897, and demarcated by the Demarcation Commissions in 1899;
- (c) the land boundary running from that point “along the right bank of the San Juan de Nicaragua river up to a point three English miles distant from Castillo Veijo”, under Article II of the 1858 Treaty;

(d) Nicaragua's "exclusive dominion and sovereign jurisdiction over the waters of the San Juan river from its origin in the Lake to its mouth in the Atlantic", under Article VI of the 1858 Treaty.

5. And so, as Ambassador Argüello explained, Nicaragua submits that as a matter of law the maritime boundary between Nicaragua and Costa Rica must therefore run through the Alexander Point, whose precise location was recently established by the Court's experts, and the land boundary terminus lies at the present right-hand headland of the lagoon at Punta de Castilla.

6. The "due northeast and southwest" boundary from the Alexander Point, to which the first Alexander Award refers⁷⁵, strikes land at the lagoon [Map]; but Costa Rica accepts that the *whole* of Harbor Head Lagoon belongs to Nicaragua. This section of the boundary, only 1 km long, should therefore for practical reasons be drawn to Punta de Castilla. That conforms to Alexander's approach to the interpretation of the 1858 Treaty, which is binding in the present case.

Maritime boundary: Caribbean

7. I turn to the maritime boundary in the Caribbean. There have been attempts to find areas of disagreement — the primacy of equidistance; the territorial sea/EEZ distinction; and so on. But none of it has been shown — or even argued — to have any practical significance at all in this case.

8. In the first round, we challenged them to identify something that the Court could do in the EEZ that it could not do in a territorial sea delimitation. Their answer was in paragraph 10 of Professor Lathrop's speech⁷⁶, in which he asked you to look at his tab 222 and

"consider the differences between an equidistance line drawn, in the absence of special circumstances, from the nearest points on the coasts of the Parties . . . compared to an angle bisector constructed from a general direction line drawn across Nicaragua's concavity, over 75 per cent of which is relevant only to areas *beyond* the territorial sea."

9. But that does not answer the question. That compares two different approaches to drawing the line in the territorial sea: one, Costa Rica's, is strict equidistance; the other, Nicaragua's, is based on the general direction of the coast, which of course requires consideration of the coast beyond the areas immediately adjacent to the starting-point. The question is, when you have drawn

⁷⁵*Land Boundary*, CMN, Ann. 2, p. 220.

⁷⁶CR 2017/14, pp. 13-14

a strict equidistance line, does the Court's discretion in adjusting it in the light of special circumstances differ in relation to the territorial sea portion from its discretion in relation to the rest of the line. And Costa Rica has offered no explanation of how or why the Court's discretion should be thought to change its nature at the 12-mile limit.

10. Costa Rica suggested that the division of Nicaragua's oral submissions into sections dealing with the territorial sea and sections dealing with the EEZ reflected our acceptance that the difference is important for some reason. The simple truth is that we thought that no court should have to listen to Mr. Reichler for an hour and a half without a break.

11. Costa Rica's position is confused. It accepts that under Article 15 special circumstances may require a departure from equidistance, but it seems to suggest that sovereign rights in an EEZ can never trump sovereignty in the territorial sea⁷⁷. [Diagram] But *every* departure from equidistance through the territorial sea *necessarily* produces an area of EEZ in what might otherwise be the other States' territorial sea, as you can see on the map. That is elementary geometry. Their position is self-contradictory.

12. Cases and dicta are wheeled out and relied upon or distinguished. Statistics are produced, such as "only three cases" of departure from equidistance in the territorial sea: but how many cases are there that delimited the territorial sea? Three out of how many? We think that the answer is that there have been 11 post-UNCLOS territorial sea delimitation decisions by courts or tribunals. Three applied adjusted equidistance⁷⁸; three applied strict equidistance⁷⁹; and five applied other lines such as agreed boundaries or angle bisectors⁸⁰. Of three pre-UNCLOS cases, one applied strict equidistance⁸¹, and two applied adjusted equidistance⁸². The references are in the text. And nowhere is it suggested that adjustment of the equidistance line in the territorial sea is not permissible.

⁷⁷CR 2017/13, p. 13, para. 8 (*b*), (Parlett).

⁷⁸*Qatar–Bahrain; Guyana–Suriname; Croatia–Slovenia.*

⁷⁹*Eritrea–Yemen; Bangladesh–Myanmar; Bangladesh–India.*

⁸⁰*Guinea–Guinea-Bissau* (angle bisector); *Guinea-Bissau–Senegal* (agreed boundary); *Cameroon–Nigeria* (agreed boundary); *Nicaragua–Honduras* (angle bisector); *Peru–Chile* (tacitly agreed boundary).

⁸¹*Dubai–Sharjah.*

⁸²*Argentina–Chile* (Beagle Channel); *Norway–Sweden* (Grisbådarna).

13. But whatever the exact numbers, why does it matter? The Parties here agree that one starts with a provisional equidistance line, and then looks to see if special circumstances require its adjustment. They agree that a cut-off is one of the special circumstances that may require an adjustment. We say that in this case it does; they say that it does not.

14. They say that a cut-off only counts if it is produced by a configuration of at least three neighbouring States. We say that there is no such rule. Costa Rica points to no decision, no treaty provision, no State practice, and no argument of principle in support of its supposed three-State rule. It points only to maps in which configurations of three States have produced cut-offs. Well, yes: if equidistance lines are used, all three-State concave coasts produce cut-offs. But it is an elementary fallacy to infer from that that all cut-offs must therefore be produced by three-State concave coasts.

15. I will not show you again the maps that we presented in our written and oral submissions, but please let me show you how Costa Rica's approach on Monday works when it is applied to the Caribbean coastline in this case.

16. Dr. Parlett showed you tab 175⁸³, a map based on the *North Sea Continental Shelf* cases, first with two equidistance lines between States A, B and C, then with only one, between States B and C. And that one line she said is not a cut-off: "it is the equitable boundary that results from geography"⁸⁴.

17. Now superimpose that "equitable boundary" on the Caribbean coast. [Map] On this map, the strict equidistance line is red. Nicaragua's proposed equidistance line using the general direction of the coast is in green. You can see that what we propose as the line is very close to the line that Costa Rica itself presents as an "equitable boundary that results from the geography". And the line is far away from Costa Rica's "equitable boundary", applying strict equidistance.

⁸³CR 2017/13, pp. 21-22, paras. 28-29.

⁸⁴CR 2017/13, p. 22, para. 29.

Maritime boundary: Pacific

18. As regards the territorial sea in the Pacific, the difference between the Parties rests essentially on the treatment of the Santa Elena promontory. Is it, or is it not, an anomaly that distorts a delimitation based on strict equidistance?

19. Well, you have seen maps depicting coastal projections, with more arrows on them than a medieval battlefield. But again, let me show you just one map — and it is the *Limits in the Seas* map of Costa Rica's straight baselines, which as I explained must by definition follow what Costa Rica considers to be the general direction of its coast. There can be no complaint at drawing perpendiculars to those lines in order to depict the "coastal projection". (You can see that Santa Elena in fact faces a little more due north than Costa Rica's "general direction" line — but put that to one side.) The arrows show that the Santa Elena coast, whose base points control the first 13 miles of the boundary, projects directly across Nicaragua's Pacific coastline, practically at a 90-degree angle, cutting off its territorial sea projection.

20. Well, of course, one could say equally that Nicaragua's coastline projects across the Santa Elena projection. But the point is that Nicaragua's coastline maintains the same general direction for the entire 100 per cent of the 345 km measured along its natural configuration from the Gulf of Fonseca down to the border with Costa Rica [Map XX]. That is the practically same general direction as the general direction of the Pacific coast of Costa Rica [Map CMN Fig Id-1]. But Santa Elena, by contrast, runs at right angles to this general direction for about 20 km out of Costa Rica's 1,400 km, again measured along the natural configuration of the coast. That is about 1.5 per cent of Costa Rica's coastline. And that is why we say that Santa Elena is an anomaly, and the strict equidistance line calls for a correction.

21. In the end, however, it comes down to the Court's judgment as to whether the equidistance line on the map requires adjustment, and if so, by how much — what Dr. Parlett described as "a sensible approach, within a margin of discretion". And Mr. Reichler will explain how that works in the context of the rest of the Pacific boundary.

22. Unless I can be of further assistance to the Court, Sir, that concludes my submission on behalf of Nicaragua and I thank the Court for its patient attention, and would ask that you call upon Mr. Reichler when you are ready, Sir.

Le PRESIDENT: Merci, Monsieur le professeur. Nous allons maintenant faire une pause de 15 minutes, ce qui donnera ensuite à la Cour le plaisir d'écouter la plaidoirie de M. Reichler sans interruption. L'audience est suspendue.

The Court adjourned from 11.10 a.m. to 11.30 a.m.

Le PRESIDENT : Veuillez vous asseoir. Je donne la parole à M. Reichler.

Mr. REICHLER:

**THE DELIMITATION OF THE EEZ AND CONTINENTAL SHELF IN THE CARIBBEAN SEA AND
PACIFIC OCEAN**

1. Mr. President, Members of the Court, it is my privilege to present Nicaragua's second round arguments on delimitation of the EEZ and continental shelf in the Caribbean Sea and the Pacific Ocean. I will focus on the major issues that still divide the Parties. I will begin with the Caribbean.

2. There are four contested issues here. I will first identify them, and then address each of them in turn, as economically as I can and mindful of the Court's admonition that it is not the purpose of the second round to repeat arguments made in the first.

3. The four issues in the Caribbean are:

- (a) Costa Rica's claim to be the victim of a so-called three-State concavity, such that it is cut off, within 150 miles from its coast, by converging equidistance boundaries with Nicaragua and Panama.
- (b) Costa Rica's claim that Nicaragua's Corn Islands have a distorting effect on the equidistance line, such that they should be disregarded in this delimitation.
- (c) Nicaragua's claim that Costa Rica's 1977 Treaty with Colombia constitutes a relevant circumstance to be taken into account in this delimitation.
- (d) Which of the boundary lines proposed by the two Parties constitutes an equitable solution.

4. In regard to the so-called cut-off of Costa Rica by converging equidistance lines, Nicaragua has already made its position very clear in our first round. We fully maintain that

position. If our words were strong, that is because strong words were justified. And Costa Rica itself has now provided further grounds for our criticism.

5. This slide was displayed by Mr. Lathrop on Monday. It is at tab 15 today. We appear to have embarrassed Costa Rica into showing it to you in their second round. Throughout this case, until then, their very last moment before you, Costa Rica saw fit not to disclose to the Court their real maritime claims, far beyond any notional equidistance line to Panama. They made no such disclosure in their written pleadings, nor in the first round. After we produced the Court's version of this Costa Rican map last week, the cat was out of the bag, and Costa Rica was left with no choice but to deal with it.

6. You will note, however, two significant differences between this Costa Rican map, and the one attached to the Court's Judgment of 4 May 2011⁸⁵. First, the Costa Rican map presents Costa Rica's maritime entitlements all in the same colour. It does not draw a distinction between the areas bounded by its treaties with Colombia and Panama, and those areas beyond. All of it is claimed on the same basis by Costa Rica. Second, the Costa Rican map bears the legend "Costa Rica's *minimum* area of interest"⁸⁶. In this entire area, Costa Rica explained to the Court in 2010, it claims all the "sovereign rights and jurisdiction . . . to which it is entitled under international law by virtue of its coast facing on [the Caribbean] Sea"⁸⁷.

7. This map is a dagger to the heart of Costa Rica's argument that it is cut off by converging equidistance boundaries. There are no converging equidistance boundaries. In the south, there is no boundary at all with Panama, beyond 100 miles. As you can see, when the Costa Rica/Panama boundary reaches 100 miles, it does not continue along the same path until it intersects with the Costa Rica/Nicaragua equidistance line. To the contrary, Costa Rica's entitlement claim turns sharply to the right, to the east, where it proceeds all the way to Costa Rica's 200-mile limit. The result is not what Mr. Lathrop and others told you that you would see if there were a cut-off: a triangle whose sides converge sharply as they extend seaward, until they form an apex well short of

⁸⁵*Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Costa Rica for Permission to Intervene, Judgment, I.C.J. Reports 2011*, p. 366.

⁸⁶Costa Rica's judges' folder, second round of oral pleadings in *Maritime Delimitation and Land Boundary* 10 July 2017, tab 217 emphasis added.

⁸⁷*Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Costa Rica for Permission to Intervene, Judgment, I.C.J. Reports 2011*, p. 364, para. 54 (citing Costa Rica's Application to Intervene).

200 miles⁸⁸. Costa Rica itself does not depict its maritime space as a triangle. What you see here is a bow tie!

8. Mr. President, let us look at another new Costa Rican slide, which they entitled “The Delimitation Scenario in the Southwestern Caribbean Sea”⁸⁹ — The Delimitation Scenario in the Southwestern Caribbean Sea. Now, before we look at it, from the title alone, we might expect this slide to include a bow-tie-shaped maritime area that Costa Rica has described as the “minimum area of interest”⁹⁰ where it has “sovereign rights and jurisdiction”⁹¹. But what is this? Costa Rica has clipped off the entire right half of its bow tie!

9. And the reason is obvious. They cannot show a cut-off, unless they impose one on themselves. But this is just for the sake of appearances. In no way have they given up the other half of their bow tie.

10. This new slide differs from its fraternal twin, CR-133, which they displayed in the first round, and the differences merit comment. First, it underscores how reticent Costa Rica is to show you the Panama/Colombia boundary, which they studiously avoided depicting in all their written pleadings and all their first round of argument here. We called them on that last Friday. We appear again to have caused them to disclose something they were intending to keep out of view. But just barely. Their newfound transparency is, at best, tepid. As you can see, the outline of the Panama/Colombia boundary is so faintly depicted, in dashed light grey lines, that one might easily overlook it. By contrast, the Nicaragua/Colombia boundary line is boldly depicted by a solid black line, as established boundary lines normally are.

11. The other notable difference between the round one and round two versions of this slide is the annotation: “Panama has not renounced this area as against Costa Rica and Nicaragua”⁹². We

⁸⁸CR 2017/14, pp. 22-23, paras. 36-39 (Lathrop); CR 2017/7, p. 52, para. 46 (Parlett); CR 2017/7, p. 31, para. 43 (Ugalde).

⁸⁹Costa Rica’s judges’ folder, second round of oral pleadings in *Maritime Delimitation and Land Boundary*, 10 July 2017, tab 226.

⁹⁰Costa Rica’s judges’ folder, second round of oral pleadings in *Maritime Delimitation and Land Boundary* 10 July 2017, tab 217; emphasis added.

⁹¹*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Costa Rica for Permission to Intervene, Judgment, *I.C.J. Reports 2011*, p. 364, para. 54 (citing Costa Rica’s Application to Intervene).

⁹²Costa Rica’s judges’ folder, first round of oral pleadings in *Maritime Delimitation and Land Boundary* 4 July 2017, tab 132; and Costa Rica’s judges’ folder, second round of oral pleadings in *Maritime Delimitation and Land Boundary*, 10 July 2017, tab 226.

all know why Costa Rica added these words. To make it appear that Panama has an interest in this area. In fact, the annotation is both wrong and irrelevant.

12. It is wrong because, as we have seen, Panama has said that it has no interest in the area. It has written to the United Nations Secretary-General that the outer limits of its maritime areas fall precisely along the agreed boundary lines with Costa Rica and Colombia, and do not extend into any areas beyond those lines⁹³. My friend Professor Kohen suggested that Panama's boundary claims are "unknown"⁹⁴. They are certainly *not* unknown to Panama. Panama's letter, signed by its Foreign Minister, included a map depicting what he called "the *full extent* of the maritime space of the Republic of Panama delimited by the boundary treaties with the Republic of Costa Rica and the Republic of Colombia"⁹⁵. The full extent of Panama's maritime area, according to Panama, is shown here.

13. Professor Kohen suggested that the Foreign Minister's letter should be disregarded because it was not sent to the Parties⁹⁶. We don't think that is relevant. But, in any event, the letter *was* circulated to the Parties, and other interested States, as part of the documentation pertaining to Nicaragua's submission to the Commission on the Limits of the Continental Shelf⁹⁷.

14. And this was not the only important letter from Panama's Foreign Minister. There was another one in February 2014, which is at tab 20 today. In it, Panama protests Nicaragua's outer limits beyond 200 miles that fall *within* the Panama/Colombia boundary lines. Significantly, Panama makes no claims or protests regarding Nicaragua's claims beyond the Panama/Colombia boundary:

⁹³Letter from the Ministry of Foreign Relations of the Republic of Panama to the Secretary-General of the United Nations, No. DGPE/DG/665/2013 (30 Sept. 2013), p. 2, available at http://www.un.org/depts/los/clcs_new/submissions_files/nic66_13/pan_re_nic_2013_09_30.pdf (Spanish original) and http://www.un.org/depts/los/clcs_new/submissions_files/nic66_13/pan_re_nic_2013_09_30e.pdf (English).

⁹⁴CR 2017/13, p. 68, para. 13 (Kohen).

⁹⁵Letter from the Ministry of Foreign Relations of the Republic of Panama to the Secretary-General of the United Nations, No. DGPE/DG/665/2013 (30 Sept. 2013), p. 2, available at http://www.un.org/depts/los/clcs_new/submissions_files/nic66_13/pan_re_nic_2013_09_30.pdf (Spanish original) and http://www.un.org/depts/los/clcs_new/submissions_files/nic66_13/pan_re_nic_2013_09_30e.pdf (English).

⁹⁶CR 2017/13, p. 68, para. 13 (Kohen).

⁹⁷Commission on the Limits of the Continental Shelf, Progress of work in the Commission on the Limits of the Continental Shelf: Statement by the Chair, Third-fourth session, 27 Jan.-14 Mar. 2014, UN Doc. CLCS/83 (31 Mar. 2014), para. 80 (noting that "communications had been transmitted" from various States in respect of Nicaragua's submission).

“When the limits established in the Treaty on the delimitation of marine and submarine areas . . . between the Republic of Panama and the Republic of Colombia are compared against the area between the coordinates of [the fixed points] set out in the executive summary submitted by Nicaragua, it is absolutely clear that those coordinates fall *within* Panama’s marine and submarine areas and continental shelf. A map is attached hereto for your reference.”⁹⁸

As shown on that map, which is at tab 21, the outer limits of Panama’s marine and submarine areas again strictly follow the limits of its boundary agreements with Costa Rica and Colombia, and the “Area de Traslape”⁹⁹ (the area of overlap), where Nicaragua’s outer continental shelf claims and Panama’s maritime claims are said to overlap, is entirely within Panama’s limits under those treaties. This is further confirmation that Panama claims no entitlements beyond those treaty limits.

15. Mr. Lathrop tells us that: “[boundary] negotiations have not yet even begun between Costa Rica and Panama”¹⁰⁰. Well, that is entirely unsurprising. There is no boundary to negotiate. The Panama/Costa Rica boundary terminates where the Panama/Colombia boundary begins¹⁰¹. Panama considers all of its boundaries to be settled by treaty. This was confirmed in writing by the Panamanian Foreign Minister to the Secretary-General at least twice, and both times were after the Court’s 2012 Judgment in *Nicaragua v. Colombia* and in full cognizance of that Judgment. There is no reason to doubt that Panama regards its boundary agreements with Costa Rica and Colombia to be complete, binding and permanent. And, certainly, Costa Rica has given us no reason to doubt that. What is there for Panama to negotiate with Costa Rica in the south-western Caribbean Sea? Nothing!

16. Accordingly, Mr. President, we will now make a correction on Costa Rica’s slide, so that, at least in this one regard, it conforms to the facts.

17. But, even so, Mr. President, this slide is still a work of fiction. Costa Rica’s “notional” equidistance boundary with Panama is still “fictional”. It doesn’t exist now, and it is something that never *will* exist. Neither Panama nor any other State has proposed or could propose this line as a

⁹⁸Letter from the Minister of Foreign Affairs of Panama to the Secretary-General of the United Nations, No. DGPE/FRONT/082/14 (3 Feb. 2014), p. 1, available at: http://www.un.org/depts/los/clcs_new/submissions_files/nic66_13/pan_re_nic_2014_02_03_e.pdf.

⁹⁹*Idem*.

¹⁰⁰CR 2017/14, p. 21, para. 35 (Lathrop).

¹⁰¹See Treaty Concerning Delimitation of Marine Areas and Maritime Cooperation between the Republic of Costa Rica and the Republic of Panama (2 Feb. 1980), Art. 1 (1) (MCR, Vol. II, Ann. 2); Treaty on the Delimitation of Marine and Submarine Areas and Related Matters between the Republic of Colombia and the Republic of Panama (20 Nov. 1976), 1074 *UNTS* 221, Art. 1 (A) (2).

boundary with Costa Rica. It is beyond fantasy to suggest that Costa Rica would voluntarily and gratuitously propose such a prejudicial boundary for itself. As Mr. Lathrop told us: “One can perhaps assume that States maximize when they can . . .”¹⁰² Why would Costa Rica deliberately seek or agree to *minimize* itself?

18. In the second round, Costa Rica again compared itself to Germany. Mr. Lathrop dedicated five paragraphs and two slides to this on Monday¹⁰³. But the comparison is still wrong. Germany did not agree, notionally or otherwise, to equidistance boundaries with either Denmark or the Netherlands beyond the near-shore area. Germany did not agree to cut itself off. It went to the Court, and ultimately to negotiations, to avoid this. Costa Rica asks the Court to presume that, unlike Germany, it has accepted or is willing to accept an equidistance boundary with Panama even though this is not the case.

19. Apparently our response on these issues made an impression on our friends. This is reflected in their change of tone in the second round. In the first round, Mr. Lathrop declared that, “Costa Rica’s maritime area *is* truncated by equidistance delimitations with its adjacent neighbours”¹⁰⁴, and that, “Costa Rica *is* cut-off at less than 150 miles from its coast and *is* prevented from extending its maritime area as far seaward as international law permits.”¹⁰⁵ In the second round, Mr. Lathrop was not so certain. His remarks were notably qualified:

“Costa Rica contends that *under a scenario in which the boundaries among Costa Rica, Nicaragua and Panama would be constructed on the basis of equidistance measured from the mainland coasts, Costa Rica would be cut off completely from the extension of its 200-nautical-mile zone at less than 150 nautical miles from the coast.*”¹⁰⁶

20. Yes. And, as it has been said, if pigs could fly they would be birds. In fact, the odds of pigs flying are probably better than those of Costa Rica ever agreeing to an equidistance boundary with Panama that converges with its boundary with Nicaragua. The “scenario”¹⁰⁷ that Mr. Lathrop

¹⁰²CR 2017/14, p. 22, para. 35 (Lathrop).

¹⁰³CR 2017/14, pp. 18-19, paras. 25-29 (Lathrop); Costa Rica’s judges’ folder, second round of oral pleadings in *Maritime Delimitation and Land Boundary*, 10 July 2017, tabs 224 & 225.

¹⁰⁴CR 2017/9, p. 49, para. 41 (Lathrop); emphasis added.

¹⁰⁵CR 2017/9, p. 49, para. 43 (Lathrop); emphasis added.

¹⁰⁶CR 2017/14, p. 20, para. 31 (Lathrop); emphasis added.

¹⁰⁷CR 2017/14, p. 20, para. 31 (Lathrop).

postulates as the *sine qua non* for his third State cut-off argument is an impossible one. It will never come to pass. Without it, there are no converging equidistance boundaries, and there is no cut-off of Costa Rica, by Costa Rica's own definition. According to them, a concavity-induced cut-off can only be a relevant circumstance when there is a third State, and the middle State is cut off by equidistance boundaries with both its neighbours¹⁰⁸. Plainly that is not the case here. There is no — to use their terminology — “three-State cut-off”. The fictional cut-off alleged by Costa Rica, is therefore not a relevant circumstance calling for adjustment of the provisional equidistance line.

21. Mr. President, this brings me to the second major issue of dispute in the Caribbean Sea, the Corn Islands. Two things struck me from Mr. Lathrop's second round argument that the Corn Islands should be disregarded in this delimitation. First, he never said that the Corn Islands have a cut-off effect. That is, he never said that the Corn Islands cause the equidistance line to change direction in such a manner as to cut off Costa Rica from its maritime entitlements. This was a very significant omission. I went back and checked his first speech, and found that he was consistent. In neither speech did he claim that the Corn Islands produce a cut-off of Costa Rica¹⁰⁹. To the contrary, the only aspect of the geography that he identified as causing a cut-off of Costa Rica, in both speeches, was the so-called three-State concavity¹¹⁰. Although he said that the impact of the Corn Islands was to “exacerbate” the effects of *that* cut-off¹¹¹, he notably did *not* say that the islands *themselves* were responsible for any cut-off of Costa Rica. This is a very significant admission.

22. The other thing that struck me about Mr. Lathrop's presentation on Monday was that, despite displaying many slides, he did not present a single one showing the actual effects of the Corn Islands on the equidistance line, or on Costa Rica, and he did not present the customary arrow-filled graphic purporting to show that the line, as influenced by the Corn Islands, cuts off the seaward projection of any part of Costa Rica's coast.

¹⁰⁸See CR 2017/7, pp. 52-56, paras. 50-54 (Parlett); CR 2017/9, p. 23, para. 40 (Kohen); CR 2017/9, p. 52, para. 49 (Lathrop); CR 2017/14, p. 17, paras. 20-22 (Lathrop); CR 2017/13, pp. 19-22, paras. 22-29 (Parlett).

¹⁰⁹See CR 2017/9, p. 52, para. 49 (Lathrop); CR 2017/14, pp. 14-16, paras. 13-18 (Lathrop).

¹¹⁰See CR 2017/9, pp. 45-46, 47, 50, paras. 34-35, 37, 44, (Lathrop); CR 2017/14, p. 17, paras. 20-22 (Lathrop).

¹¹¹CR 2017/9, p. 50, para. 44 (Lathrop); CR 2017/14, p. 16, para. 17 (Lathrop).

23. This is another telling admission by omission, for a number of reasons. First, Costa Rica leaves undisputed our demonstration of the actual, specific impact of the Corn Islands on the equidistance line. This is at tab 23. I have no intention, Mr. President, of repeating the detailed description I gave you in regard to the precise impacts of the base points located on Great and Little Corn Island on each particular segment of the equidistance line, or the counter-balancing effects of the corresponding Costa Rican base points¹¹². But it *is* worth underscoring that Costa Rica has not challenged any part of that presentation, and it can now be regarded as undisputed.

24. Second, Mr. Lathrop failed to challenge any of the conclusions drawn from these undisputed geographical facts, in particular: (i) that Great Corn Island causes the equidistance line to run gradually to the south-east, between Point B at 55 miles and Point C at 80 miles, with the effect of compensating Nicaragua for the cut-off in the first segment of the line, by bringing it back to a point that is aligned with the land boundary terminus, and better reflects the general directions of the Parties' coasts¹¹³; and (ii) that the remaining effects of the Corn Islands, which are felt east of Point C, are perfectly balanced by the corresponding base points on Costa Rica's coast, resulting in an east-to-north-east flowing line that cuts across neither State's seaward projection¹¹⁴.

25. If you want to know why Mr. Lathrop did not display a slide with cut-off arrows, this is the reason. It is at tab 24. As Mr. Lathrop, Mr. Wordsworth and Dr. Parlett all said, and as we have agreed, in a delimitation between adjacent States some cut-off of each State is inevitable¹¹⁵. The key issue is whether the cut-offs are mutually shared and balanced between the two States¹¹⁶, or disproportionately borne by one of them. As shown above, the Corn Islands *do* exert an influence on the equidistance line, just as the base points on Costa Rica's coast influence the line. But, as you can see, those influences are mutual and balanced. The Corn Islands do not cause a significant or unbalanced cut-off of Costa Rica. Under this standard, which we suggest is the proper legal

¹¹²See CR 2017/11, pp. 31-34, paras. 36-46 (Reichler).

¹¹³CR 2017/11, p. 36, para. 51 (Reichler).

¹¹⁴CR 2017/11, p. 36, para. 52 (Reichler).

¹¹⁵See CR 2017/7, p. 66, para. 35 (Wordsworth); CR 2017/13, p. 21, para. 29 (Parlett); CR 2017/14, pp. 10, 17, paras. 2 (b), 22 (Lathrop); CR 2017/11, p. 39, para. 61 (Reichler).

¹¹⁶See CR 2017/7, p. 66, para. 35 (Wordsworth) (citing *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012 (II), para. 215. See also *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 127, para. 201; ITLOS, *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, 14 Mar. 2012, para. 325).

standard to assess the impact of the Corn Islands, and whether they are relevant circumstances¹¹⁷, they are plainly *not*, and there is no justification for giving them anything less than full effect.

26. Mr. Lathrop still insists that the effects of the Corn Islands are “disproportionate”¹¹⁸. But how can he sustain this position when he never addresses what their actual impact is, and fails to show that the impact is unbalanced? We say, he cannot sustain the position without showing that the Corn Islands have a cut-off effect. But, he does not even allege this, let alone show it.

27. Instead, he tells us that the Corn Islands are exactly like Serpents’ Island in the *Black Sea* case. He devotes considerable time to this¹¹⁹. But he never shows what the impact of Serpents’ Island on an equidistance line would have been, or demonstrates that the impact is like that of the Corn Islands. This, at tab 25, shows the impact of Serpents’ Island. An equidistance line taking Serpents’ Island into account would have produced the cut-off of Romania’s coast that you see here. The Court rejected Ukraine’s proposed boundary, in part because any line giving full weight to Serpents’ Island would have “significantly curtail[ed] the entitlement of [Romania] to the continental shelf and the exclusive economic zone”¹²⁰. As the Court further explained: “the Ukrainian line restricts the entitlement of [Romania] generated by its coast, in particular the first sector between the Sulina dyke and the Sacalin Peninsula”¹²¹. Mr. President, the Corn Islands do not produce a similar, or, indeed, any, cut-off effect. There is thus no similarity with Serpents’ Island.

28. Nor is there a similarity with Abu Musa, as Mr. Wordsworth suggested¹²². This is at tab 26. And for the same reasons. Abu Musa caused the equidistance line to veer sharply in front of Dubai’s coast, contributing to a near complete cut-off¹²³. This situation also does not resemble that of the Corn Islands.

¹¹⁷See *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012 (II), para. 215; *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 127, para. 201; *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, 14 Mar. 2012, para. 318.

¹¹⁸CR 2017/9, p. 47, para. 37 (Lathrop); see CR 2017/14, p. 16, para. 18 (Lathrop).

¹¹⁹See CR 2017/14, p. 15, paras. 13-14 (Lathrop)

¹²⁰*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 127, para. 201.

¹²¹*Idem.*

¹²²CR 2017/13, p. 31, para. 16 (a) (Wordsworth).

¹²³See *Dubai/Sharjah Border Arbitration, Award* (19 Oct. 1981), 91 ILR 543 (1993), p. 677.

29. Mr. President, I have one last point on the Corn Islands. As we showed in the first round and at tab 27 today for your convenience, what did Costa Rica have to say about *this* slide? Absolutely nothing. I pointed out that Costa Rica's arguments about the Corn Islands are entirely inconsistent with the treatment that Costa Rica agreed to give to Colombia's much smaller and less significant Albuquerque Cays¹²⁴. We heard not a word of dissent from Costa Rica about that. In fact, they cannot dissent. As Colombia explained during Costa Rica's intervention proceedings in 2010, "the giving of full weight to Colombia's islands", was an "assumption underlying the 1977 Treaty"¹²⁵. In fact, "Costa Rica agreed that Colombia's islands were entitled to the same equidistance treatment as they had been accorded in the Colombia-Panama Treaty"¹²⁶. Mr. President, Costa Rica cannot justify treating the Corn Islands less favourably than they have treated Colombia's much smaller islands for the past 30 plus years. And they have not even attempted to justify this.

30. For all of these reasons, Mr. President, the Corn Islands are not a relevant circumstance in this delimitation, and they are entitled to full weight.

31. I come next to the third disputed issue in regard to the Caribbean Sea, which is Nicaragua's contention that the 1977 Treaty is a relevant circumstance that should be taken into account by the Court in drawing the maritime boundary. There are two main points of disagreement here, one on the law and the other on the facts. On the law, Professor Kohen argued that *Tunisia/Libya* is not applicable to this case because, in that one, there had been a boundary agreement, no longer in effect, between the colonial powers, and because the parties awarded their oil concessions based on that line¹²⁷. But that hardly makes *Tunisia/Libya* inapplicable. Here, there was a boundary treaty between the two Parties themselves, which was in effect for more than 30 years, and, apparently in Colombia's view, may be in effect still. In *Tunisia/Libya*, the Court found that there was not even a tacit agreement between the two parties, yet nevertheless considered the parties' conduct to be a relevant circumstance¹²⁸.

¹²⁴CR 2017/11, p. 38, para. 58 (Reichler).

¹²⁵CR 2010/14, p. 25, para. 37 (Bundy).

¹²⁶CR 2010/14, p. 22, para. 27 (Bundy).

¹²⁷CR 2017/13, p. 67, para. 10 (Kohen).

¹²⁸See *Continental Shelf (Tunisia v. Libya)*, Judgment, I.C.J. Reports 1982, para. 118.

32. While we have no information on oil concessions given by Costa Rica or Colombia, the 1977 Treaty explicitly covers the development, use and protection of all non-renewable resources [Art. III], the exploitation of living resources [Art. V], navigation [Art. VII], conservation [Art. IV] and environmental protection [Art. VI]¹²⁹. The practices governed by the Treaty are thus far broader than those shared by Tunisia and Libya around their *de facto* boundary.

33. On the facts, Professor Kohen asked: where is the evidence that the parties to the 1977 Treaty actually conducted themselves in accordance with it?¹³⁰ That is an easy one to answer. Costa Rica itself has done so. In response to a question from Judge Bennouna, the distinguished Agent of Costa Rica, Ambassador Ugalde Álvarez, wrote, in October 2010 that: “Costa Rica reiterates that it has complied in good faith with the 1977 Treaty, [and] that it will continue to do so . . .”¹³¹ According to Colombia: “In practice, both Colombia and Costa Rica have fully respected the boundary line. Both States have exercised sovereign rights and jurisdiction on their respective sides of the line in a manner that is entirely consistent with it . . .”¹³² Costa Rica has not disputed that.

34. If in *Tunisia/Libya* the conduct of the parties, which fell short of even a tacit agreement and covered only ten years, was a relevant circumstance to be taken into account by the Court as indicia of a boundary that the parties themselves considered equitable¹³³, then that must be the case here. Costa Rica, for its part, has never challenged our assertion that, for over three-and-a-half decades, they regarded the 1977 boundary as “beneficial”¹³⁴ and equitable.

35. So what does Nicaragua mean when it says that the 1977 Treaty and Costa Rica’s consistent conduct under it should be “taken into account”¹³⁵ by the Court in its delimitation of the boundary in this case? We see three options. The first, as we proposed in the Counter-Memorial and again in the first round, is to delimit the boundary in conformity with the 1977 Treaty lines,

¹²⁹See Treaty on Delimitation of Marine and Submarine Areas and Maritime Cooperation between the Republic of Colombia and the Republic of Costa Rica of 1977; CMN, Vol. II, Ann. 3.

¹³⁰See CR 2017/13, p. 67, para. 10 (Kohen).

¹³¹Written response of Costa Rica to the question put to it by Judge Bennouna at the end of the hearing held on 15 October 2010, at 5 p.m. (22 Oct. 2010), para. 7.

¹³²CR 2010/14, pp. 19-20, para. 22 (Bundy).

¹³³*Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, *I.C.J. Reports 1982*, paras. 118, 125.

¹³⁴See CR 2017/11, p. 41, para. 65 (Reichler).

¹³⁵CR 2017/11, p. 39, para. 62 (Reichler).

based on Costa Rica's own actions and statements evidencing that it has long regarded its boundary with Colombia as an equitable one¹³⁶. The second option, if, *quod non*, the Court is unwilling to hold Costa Rica to the 1977 boundary, would be for it to adjust the provisional equidistance line in Nicaragua's favour, to an extent that it considers appropriate, short of the 1977 boundary lines.

36. The third possibility, which we submit would be the very minimum required for an equitable solution in this case, would be for the Court to refrain from making any adjustments of the provisional equidistance line in Costa Rica's favour. We have already shown that no such adjustments are defensible. There are no relevant circumstances that operate in Costa Rica's favour: there is no third State cut-off, and there is no basis for discounting the Corn Islands. In Nicaragua's submission, Costa Rica's long-standing and consistent conduct demonstrating that it has considered its 1977 boundary agreement with Colombia to be beneficial and equitable, constitutes, if nothing else, a further basis for rejecting Costa Rica's attempt to secure for itself a more favourable boundary than the provisional equidistance line drawn by Nicaragua. That line bestows on Costa Rica more than 6,500 sq km of maritime space than it has under the 1977 Treaty, a 25 per cent increase. There is no justification for Costa Rica to demand, or receive, more than that.

37. I turn to the fourth and final disagreement in the Caribbean: the equitableness of the Parties' proposed boundary lines. I do not need to dwell on Costa Rica's proposal. I addressed it in the first round¹³⁷. It remains only for me to point out that Costa Rica did not challenge this depiction of their proposed solution, or any of the measurements in it, on Monday. The accuracy of the figures is therefore confirmed. Costa Rica's proposed boundary is self-aggrandizing and demonstrably inequitable to Nicaragua.

38. This is Nicaragua's proposed solution — it is at tab 29. It was fully explained and justified in the first round. In our submission, the provisional equidistance line should be adjusted to ameliorate the cut-off of Nicaragua in the first segment of the line, and again to conform to the 1977 Treaty boundary, for the reasons given by Professor Remiro¹³⁸, or, as I have explained, based

¹³⁶CR 2017/11, p. 41, para. 64 (Reichler); CMN, para. 3.79.

¹³⁷CR 2017/11, pp. 28-29, paras. 25-29 (Reichler).

¹³⁸CR 2017/10, pp. 38-45, paras. 8-41 (Remiro Brotóns)

on relevant circumstances. If, contrary to our submission on the 1977 Treaty, the Court were disinclined to adopt Costa Rica's 1977 boundary lines in this delimitation, Nicaragua's provisional equidistance line, without adjustment, would continue to follow its normal course between Point D and the 200-mile limit, as depicted here.

39. Mr. President, this completes our presentation on delimitation in the Caribbean Sea. I turn next, and finally, to our case on delimitation in the Pacific Ocean. As in the first round, my discussion of the Pacific will be considerably shorter.

40. This is because there is just one disagreement in regard to the Pacific: whether the base points on the Santa Elena Peninsula and the Nicoya Peninsula should be given full weight, as Costa Rica claims¹³⁹, or less than full weight, as Nicaragua contends¹⁴⁰. The facts do not appear to be in dispute.

41. The next three slides are the ones that I displayed last week, showing how the Santa Elena Peninsula and the Nicoya Peninsula — and, specifically, just three base points at the western extremities of those promontories — influence the equidistance line between 6 miles and 200 miles. These three slides are at tabs 30 and 32 today. Costa Rica did not challenge any of this. They accept that the base points at Punta Blanca and Cabo Santa Elena on the Santa Elena Peninsula, and at Cabo Velas on the Nicoya Peninsula have precisely these effects. And that is further reflected in the fact that the Parties' respective provisional equidistance lines are identical.

42. Nor is it disputed — and this is at tab 33 — that these base points, in combination, push the equidistance line northward in front of Nicaragua's coast, blocking its seaward projection. That is obvious from just looking at these maps. Nicaragua and Costa Rica disagree over whether this blocking effect constitutes a cut-off sufficient to justify an adjustment to the provisional equidistance line¹⁴¹. Does the line cut off Nicaragua's entire coast? No. But it does cut off a

¹³⁹See CR 2017/13, pp. 28-34, paras. 13-23 (Wordsworth).

¹⁴⁰See 2017/11, p. 55, para. 31 (Reichler).

¹⁴¹CR 2017/13, pp. 29-30, paras. 14-15 (Wordsworth); CR 2017/11, pp. 47-55, paras. 5-32 (Reichler).

significant part of that coast; and the segment of coast that is cut off is particularly important to Nicaragua as a fishing and tourism hub¹⁴².

43. The cut-off is not only in the territorial sea, as Professor Lowe has shown¹⁴³. It also extends into the EEZ, and, indeed, all the way to 200 miles. Even though the direction of the line beyond 60 miles is to the south-west, as expected when the general direction of the relevant coasts, as here, is north-west to south-east, the fact that the line has been significantly transposed to the north in its first segments means that it will always be north of where it would have been absent the influence of the base points on the promontories that control those initial segments.

44. Whether there is a cut-off sufficient to justify an adjustment to the provisional equidistance line is, of course, for the Court to determine, in the exercise of its discretion to fashion an equitable solution. Nicaragua respectfully submits that the best way to make such a determination is by asking whether the cut-off produced by the equidistance line is shared by the Parties in a mutual and balanced way, or whether it falls disproportionately on only one of the Parties. As was stated by both sides, cut-off is inevitable between adjacent States¹⁴⁴. But inevitable becomes inequitable when the cut-off is not shared¹⁴⁵. As you can see, that is the case here. The cut-off is imposed solely and entirely on Nicaragua. This is not the kind of mutual and balanced cut-off that equity requires.

45. Here is Nicaragua's proposed solution. This slide, today at 35, which you did see in the first round, shows the provisional equidistance line on the top, with an equidistance line that

¹⁴²Nicaraguan Institute of Tourism, *2016 Statistical Bulletin of Tourism*, No. 27, p. 81, available at <https://www.intur.gob.ni/estadisticas-de-turismo/> (showing that San Juan del Sur was the top cruise ship destination in 2016); National Hotel School, *Introduction to Tourism: National Tourism*, pp. 4, 10, available at <http://enah.edu.ni/files/uploads/biblioteca/902.pdf> (stating that San Juan del Sur is one of the most important tourist destinations in Nicaragua); Nicaraguan Institute of Tourism, *2016 Statistical Bulletin of Tourism*, No. 27, p. 79, available at <https://www.intur.gob.ni/estadisticas-de-turismo/> (showing that from 2012-2016, tourism was between the 1st and 4th most important sector of the Nicaraguan economy); Registered Landing of Fish from the Pacific (Jan.-Dec. 2015), in Nicaraguan Institute for Fishing and Aquaculture, *2015 Fishing and Aquaculture Report* (Dec. 2016), table 1.17, p. 89, available at <http://www.inpesca.gob.ni/images/DocumentosSubidos2016/ANUARIO%20PESQUERO%20Y%20ACUICOLA%20DE%20NICARAGUA%202015.pdf> (showing that San Juan del Sur has the highest landings of any artisanal port on the Pacific coast); Nicaraguan Institute for Fishing and Aquaculture, *Indicative Guide: Nicaragua and the Fishing and Aquaculture Sector* (Aug. 2008), p. 55, available at http://www.bvsde.org.ni/Web_textos/INPESCA/0011/0011guiaindicativa.pdf (noting that San Juan del Sur is an important Pacific fishing port).

¹⁴³CR 2017/11, pp. 43-45, paras. 4-17 (Lowe).

¹⁴⁴CR 2017/7, p. 66, para. 35 (Wordsworth); CR 2017/13, p. 21, para. 29 (Parlett); CR 2017/14, pp. 10, 17, paras. 2 (b), 22 (Lathrop); CR 2017/11, p. 39, para. 61 (Reichler).

¹⁴⁵*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012 (II)*, pp. 703-704, para. 215. See also *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 127, para. 201; ITLOS, *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, 14 March 2012, para. 325.

excludes both the Santa Elena and Nicoya Peninsulas entirely on the bottom. And it also shows, in the middle, a line giving both Santa Elena and Nicoya half weight, which Nicaragua has proposed as an equitable solution in this case.

46. In addition to the slide with three lines, we also displayed the one on the right, with two lines. The one on the right is, unfortunately, mislabelled. The blue lines on both slides were intended to be the same, only on different scales. It is correctly drawn and labelled on the left as an equidistance line without Santa Elena and Nicoya. It is misidentified on the right as excluding only Santa Elena. I apologize to the Court for not catching this error when I reviewed these slides the night before my presentation, and I apologize to our friends on the other side for causing them to go to the trouble of creating and displaying their own slide to demonstrate this error in ours.

47. Mr. President, half weight for both Santa Elena and Nicoya has been Nicaragua's position throughout this case. That was what we requested in the Counter-Memorial¹⁴⁶, and it is what we argued for in the first round¹⁴⁷. My friend Mr. Wordsworth suggested that I was somehow attempting to signal to the Court, *sotto voce*, that Nicaragua would be satisfied if only Santa Elena were discounted¹⁴⁸. That might have been wishful thinking on my friend's part, but it is not accurate. In the first place, I don't do *sotto voce* very well. That kind of subtlety is not my forte. But it would also make no sense for Nicaragua to propose half weight for Santa Elena but not for Nicoya.

48. In Nicaragua's view, an equitable solution cannot be achieved from the EEZ and the continental shelf by discounting only the base points on Santa Elena. And this is why. It is a new slide and it is tab 37 today. Even if the base points on Santa Elena would disappear entirely, and that peninsula is given no weight at all, the cut-off would not be eliminated. What happens instead is that the base point at Cabo Velas, at the western tip of Nicoya, begins to exercise its influence earlier, in their place, at 30 miles instead of 120 miles. The cut-off of Nicaragua is slightly ameliorated, but only slightly. That is why we say that a truly equitable solution, which distributes the cut-off in a more balanced manner, requires that half weight be given to both peninsulas.

¹⁴⁶MCR, para. 2.55, Maps Id-5 & Id-6.

¹⁴⁷CR 2017/11, p. 55, para. 31 (Reichler).

¹⁴⁸CR 2017/13, pp. 23-24, paras. 4-5 (Wordsworth).

49. Costa Rica argues that the Court can only disregard or discount *islands* that have a disproportionate impact on the equidistance line, not peninsulas or promontories or other mainland features¹⁴⁹. But surely that is not an accurate statement of the law. Certainly it was not the position of the Arbitral Tribunal in *Croatia/Slovenia*. At tab 38 is a composite of two of the Tribunal's sketch-maps, one showing an equidistance line and the other showing the boundary adopted by the Tribunal. We know, from the passages of the Award that I read last week, that the Tribunal decided to give less than full weight to the Croatian base points at the end of the Savudrijan Peninsula, a long promontory running in a different direction than the general Croatian coast, in order to minimize a cut-off, or boxing in, of Slovenia¹⁵⁰. As you can see here, the solution appears to have been to give those Croatian base points what looks like half effect.

50. Mr. Wordsworth suggested that there was some significance to the fact that *I* made this argument in the first round rather than Professor Lowe, whom he said “knows the award better, and who has no affection for developing weak points”¹⁵¹. Well, I don't disagree with my friend Mr. Wordsworth on either of his assertions. Professor Lowe *does* know the Award better, since he was one of its authors. But that is precisely why he concluded — and we all agreed — that it would be inappropriate for him to comment on it as an advocate. And I am delighted to know that Costa Rica's counsel do not believe that Professor Lowe argues weak points. I presume that means they consider his arguments on delimitation in the territorial sea to be strong ones.

51. *Croatia/Slovenia* is one of only three cases to consider whether a peninsula or promontory should be given less than full effect. One of the other cases was *Gulf of Maine*. As our friends on the other side have pointed out, the Special Chamber declined to treat Cape Cod as a relevant circumstance¹⁵². But what they neglected to say was that this was because the influence of Cape Cod, on the US side, was counterbalanced and effectively neutralized by the Nova Scotia

¹⁴⁹See CR 2017/7, pp. 52-53, *paras.* 48-49 (Parlett); CR 2017/13, pp. 28-34, *paras.* 14-21 (Wordsworth)

¹⁵⁰See *Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009*, PCA Case No. 2012-04, Final Award (29 June 2017), *paras.* 1011-1014.

¹⁵¹CR 2017/13, p. 34, *para.* 22 (Wordsworth).

¹⁵²CR 2017/7, p. 53, *para.* 49 (Parlett).

Peninsula on the Canada side¹⁵³. Here, by contrast with *Gulf of Maine*, but like *Croatia/Slovenia*, there are no coastal formations on the Nicaraguan side to counterbalance Costa Rica's two peninsulas.

52. The third case to address peninsulas or promontories is the *Anglo-French* arbitration. There, the Court of Arbitration gave half weight to the Scilly Isles, which it treated as an extension of the Cornish Peninsula¹⁵⁴. Mr. Wordsworth and I disagree about that. So, perhaps, since we both quoted Professor Weil, we should defer to him at least on this specific point: "Which, more precisely, are the salients whose effects warrant correction? Whereas the *North Sea* Judgment spoke of 'minor coastal projections', the *Anglo-French* referred, in contrast, to an 'exceptionally long promontory'."¹⁵⁵

53. My good friend very helpfully displayed this schematic by Commander Beazley, as an example of the distorting effect and cut-off that could be caused by a peninsula or coastal promontory¹⁵⁶. We have it today at our tab 39. Here, the equidistance line is deflected by the peninsula some 23 degrees. The deflection of the equidistance line, and cut-off, caused by Santa Elena and Nicoya is even greater: 44 degrees. Yet, my friend tells us that: "It is quite plain that the Court is not looking at the situation that Mr. Beazley had in mind."¹⁵⁷ Plain to whom? The Beazley diagram is one that could have been drawn especially for this case, except that the distorting effect of the peninsulas on the equidistance line is even greater in our case.

54. Mr. President, counsel on both sides have spent a considerable amount of time distinguishing each other's cases. In maritime delimitation, it is always possible to make these distinctions, because the geographic circumstances of each case will never be the same. They are always unique to that particular case. However, as disparate as all of cited cases might appear, there is a unifying theme that makes sense of all of them. And that is the need to avoid, or at least reduce,

¹⁵³See *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 334, para. 216 ("stress[ing] the quasi-parallelism between the line which, on the Massachusetts coast, links the promontory of Cape Ann to the elbow of Cape Cod and the line which, on the coast of Nova Scotia, joins up Brier Island and Cape Sable").

¹⁵⁴See *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (France v. United Kingdom)*, RIAA, Vol. XVIII, Part I, paras. 4, 243, 249-251.

¹⁵⁵Prosper Weil, *The Law of Maritime Delimitation — Reflections* (1989), p. 228.

¹⁵⁶Peter Beazley, *Technical Aspects of Maritime Boundary Delimitation* (1994), fig. 5.

¹⁵⁷CR 2017/13, p. 26, para. 8 (d) (Wordsworth).

cut-off. Beginning with the *North Sea* cases, international courts and tribunals have consistently reacted to what they perceived as a cut-off by adjusting the equidistance or median line to prevent one State from being cut off disproportionately in relation to the other. The causes of the cut-offs that have been remedied in this fashion have varied. In some cases, the cut-off was caused by a pronounced coastal concavity¹⁵⁸. In others, the cause was an offshore feature. In the *Anglo-French* case as we have seen, it was the combination of a coastal promontory and closely connected offshore islands¹⁵⁹. In *Croatia/Slovenia*, it was a peninsula¹⁶⁰. But what all these cases have in common is the adjustment of equidistance to eliminate, or at least reduce, cut-off, whether its cause is land-based or island-based.

55. The question for the Court thus boils down to this: do the Santa Elena and Nicoya Peninsulas influence the equidistance line in such a way as to deflect it in front of Nicaragua's coast so that Nicaragua's coast is cut-off by the line to a disproportionately greater extent than Costa Rica? If the answer is yes, as we submit it is, then an adjustment to equidistance is called for to avoid or reduce that cut-off. In Nicaragua's view, that adjustment should be to give half weight to the features responsible for the cut-off, as in *Croatia/Slovenia* and the *Anglo-French* case.

56. You can see here, and at tab 42, that the modest adjustment Nicaragua seeks does not prevent Costa Rica from enjoying a massive maritime entitlement on this side of the isthmus. Costa Rica's maritime space fans outward across a vast expanse of open sea. It cannot reasonably claim to be materially disadvantaged by the adjustment that Nicaragua proposes.

57. Mr. President, Members of the Court, this brings me to the end of my presentation. It has been a great honour for me to appear before you once again, as it always is. I thank you deeply for your time, your patience and your courtesy. I ask you please to call Nicaragua's next speaker to the

¹⁵⁸See *North Sea Continental Shelf (Fed. Rep. of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 3, para. 8; *Delimitation of the maritime boundary between Guinea and Guinea-Bissau, Decision of 14 Feb. 1985, RIAA*, Vol. XIX, Part IV, p. 187, para. 104; *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal, Judgment, ITLOS Reports 2012*, para. 293; *Bay of Bengal Maritime Boundary Arbitration (Bangladesh/India), Award (7 July 2014)*, para. 408.

¹⁵⁹See *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (France v. United Kingdom), RIAA*, Vol. XVIII (1), paras. 4, 243, 249-251.

¹⁶⁰See *Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 Nov. 2009, PCA Case No. 2012-04, Final Award (29 June 2017)*, paras. 1011-1014.

podium, my esteemed colleague, Mr. Samson, but perhaps if the Court sees fit, after the lunch break.

The PRESIDENT: Merci M. Reichler. Oui, nous écouterons M. Samson après la pause déjeuner. So the Court will meet again this afternoon at 3 p.m., to hear the conclusion of Nicaragua's second round of oral argument, at the end of which Nicaragua will present its final submissions. Thank you. L'audience est levée.

The Court rose at 12.30 p.m.
