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THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2017

Public sitting

held on Monday 10 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 lundi 10 juillet 2017, à 10 heures, au Palais de la Paix,

sous la présidence de M. Abraham, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

The Government of Costa Rica is represented by:

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

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

as Agent;

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

as Co-Agent, Counsel and Advocate;

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

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

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

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

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

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

as Counsel and Advocates;

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

as Counsel;

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

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

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

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

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

as Assistant Counsel;

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

as Assistant.

Le Gouvernement du Costa Rica est représenté par :

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

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

comme agent ;

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

comme coagent, conseil et avocat ;

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

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

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

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

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

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

comme conseils et avocats ;

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

comme conseil ;

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

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

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

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

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

comme conseils adjoints ;

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

comme assistante.

The Government of the Republic of Nicaragua is represented by:

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

as Agent and Counsel;

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

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

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

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

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

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

as Counsel and Advocates;

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

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

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

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

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

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

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

as Counsel;

Ms Gimena González, Researcher in public international law,

Ms Ilona Tan, Legal Intern, Foley Hoag LLP,

as Legal Assistants;

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

Le Gouvernement du Nicaragua est représenté par :

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

comme agent et conseil ;

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

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

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

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

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

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

comme conseils et avocats ;

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

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

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

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

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

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

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

comme conseils ;

Mme Gimena González, chercheuse en droit international public,

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

comme assistants juridiques ;

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

Ms Victoria Leader, Geographical and Technical Consultant,

as Scientific and Technical Advisers;

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

as Administrator.

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

comme conseillers scientifiques et techniques ;

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

comme administrateur.

Le PRESIDENT : Veuillez vous asseoir. The sitting is now open. This morning the Court will hear the opening of Costa Rica's second round of oral argument. I now give the floor to Dr. Kate Parlett.

Ms PARLETT:

RELEVANT ASPECTS OF THE APPLICABLE LAW

A. Introduction

1. Mr. President, Members of the Court, it is an honour for me to open Costa Rica's second round of oral argument. Our presentations will broadly follow the same order as in the first round. And I will start Costa Rica's response by addressing the relevant aspects of the applicable law in the delimitation of the maritime boundaries in the Caribbean Sea and the Pacific Ocean.

2. Last Monday, I introduced three issues of law on which the Parties disagree[1]. Today I will return to those three issues, focusing my remarks on responding to Nicaragua's case on the applicable law as put last week.

B. The primacy of equidistance to delimit the territorial sea

3. The first issue is the primacy of equidistance to delimit the territorial sea. You will recall that Costa Rica delimits the territorial sea in both the Caribbean and the Pacific with strict equidistance, whereas Nicaragua seeks an adjustment in its favour in the equidistance line on both sides.

4. [On screen] I explained last Monday that Article 15 of UNCLOS is the law applicable between the Parties, and to this dispute, to delimit the territorial sea[2], and it gives primacy to an equidistance delimitation[3]. Both Professor Lowe and Mr. Reichler focused on my use of the term "primacy"[4] but it was not my term — it was the word used by the Tribunal in *Guyana/Suriname* to

[1]CR 2017/7, p. 38, para. 8 (Parlett).

[2]CR 2017/7, p. 38, para 10 (Parlett), citing *Maritime Delimitation in the Pacific Ocean and the Caribbean Sea (Costa Rica* v. *Nicaragua)*; CMN, para 2.42; MCR, para. 2.43.

[3]CR 2017/7, p. 38, para. 8 *(a)* (Parlett).

[4]CR 2017/11, p. 10, para. 4 (Lowe); also p. 50, para. 14 (Reichler).

describe the effect of Article 15[5]. It is an apt description, because unlike the articles dealing with delimitation of the EEZ/continental shelf, Article 15 actually prescribes the use of equidistance, in the absence of historic title or special circumstances. In the words of the Court in *Nicaragua* v. *Honduras*, "[t]he methods governing territorial sea delimitations . . . are, more clearly articulated in international law than those used for other, more functional maritime areas"[6]. [End slide]

5. I explained last week that the particular terms of Article 15, and the difference between those terms and Articles 74 and 83, followed a deliberate choice of the drafters of UNCLOS, who declined to abandon the distinction in response to a proposal providing for an equitable solution in the delimitation of all maritime spaces[7]. Nicaragua ignores that aspect of the drafting history, and seeks to characterize the differences between Article 15, and Articles 74 and 83, as merely "presentational"[8]. The explanation given to you by Professor Lowe as to the drafting history was that the provisions governing territorial sea delimitation were seamlessly incorporated from the 1958 Convention on the Territorial Sea, whereas new provisions had to be drafted for the EEZ, and those new provisions had to be aligned with the provisions on the continental shelf[9].

6. Like the 1958 Convention on the Territorial Sea, the 1958 Convention on the Continental Shelf provided for the continental shelf to be delimited by an equidistance line, absent special circumstances[10]. At the Third Conference, States deliberately decided not to retain the equidistance/special circumstances rule for the continental shelf, nor to apply it to the EEZ, and replaced it with an "equitable solution", now reflected in the words of Articles 74 and 83[11]. If these

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[5]*Award in the Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname, Award*, 17 Sep. 2007, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXX, Part 1, para. 296 ("Article 15 of the Convention places primacy on the median line as the delimitation line between the territorial seas of opposite or adjacent States").

[6]*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 740, para. 269; see also p. 740, paras. 267-289.

[7]CR 2017/7, pp. 39-40, para. 15, citing *Official Records of the Third United Nations Conference on the Law of the Sea, Volume XII (Summary Records, Plenary, General Committee, First and Third Committees, as well as Documents of the Conference, Ninth Session)*, A/CONF.62/SR.126, 126th Plenary Meeting (1980), statements by Venezuela, para. 137; see also statements by Argentina, *ibid.*, para. 88; see also S. N. Nandan and S. Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume II* (1985), p. 141, para. 15.10.

[8]CR 2017/11, p. 10, para. 3 (Lowe).

[9]*Ibid.*, pp. 10-11, paras. 6-8 (Lowe).

[10]1958 Convention on the Continental Shelf, done at Geneva 29 April 1958 (entry into force 10 June 1964), 499 *UNTS* 311, Art. 6.

[11]See Y. Tanaka, "Article 83" in Proelss, *UNCLOS, 1st edition* (2017), pp. 654-655, paras. 2-3.

provisions are all the same, as Nicaragua now contends, when States disposed of the equidistance/special circumstances rule for the continental shelf in favour of an "equitable solution", why did they not do the same for the territorial sea?

7. It is relevant to note that the Court's Judgment in the *North Sea* cases was delivered in 1969, before consideration of the appropriate delimitation method for the EEZ and continental shelf at the Third Conference. In that case, the Court held that the equidistance/special circumstances rule under Article 6 of the Continental Shelf Convention did not reflect customary international law[12], and instead referred to delimitation in accordance with equitable principles and relevant circumstances[13]. The "equitable solution" approach was subsequently incorporated in Articles 74 and 83, but not adopted in Article 15. That difference cannot be dismissed out of hand as merely "presentational". It was deliberate. And it can be explained on the basis that, as the Court held in *North Sea*, the distorting effects of an equidistance line are relatively minor within the territorial sea[14]: equidistance/special circumstances therefore works perfectly well in achieving an equitable delimitation of the territorial sea.

8. Now both Professor Lowe and Mr. Reichler emphasized that the equidistance/special circumstances rule, and the approach to delimitation of the EEZ/continental shelf, are similar, and suggested that in fact there is no practical difference in their application[15]. In fact, there are two very practical reasons for the difference: both of these were raised by Costa Rica in its first round, and both were ignored by Nicaragua.

(a) The first is the point explained by the Court in *North Sea* which I have just mentioned: the distorting effects of any particular geographical feature are likely to be insignificant within the territorial sea. This was one reason why ITLOS in *Bangladesh/Myanmar* gave full effect to St. Martin's Island in the territorial sea delimitation[16], and zero effect to it in the

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[12]*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 41, para. 69; pp. 45-46, paras. 81-82.

[13]*Ibid.*, p. 53, para. 101 (C) (1).

[14]*Ibid.*, p. 37, para. 59; see also p. 17, para. 8; and *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, 14 Mar. 2012, para. 318.

[15]CR 2017/11, p. 12, para. 14 (Lowe); p. 50, para. 14 (Reichler).

[16]ITLOS, *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, 14 Mar. 2012, para. 152.

EEZ/continental shelf[17]. It noted that "the effect to be given to islands in delimitation may differ, depending on whether the delimitation concerns the territorial sea or other maritime areas beyond it"[18]. The same reasoning from *North Sea* guided the Tribunal in *Bangladesh* v. *India*, in refusing to adjust an equidistance line to account for Bangladesh's three-State concavity in the territorial sea delimitation[19], but adjusting it for the same circumstance beyond the territorial sea[20]. The question is in part one of impact, and the reality is that the impact in near-shore areas, within the territorial sea, is insignificant.

(b) The impact needs to be assessed in any particular context, and must therefore take into account the fact that any adjustment to an equidistance line in the territorial sea will mean that one State's territorial sea is cut off in favour of the other's EEZ. As ITLOS observed in *Bangladesh/Myanmar*, this would give "more weight to the sovereign rights and jurisdiction of [one State] in its exclusive economic zone and continental shelf than to the sovereignty of [another State] over its territorial sea"[21]. That is an important point, and it is one Nicaragua ignores. The rule in Article 15 reflects the fact that in the territorial sea, absent special circumstances, an equidistance line will be an equitable solution to the delimitation, enabling both States to enjoy their full sovereignty over the territorial sea on equal terms. This is not a question of "dogmatic imposition of equidistance"[22]; it is instead a reason why equidistance is an equitable way of dividing the territorial sea.

9. As to the assimilation of "special circumstances" and "relevant circumstances", Nicaragua made much of this on Friday, relying on dicta from the *Guyana/Suriname* Award to the effect that special circumstances "generally refer to equitable considerations"[23]. That same Award, as I have

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[17]ITLOS, *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, 14 Mar. 2012, paras. 318-319.

[18]*Ibid.*, para. 148.

[19]UNCLOS Annex VII Tribunal, *Bay of Bengal Maritime Boundary Arbitration (Bangladesh* v. *India)*, *Award*, 7 July 2014, para. 272.

[20]*Ibid.*, paras. 406-421.

[21]ITLOS, *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, 14 Mar. 2012, para. 169.

[22]Cf. CR 2017/11, p. 13, para. 21 (Lowe).

[23]*Ibid*., pp. 15-16, para. 33 (Lowe); see also p. 16, para. 32; pp. 11-12, paras. 12 and 15 (Lowe).

already mentioned, emphasizes the "primacy" of equidistance in the territorial sea[24], which suggests that delimitation in the territorial sea and in other maritime spaces are not to be assimilated. But leaving the dicta in that case to one side, it is worth recalling that there have only been three cases in which this Court or a tribunal has departed from a strict equidistance line in the territorial sea on account of special circumstances. Mr. Lathrop discussed them last week and I will not recount them[25]. The limited number of "special circumstances" that have been found in the cases, in comparison with "relevant circumstances" that have been found for delimitation of the EEZ and continental shelf, does suggest that there is a difference in practice. Further, the fact that the same factor has been found *not to be* a "special circumstance" for the delimitation of the territorial sea, but has been found *to be* a "relevant circumstance" for delimitation of the more functional maritime zones, confirms that there is a difference.

10. Nicaragua also placed emphasis on the remarks of President Guillaume in 2001: when discussing the *Jan Mayen* Judgment, he referred to the need to seek an equitable result for each of the "territorial sea, the continental shelf or the fishing zone"[26]. Those very general remarks, and the decision in *Jan Mayen*, both preceded the Court's development of the three-stage methodology for delimiting the EEZ and continental shelf, as well as the Judgment of the Court in *Nicaragua* v. *Honduras*, in which it was affirmed, consistently with the provisions of UNCLOS, that there is a distinction between the methods governing territorial sea delimitations and those governing the EEZ and continental shelf[27].

11. On the primacy of equidistance in the territorial sea, I have four further short but important points.

12. First point: last Monday I pointed out that Nicaragua's argument for adjustment to the equidistance line delimiting the territorial sea was made not solely on the basis of geographic features impacting on the line dividing the territorial sea, but because it considered the endpoint of

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[24]*Award in the Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname, Award*, 17 Sep. 2007, *RIAA*, Vol. XXX, Part 1, para. 296.

[25]CR 2017/9, pp. 36-37, para. 10 (Lathrop).

[26]*Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 9.

[27]*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 740, para. 269; see also p. 740, paras. 267-289.

that line to be an unsatisfactory place to start the EEZ continental shelf delimitation[28]. Professor Lowe repeated that plea on Friday, saying that in respect of the Caribbean, an adjusted equidistance line for the territorial sea "generate[s] a line that can be continued seawards so as to produce an equitable result in the delimitation of the EEZ and continental shelf, and a harmonious application of UNCLOS Articles 15, 73 and 84"[29]. Harmonious application is a new point and it seems then that Nicaragua is not pursuing its interpretation based on the object and purpose of the Convention[30]. Again though, no authority is cited. And crucially, no explanation is given for why this "harmonious application" means you should take into account the course of equidistance lines further out to sea, in delimiting within the territorial sea.

13. Second: Professor Lowe told you that a "straightforward" delimitation line is a desirable one[31]. He suggested that, for the territorial sea delimitation, it might be preferable to have a "simple[] line, with a single turning point at the 12 nautical-mile limit"[32]. It was said that Nicaragua's proposed line "yields results that look 'right'"[33]. These might seem like throw-away remarks but there is an important point. Maritime delimitation is not achieved by simply eye-balling a solution that looks "right" on what will inevitably be a highly subjective basis. The methods that have been agreed by States in UNCLOS and have been developed by the Court in its case law are ones which follow the coastal geography, and they cannot be disregarded in favour of fewer turning points, for example. The Court has said that in delimiting maritime boundaries it will consider "the circumstances of the case", "previous decided cases and the practice of States", "and [it] will be mindful of the need to achieve 'consistency and a degree of predictability'"[34]. This, unsurprisingly, points to the application of principle, not following suggestions from one party's counsel that a line adjusted in a particular way looks better or more "right" than an unadjusted line.

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[28]CR 2017/7, pp. 38-39, para. 10 (Parlett), citing *Maritime Delimitation in the Pacific Ocean and the Caribbean Sea (Costa Rica* v. *Nicaragua)*, CMN, paras. 2.44 and 2.49-2.50.

[29]CR 2017/11, p. 46, para. 18 (Lowe).

[30]CR 2017/7, pp. 39-40, paras. 13-16 (Parlett), citing *Maritime Delimitation in the Pacific Ocean and the Caribbean Sea (Costa Rica* v. *Nicaragua)*, CMN, para. 2.44.

[31]CR 2017/11, p. 13, para. 21 (Lowe).

[32]*Ibid*., p. 17, para. 42 (Lowe).

[33]*Ibid*, p. 20, para. 59 (Lowe).

[34]*Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 64, para. 58; quoted in *Award in the Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname*, *Award*, 17 Sept. 2007, *RIAA*, Vol. XXX, Part 1, para. 303.

14. Third point. When addressing you on the territorial sea delimitation in the Caribbean Sea, Nicaragua's counsel told you that it was "common ground that cut-offs resulting from coastal configurations can require adjustments to the provisional equidistance line"[35]. The Court will no doubt appreciate that this is an entirely general statement, which can be of no assistance to it in deciding the present case. The Court has never departed from an equidistance line in the territorial sea because of alleged cut-off, and there is no reason to do so in the present case, in either the Pacific or the Caribbean.

15. Fourth and final point. Nicaragua says there is no "practical difference" between delimiting the territorial sea and the EEZ/continental shelf[36]. It will not have escaped the Court's attention that Nicaragua took exactly the same approach to the delimitation as the Court does in its practice: it first considered delimitation of the territorial sea (on that we heard from Professor Lowe), it then considered delimitation of the EEZ/continental shelf (argued by Mr. Reichler). The same approach was taken in Nicaragua's written pleadings and it is helpfully consistent with the approach of the Court.

C. Radial projection to identify the relevant area

16. I turn then to the use of radial projection to identify the relevant area. I need not trouble the Court with the issue of identification of relevant coasts because the Parties are in broad agreement, save for those areas of coast that would be included if one uses a radial projection, and excluded if one uses a unidirectional frontal projection.

17. In presenting Nicaragua's case on frontal projection, Professor Oude Elferink emphasized the statement of the Court in *Black Sea*, relying on *North Sea*, that an underpinning principle is "that the 'land dominates the sea' in such a way that coastal projections in the seaward direction generate maritime claims"[37]. And although he had no authority for this point, Nicaragua's counsel said that "seaward" means frontal protection[38]. But when the Court set out the principle

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[35]CR 2017/11, p. 16, para. 34 (Lowe).

[36]*Ibid.*, p. 12, para. 14 (Lowe).

[37]*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, pp. 96-97, para. 99; cited in CR 2017/10, p. 25, para. 21 (Oude Elferink).

[38]CR 2017/10, p. 26, para. 21 (Oude Elferink).

that the land dominates the sea in *North Sea*, it noted that "the land is the legal source of the power which a State may exercise over territorial extensions to seaward"[39]. The underlying principle thus explicitly links "territorial extensions . . . seaward" with the extension of a State's jurisdiction over maritime spaces. And that jurisdiction is defined not by the use of a frontal projection, but by a radial projection[40].

18. The use of a frontal projection would essentially ignore the reality that coasts project radially and the fact that outer limits are measured radially. Nicaragua agrees that the relevant area is the area of overlapping projections of the two States[41]. But then it says that "the determination of the outer limits of maritime areas and their bilateral delimitations are separate issues . . . governed by different provisions of [UNCLOS]"[42]. Two brief points on this.

(a) First, UNCLOS does not explain how to measure relevant area, but it does explain how outer limits are to be measured[43]. There is no cogent reason to ignore the provisions of the Convention that help you identify the limits of a State's maritime entitlement in identifying the limits of two State's overlapping entitlements.

(b) Second, Nicaragua purported to rely on the approach of the Court. The most recent Judgment of the Court that shows its approach is that of *Nicaragua* v. *Colombia*, where the Court included in the relevant area a radial projection from the coasts of the islands of San Andres and Providencia, rejecting Nicaragua's argument to the contrary[44]. Nicaragua's counsel avoided reference to this, preferring instead to focus on the exclusion of part of the coast of the Andaman Islands by the Tribunal in *Bangladesh* v. *India*[45]. But that approach is difficult to reconcile with the Court's approach in *Nicaragua* v. *Colombia*, as I mentioned last week[46].

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[39]*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 51, para. 96.

[40]CR 2017/7, pp. 45-46, paras. 28-30 and references therein. See also P. Weil, *The Law of Maritime Delimitation —Reflections* (1989), p. 63.

[41]*Maritime Delimitation in the Pacific Ocean and the Caribbean Sea (Costa Rica* v. *Nicaragua)*, CMN, para. 2.15; MCR, para. 3.3.

[42]CR 2017/10, p. 26, para. 22 (Oude Elferink).

[43]UNCLOS, Art. 4.

[44]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, pp. 679-680, para. 151.

[45]CR 2017/10, pp. 27-28, para. 26 (Oude Elferink).

[46]CR 2017/7, p. 49, para. 36 (Parlett).

While ignoring the Court's treatment of the Colombian islands, Nicaragua simultaneously sought to rely on the Court's treatment of the east-facing coast of Nicaragua's islands, as proof of the use of frontal projection[47]. But this does not assist Nicaragua. The Court did not count the east-facing coast of the islands in front of, and parallel to Nicaragua's mainland coast. It had already counted all of Nicaragua's mainland coast as relevant coast[48]. It would have been double-counting for the Court to include the islands as well. This does not support the frontal projection thesis; it merely shows that the Court took a sensible approach, within a margin of appreciation, to determine the relevant coast.

19. I put to the Court on Monday last week various hypothetical scenarios that demonstrated that a frontal projection approach means that only where adjacent States have some kind of coastal concavity will there ever be any relevant area. Those scenarios showed that Nicaragua's frontal projection approach makes no sense[49]. Professor Oude Elferink told you that you need not be concerned with hypotheticals because here you can find relevant area on a frontal projection approach[50]. But he made no effort to answer the point of principle: and the principle is important, because the law of maritime delimitation should be consistent and predictable.

20. Since Nicaragua insisted that its frontal projection approach leads to "no difficulty whatsoever"[51] in this case, it bears looking at it a little more closely.

(a) You see on your screens Nicaragua's Figure Ib-4, showing its relevant coast and relevant area in the Pacific. Nicaragua's relevant coast is quite straight, giving on Nicaragua's case a frontal projection in a single rectangular shape. The segments Nicaragua draws to identify Costa Rica's relevant coast do not project in a single direction but actually include three sections of coast facing in slightly different directions. We have added those projections in dark blue. If one then looks for the overlapping areas, you actually end up with disparate pieces

[47]CR 2017/10, p. 30, para. 33 (Oude Elferink).

[48]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 678, para. 145.

[49]CR 2017/7, pp. 46-47, paras. 31-32 (Parlett), and Costa Rica's judges' folder, tab 18.

[50]CR 2017/10, p. 26, para. 23 (Oude Elferink).

[51]*Ibid*.

which would, on Nicaragua's case, comprise the relevant area. These bear no relation to the actual area of overlapping entitlements of the two States.

(b) The same problem arises for Nicaragua in the Caribbean. If you take Nicaragua's view of the relevant area as set out in its Figure IIc-5, and apply unidirectional frontal projections to Nicaragua's segments of relevant coast for the two States, the resulting overlapping area would resemble the area now on your screens. Again, this bears no relation to the actual area of overlapping entitlements of both States. It makes no sense.

21. Finally, Professor Oude Elferink relied on my explanation of the exclusion of lengths of coast facing onto the same State, or a third State, or facing entirely away[52], as supporting his conclusion that frontal projection is appropriate, because "[t]he verb to face has a connotation of a frontal relationship"[53]. He said he was facing the Court in a frontal relationship. Okay, but if we are to see this as in any way a helpful analogy, it must then be noted that if he was projecting only frontally, in the same way that Nicaragua treats the relevant area, he would only have been facing the President, perhaps also the Vice-President and Judge Owada; one would need a radial projection to take in the entire Court, particularly Judges Al-Khasawneh, Judge Simma, and the Registrar. This deals with the word facing, but it does bear noting that the exercise of identifying the relevant area, and the relevant coast, is one in which the Court retains a "margin of appreciation"[54]. It is unsurprising that there is some degree of discretion and flexibility, given that this feeds into the third-stage gross disproportionality test. Nevertheless, that discretion need not be unprincipled: it can be applied in a consistent and predictable way, and it can reflect the reality that States use radial projections to determine their maritime entitlements.

D. Three-State coastal concavity as a relevant circumstance

22. Finally, I will make some remarks on the question of three-State coastal concavity as a relevant circumstance.

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[52]CR 2017/7, pp. 50-51, paras. 41-43 (Parlett).

[53]CR 2017/10, p. 29, para. 29 (Oude Elferink).

[54]UNCLOS Annex VII Tribunal, *Bay of Bengal Maritime Boundary Arbitration (Bangladesh* v. *India)*, *Award*, 7 July 2014, para. 302. See also *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 747, para. 289; see also CR 2017/7, p. 45, para. 27 (Parlett).

23. I explained last week that the concept of cut-off resulting from coastal concavity as set out in *North Sea* has continued to guide the decisions of this Court and international tribunals. Essential to the finding that concavity required adjustment in *North Sea* were three elements: concavity, equidistance and a third State. All three were present in *North Sea*, *Bangladesh/Myanmar* and *Bangladesh* v. *India*, and, together, they created cut-off effects severe enough to be considered relevant circumstances impacting the State at the back of the concavity and necessitating adjustment of the provisional equidistance line in favour of the middle State[55]. The "particular geographical situation of three adjoining States situated on a concave coast" in *North Sea* was commented upon in the *Continental Shelf* case between France and the United Kingdom[56].

24. Mr. Reichler takes issue with Costa Rica's application of this principle in the Caribbean Sea, on the basis that Costa Rica's delimitation with Panama is notional[57]. Professor Kohen and Mr. Lathrop will address the particular situation of the Caribbean Sea later this morning, but for the moment it suffices for me to note that ITLOS in *Bangladesh/Myanmar* saw no difficulty in adjusting the equidistance line to account for Bangladesh's three-State coastal concavity, even in the absence at that time of a delimited boundary with India[58].

25. As for the authorities concerning cut-off resulting from three-State coastal concavity, Nicaragua seeks to apply them to achieve an adjustment on the basis of what it calls its cut-off resulting from encroachment, or deflecting, of the equidistance line towards Nicaragua's coasts[59]. There are two points on this.

26. First, in arguing for an adjustment of the territorial sea equidistance line, Professor Lowe relied on the decisions in *North Sea*, *Bangladesh/Myanmar*, and *Bangladesh* v. *India*[60]. None of those are authority for an adjustment of the territorial sea delimitation to relieve a State from any kind of cut-off. They were all concerned with adjustment in maritime spaces further out to sea.

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[55]CR 2017/7, pp. 53-56, paras. 50-54 (Parlett).

[56]*Continental Shelf (France/United Kingdom), RIAA*, Vol. XVIII, p. 57, para. 99.

[57]CR 2017/11, p. 24, para. 12 (Reichler).

[58]ITLOS, *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, 14 Mar. 2012, paras. 292 and 297.

[59]CR 2017/11, p. 45, para. 15 (Lowe) and p. 49, para. 11 (Reichler).

[60]*Ibid.*, p. 45, para. 15 (Lowe).

Adjustment in the territorial sea as a consequence of concavity was sought but rejected by the Tribunal in *Bangladesh* v. *India*[61], although adjustment was made for the EEZ/continental shelf[62]. As I explained earlier by reference to the particular rule set out in Article 15 of UNCLOS, this follows from the primacy given to equidistance in the territorial sea, and it also follows from the fact that concavity did not have any significant effect in the territorial sea.

27. Second, the authorities Nicaragua relies upon stand only for the proposition that the middle State in a three-State coastal concavity may be entitled to an adjustment, and not for the proposition that one State perceiving itself as cut off, or encroached upon, by a single equidistance line with one of its neighbours is entitled to any adjustment.

28. Last week I showed you the figures produced in the Court's Judgment in *North Sea* as demonstrating the situation of cut-off requiring adjustment[63]. [Fig. 1-01] A similar but simplified sketch showing this same situation is now on your screens[64]: here, Germany would be State B, at the back of a three-State coastal concavity, with the two equidistance lines with States A and C giving rise to a single situation, the two lines meeting "at a relatively short distance from the coast", effectively "'cutting off' the coastal State from the further areas of the continental shelf outside of and beyond this triangle"[65]. [Fig. 2-01] The same sketch but turned 90 degrees is now on your screens[66]. That is *North Sea* cut-off requiring adjustment for State B.

29. [Fig. 3-01] Now you see the same sketch but with one of the equidistance lines removed[67]. Nicaragua would tell you that here it is State B and it is suffering from encroachment of the equidistance line with State C, Costa Rica, on the Caribbean Sea. It would tell you it was also suffering from encroachment on the Pacific, in a similar situation. But this is not *North Sea* cut-off. For Nicaragua, there is no third State. There are not two equidistance lines cutting Nicaragua off

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[61]UNCLOS Annex VII Tribunal, *Bay of Bengal Maritime Boundary Arbitration (Bangladesh* v. *India)*, *Award*, 7 July 2014, para. 272.

[62]*Ibid.*, paras. 406-421.

[63]*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, figure produced on p. 16 of the Judgment; reproduced in Costa Rica's judges' folder, tab 28.

[64]Reproduced in Costa Rica's judges' folder, tab 175.

[65]*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 17, para. 8.

[66]Reproduced in Costa Rica's judges' folder, tab 175.

[67]*Ibid.*

from areas beyond a triangle; there is no triangle at all. It is not cut-off. It is the equitable boundary that results from the geography. [Fig.] And this can be seen if one considers the equitable solution found by the Court in the *Black Sea* case[68], where Romania's coastal geography resulted in a delimitation line following equidistance from point 2. That line jutted out in front of Ukraine, then it turned sharply in a southerly direction. It had more than one turning point, and it has a significant kink. I will not offer the Court an opinion as to whether it "looks right". But it is an equidistance line and it was the equitable solution found by the consistent and predictable application of the law to the coastal geography; and as my colleagues will explain, that is the basis of the delimitations sought by Costa Rica in this case.

30. Mr. President, Members of the Court, that brings my remarks to a close. I ask that you give the floor to Mr. Wordsworth to address you on the delimitation of the maritime boundary in the Pacific Ocean.

Le PRESIDENT : Je vous remercie. Je donne à présent la parole à Monsieur Wordsworth.

Mr. WORDSWORTH:

THE DELIMITATION IN THE PACIFIC

A. Introduction

1. Mr. President, Members of the Court, three initial points to identify where the Parties stand after the first round on delimitation of the maritime boundary in the Pacific Ocean.

2. First, just as in its Memorial, and as developed in oral argument last Monday, Costa Rica seeks delimitation along the equidistance line in the maritime zones of the Pacific Ocean that are now before the Court.

3. Secondly, Nicaragua's case that the Nicoya Peninsula is a "coastal protrusion"[69], a "slight irregularity"[70], and the like, has been largely excised from Nicaragua's case, just as Nicoya was excised from the maps in Nicaragua's Counter-Memorial [Fig. Id-5 on screen], and the case on

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[68]Reproduced in Costa Rica's judges' folder, tab 175.

[69]*Maritime Delimitation in the Pacific Ocean and the Caribbean Sea (Costa Rica* v. *Nicaragua)*, CMN, para. 2.65.

[70]*Maritime Delimitation in the Pacific Ocean and the Caribbean Sea (Costa Rica v. Nicaragua)*, CMN, para. 2.67, referring to *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 49, para. 89.

delimitation in the EEZ and continental shelf has been put in oral argument almost entirely by reference to the alleged impacts of Santa Elena[71]. There was no response to the arguments that Costa Rica made in opening, at pages 65 through to 69 of the transcript of last Monday morning, which demonstrate that Nicaragua's attempt to accord half-effect to Nicoya is unprincipled, and I will not be repeating those arguments today[72]. That leaves Santa Elena [N slide 43 on screen], portrayed both orally and in new depictions as standing in isolation from all around it, and that leads to my third initial point.

4. Santa Elena is now being passed like a baton between Nicaragua's counsel, such that this area of 286 sq km of Costa Rica's mainland coast is said to justify a shift from equidistance through alleged distorting impacts in the territorial sea, and then said to justify a further shift from equidistance in the EEZ and continental shelf, up to 120 miles.

(a) The submissions on the territorial sea made by my learned friend Mr. Lowe were marked by their brevity, and he chose very deliberately to put his emphasis on Punta Blanca at the north-west tip of Santa Elena, which he distinguished as facing a different direction to Santa Elena itself, and then said: "Nicaragua submits that Punta Blanca, a relatively small feature on Santa Elena, is a good example of a special circumstance which requires an adjustment of the strict equidistance line."[73] And so, although the case put in the Counter-Memorial was being formally maintained, it appeared that the real argument was shifting to a position concerning the feature that is Punta Blanca, which it is no doubt hoped to appear a less extreme position.

(b) And when it came to the EEZ and continental shelf, my good friend Mr. Reichler was focusing on Punta Blanca again, calling it "a projection attached to a projection"[74] and then describing the second base point on Santa Elena at Cabo Santa Elena as "a promontory at the westernmost tip of the peninsula", and then "the end of a convexity attached to the end of a convexity"[75]. It is as if Nicaragua's very experienced counsel wished to convey the following message to the Court: "We know Nicaragua cannot expect you to disregard a substantial and populated part of

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[71]See CR 2017/11, p. 47, para. 5, then pp. 48-51, paras. 8-19.

[72]See CR 2017/7, pp. 65-69, paras. 32-43.

[73]CR 2017/11, p. 44, para. 9.

[74]*Ibid.*, p. 49, para. 12.

[75]*Ibid.*, p. 49, para. 13.

Costa Rica's mainland coast, but perhaps you could shave off just something from the minor promontories at the end of Santa Elena on which the current basepoints are located so that Nicaragua can then get some very minor shift away from equidistance, at least out to 120 miles where we say the Santa Elena base points cease to have effect." [Slide 43 off screen]

5. Well, if that is the new position *sotto voce*, it too should be rejected. And I turn to the details of the argument made last Friday to demonstrate why, regardless of how Nicaragua may now wish to tone down its claims, Costa Rica's claim to equidistance is well-founded.

B. The territorial sea delimitation

6. Four points in response on the territorial sea.

7. First, although Professor Lowe referred to *Guyana/Suriname*[76], this was by reference to the parties' cases and other statements on the then relevant coastal geography. As Dr. Parlett has explained, Costa Rica focuses instead on the obviously correct statement of law that Article 15 of UNCLOS places primacy on equidistance[77]. The onus is on Nicaragua to displace that primacy by establishing special circumstances. It is not enough to point in general terms to a "line with a kink in it"[78] or in equally general terms to cases on non-encroachment[79].

8. Secondly, the core of Professor Lowe's submission, and indeed that of Mr. Reichler, is that there is a deflection or distortion "caused by a relatively short stretch of the coastline of Costa Rica whose orientation is markedly different — so it is said — from the general direction of most of Costa Rica's Pacific coast"[80]. Santa Elena is thus presented to you as an "anomaly"[81]. Well, that depends on which version of Nicaragua's depictions of the coastal geography one wishes to believe in.

(a) In Nicaragua's Counter-Memorial [Fig Id-5 on screen], Santa Elena is depicted not as standing in splendid isolation, but as part of the Nicoya Peninsula. It can be seen, and is shown, as part

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[76]CR 2017/11, p. 44, para. 12.

[77]See, e.g., *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, Award of 17 Sept. 2007, *RIAA*, Vol. XXX, Part 1, p. 93, para. 296.

[78]CR 2017/11, p. 43, para. 3.

[79]*Ibid.*, p. 45, para. 15.

[80]*Ibid.*, p. 43, para. 6.

[81]*Ibid.*, p. 45, para. 17.

of a significant north and north-west facing mainland coast that, at Cabo Velas, is stretching around 60 km out to sea, as measured from the so-called "effective baseline without Nicoya". The north and north-west facing part of this mainland coast measures around 150 km [Fig Id-5on screen, with highlighting]. So, it remains the case that Nicaragua's position on general direction depends on ignoring large, if inconvenient, tracts of Costa Rican mainland coast.

(b) It is also worth noting, whilst on this Nicaraguan sketch-map, that this former depiction of the "proposed boundary"[82] demonstrates in its labelling how Santa Elena and Nicoya were both portrayed by Nicaragua in its Counter-Memorial as part of the same general feature. You see the name given to the sketch, and the reference to "equidistance without Nicoya Peninsula" and the blue dotted proposed line with "Half-weight to Nicoya". One sees the same portrayal, for example at Nicaragua's paragraph 2.60, where Nicaragua asserted that "Costa Rica identifies just three base points, all of which are located on features — Punta Santa Elena (2) and Cabo Velas (1) — situated in the northern reaches of the Nicoya Peninsula".

(c) But Santa Elena is now being re-characterized as a wholly independent feature. There is also an attempt at re-positioning it as if it were an anomaly along otherwise neatly adjacent coastlines that face in the same direction. Both Professor Lowe and Mr. Reichler placed great weight on Peter Beazley's 1994 paper and a statement there that: "In the case of adjacent coasts quite small coastal promontories close to the land terminal, as well as the presence of islands, may cause marked diversions of the equidistant line."[83] So, one notes this emphasis placed on what one commentator said many years ago and, even if this weight were justified, there is an obvious question as to whether, by reference to "quite small coastal promontories", Mr. Beazley had in mind an area of some 286 sq km like, and with the geographical positioning of, Santa Elena. One would have thought obviously not. And it is helpful to look at the figure that Mr. Beazley had in mind and was referring to in the passage on which Nicaragua's counsel

[82] See CMN, para. 2.74.

[83] CR 2017/11, p. 44, para. 11, and p. 54, para. 27. Available at: https://www.dur.ac.uk/ibru/publications/download/?id=225, p. 11.

rely, his Figure 5 now on your screens. And, one notes, this looks nothing like the coastal geography that is currently before the Court.

(d) Now, Nicaragua has had a jolly good go at persuading you otherwise because this is at the very heart of its case on delimitation in the Pacific. You were shown a series of schematics on the distorting effects of peninsulas — this [second slide at tab 44], then this [third slide at tab 44], then a further graphic [further slide at tab 44] as if each might be a relevant depiction in the current case, with Santa Elena then being depicted like this [slide at tab 43 on screen] — an isolated projection along broadly aligned coasts, portrayed in striking red, as if to mark it out as a dangerous contagion threatening the world of equitable delimitation. All well and good, but if one looks at Santa Elena as it really is [sketch-map No. 3.5], and this sketch is going in a straight line around 100 km from the starting-point in the direction of each Party's coast, it is quite plain that the Court is not looking at the situation that Mr. Beazley had in mind. If his Figure 5 [on screen] had looked anything like the actual geography, one might see the force in the repeated reference to this 1994 study. But it does not.

9. I move to my third point, Professor Lowe relied on a notably short list of other legal materials to support Nicaragua's attempt to characterize Santa Elena as a minor coastal promontory, and thus a special circumstance[84].

(a) There was a reference to the geographical descriptions of the litigants, and an independent expert, of the coastline under consideration in *Guyana/Suriname*[85], and also to the unsurprising fact that the tribunal in that case then itself verified that the features identified as absent were indeed absent. That does not get one very far.

(b) And the only other reference was to *Croatia/Slovenia*, where it was said that the tribunal found such a feature, that is, a large peninsula or protrusion from one of the coastlines that dramatically skewed the course of an equidistance line, and accordingly did shift the equidistance line. Well, the Court will be familiar with that case, including with the radically different coastal geography at issue. The tribunal was concerned not to exacerbate the way

[84]CR 2017/11, p. 44, para. 12.

[85]Referring to *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, Award of 17 Sept. 2007, *RIAA*, Vol. XXX, Part 1, paras. 375-376.

Slovenia was "boxed in", and you can see this from the tribunal's Map No. V now on your screen. And it was for that reason that a discount was applied to Croatia's Cape Savadrija. [Tribunal's Map No. VI on screen] And it is to be noted from that, that even in this exceptional and wholly different situation, the result was a quite minor shift to the equidistance line, and Slovenia did not get a territorial sea well to the south of point T4, which is what it was seeking. So the case is of no assistance at all to the current arguments being put forward by Nicaragua.

10. Fourth point: Professor Lowe then turned to, and concluded on, Nicaragua's case on an alleged cut-off. He said that: "When it reaches about 6 nautical miles off the coast of Nicaragua, the strict equidistance line turns to follow a course that is not very far from parallel with the coast of Nicaragua, it is something like 20º off the parallel with the general direction of the Nicaraguan coast."

(a) He put Nicaragua's Figure Id-4 up on your screens, and said the encroachment was obvious[86]. And it was almost as if Professor Lowe had forgotten that he was arguing the case on the territorial sea, and that to show some alleged encroachment beyond 12 nautical miles would somehow suffice.

(b) Unfortunately, he then had to go to Nicaragua's Figure Ic-2, up on your screens, to show what Nicaragua is in fact claiming in the territorial sea[87]. So, first, one looks for some demonstration that the equidistance line follows a course that is not very far from parallel with the coast of Nicaragua; but that point scarcely leaps out. By contrast, what *is* remarkable is how Nicaragua's claimed line (in green) does run parallel to Costa Rica's coast, effecting a very obvious cut-off. That was said not to matter because it is "a minor and localized effect resulting from the anomalous orientation of the coastline of Santa Elena"[88]. Yet, that was no answer at all to our point that what Nicaragua is in fact doing is impermissibly prioritizing its EEZ and continental shelf claim over Costa Rica's territorial sea. You can see that from Slide No 48 that I put up last Monday morning[89]. No response to that. And there was no explanation as to how

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[86]CR 2017/11, p. 45, para. 14.

[87]*Ibid.*, para. 16.

[88]*Ibid.*, para. 17.

[89]Cf. ITLOS, *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, 14 Mar. 2012, para. 169.

Santa Elena could now be presented as an isolated anomaly, as opposed to one part of "the northern reaches of the Nicoya Peninsula", as it had much more accurately been portrayed in Nicaragua's Counter-Memorial.

C. The delimitation of the exclusive economic zone and continental shelf

11. I turn then to the case on the EEZ and continental shelf put forward by Mr. Reichler, from which you are really being asked to work backwards to justify Nicaragua's case on the territorial sea[90] — a misconceived approach to the law that Dr. Parlett has already addressed.

12. Five points.

13. First, Mr. Reichler's emphasis was on Santa Elena as opposed to Nicoya[91]. He said that "most of the prejudice to Nicaragua is caused by the Santa Elena Peninsula"[92], and he focused for the very greater part of his presentation on its allegedly distorting and disproportionate impact out to 120 miles[93]. And the Nicoya Peninsula *per se* was largely dropped.

14. Secondly, as with Professor Lowe, Mr. Reichler's arguments were based on an inaccurate portrayal of Santa Elena's relationship with other parts of Costa Rica's mainland coast[94]. As you will recall, and as I have just shown you, various slides were put up on your screens seeking to depict Santa Elena as if it were indeed an isolated projection and, through abundant repetition of the words "peninsula", "promontory", "jutting", "projection", and "convexity", it was hoped that the Court would start to believe that Santa Elena could somehow correctly be treated as a minor and anomalous feature. And all this led up to Nicaragua's slide PR2-7, now on your screens, in which Mr. Reichler showed what the equidistance line would be without what he called the "particularly elongated configuration" of Santa Elena[95].

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[90] CR 2017/11, p. 46, para. 18.

[91] *Ibid.*, p. 47, para. 5.

[92] *Ibid.*, p. 51, para. 19.

[93] *Ibid.*, p. 49, para. 10.

[94] *Ibid.*, pp. 48-49, paras. 8-9.

[95] *Ibid.*, p. 48, para. 10.

(a) And so one sees depicted the, quote, "distorting effect of the Santa Elena Peninsula", in support of Mr. Reichler's position that the two base points on Santa Elena "control the equidistance all the way out to 120 miles" and have a "very exaggerated" and "disproportionate effect"[96].

(b) But one needs to look a little more closely at what is happening here. If you place a point where the provisional equidistance line and the so-called "equidistance line without Santa Elena" diverge, unsurprisingly you see that Santa Elena is controlling, along with the base points on Nicaragua's coast. We have then put a point on the first turning point on the line, and when one sees what is happening in terms of equidistance, it is not just the base points on Santa Elena that are being discounted, but also potential points on the northern coastline of Nicoya. Rather curious.

(c) We have then added three further points on the line, one at the next turning point, one midway between these two, and one at the end of this line, said to show "equidistance without Santa Elena". And one starts to wonder what is really happening.

(d) So, two questions.

(i) First, for Nicaragua, what does an equidistance line out to 120 miles without Santa Elena — just Santa Elena — actually look like, on its case on distorting impact? Perhaps they will show the Court on Thursday, although it will be a shame that by then Costa Rica will not be able to respond to the case as it would correctly be put.

(ii) Second, how can this be a tenable position for Nicaragua? Costa Rica's argument on how it is evidently contrary to case law and basic principle to seek to give half effect to the Nicoya Peninsula has gone unanswered[97], save for by way of a brief reassertion of the alleged cut-off, which I will respond to shortly. The case has instead been presented by Nicaragua by reference to Santa Elena and its alleged distorting effect out to 120 miles. And yet, there has been no fair depiction of what that distorting really is. The alleged distortion, I should say. The reality then is that you are *still* being asked to discount the 7,500 sq km of Nicoya, even in the area out to 120 miles, and it is *still* as if Nicoya was

[96]CR 2017/11, p. 49, para. 10.

[97]See CR 2017/7, pp. 65-69, paras. 32-43.

somehow to be equated with the Scilly Isles[98], or Serpent's Island[99], or St Martin's Island[100], or Fasht al Jarim[101]. And the unprincipled nature of such comparisons, which has not in any event been addressed by Nicaragua, cannot be portrayed by them as confined to the area between 120 and 200 nautical miles through an attempt to show that the distortion up to 120 miles is really down to Santa Elena.

15. I move to my third point of response, which concerns what was said about cut-off, which was in fact just to show you this graphic, this is their PR2-10B, and then to seek to criticize two graphics shown by Costa Rica.

(a) Our slide 54 from Monday morning [on screen] was described as "unfortunate manipulation" and it was said to have been "misleading to present an image designed to make it appear that no cut-off exists"[102]. Well that seems a bit unfortunate as that was not the point being made. Our point was that "any maritime boundary, however drawn, will cut off some of the projection from a given coast", and that "[a]n equidistance line is a balanced and equitable way of allocated cut-off"[103]. The purpose of the graphic was, as I explained when I introduced it, to show that "a provisional equidistance line in no sense restricts Nicaragua from reaching the 200-mile limit"[104]. And the graphic shows that, and it is notable that Nicaragua has had nothing to say on the substance of the not unimportant point that was in fact being made.

(b) Then, our slide 51 [on screen] received similar criticism, it being said that the arrows would have to be drawn perpendicular to Costa Rica's coast so as accurately to reflect the seaward projection of the coast[105]. As with the preceding figure, it depends on whether you understand coasts as projecting frontally only or in a radial manner. It is a nothing point, and again it is to be noted that Mr. Reichler did not engage on the substance of the actual point being made,

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[98] *Continental Shelf* case *(France/United Kingdom), RIAA.*, Vol. XVIII, p. 114, paras. 249-251.

[99] *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 110, para. 149.

[100] ITLOS, *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, 14 Mar. 2012, paras. 292, 297.

[101] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, pp. 114-115, paras. 247-248.

[102] CR 2017/11, p. 52, para. 20.

[103] CR 2017/7, p. 66, para. 35.

[104] See CR 2017/7, p. 67, para. 40.

[105] CR 2017/11, p. 56, para. 33.

which was that you can draw supposed cut-off arrows up to an equidistance line — as Nicaragua has done in its Counter-Memorial and again last Friday[106] — in pretty much all cases, as that is the nature of the allocation effected by equidistance[107]. His point would have been of much more interest if he had been able to engage with the sketch-maps on the equitable delimitations that I referred you to in *Romania* v. *Ukraine*[108] and *Guyana/Suriname*[109], which, if given Nicaragua's treatment, would suddenly appear unacceptable. But he was not able to do so.

16. Fourth point, Mr. Reichler sought to justify Nicaragua's inconsistent treatment of features on the Caribbean side, notably Corn Islands, on the basis that what mattered most was location or specific geographic context, not size[110]. Apparently it is acceptable to give the 12.6 sq km of the Corn Islands full effect and the 286 sq km of Santa Elena half effect because Santa Elena is closer to the starting-point, and also to the equidistance line, and thus has an exaggerated effect, so it is said[111].

(a) But there is a fundamental misunderstanding here. The Corn Islands are small, isolated maritime features out to sea, rather like Abu Musa which also got a mention last Friday[112]. They are treated by international law accordingly. Santa Elena is part of the mainland coast, located with the Nicoya Peninsula in a substantial north and north-west-facing area of coastal territory. Of course their far greater size matters, and location does too, and both factors play against Nicaragua's depiction of what is somehow said to be inequitable on the Pacific side but then equitable when it comes to the Caribbean.

(b) And as to what Mr. Reichler said about the "exaggerated effect" of Santa Elena, well, who knows what Nicaragua's case on that effect really is? Again, perhaps Nicaragua will be showing the Court on Thursday what the equidistance line truly looks like with Santa Elena

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[106]Counter-Memorial, Nicaragua's Figure Id-3, and Nicaragua's judges' folder, 7 July 2017, 10 a.m., tab 48.

[107]See Costa Rica's judges' folder, 3 July 2017, 10 a.m., tabs 52-53.

[108]*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 133, sketch-map No. 9.

[109]*Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, Award of 17 Sep. 2007, *RIAA*, Vol. XXX, Part 1, p. 130, map 3.

[110]CR 2017/11, pp. 50-51, paras. 15-17.

[111]*Ibid.*, p. 50-51, para. 17.

[112]*Ibid*., p. 51, para. 18.

alone discounted, not any and all inconvenient slices of Nicoya, so that one will then get to see what this alleged exaggerated effect looks like.

17. I note briefly that, in this context, Mr. Reichler also sought to rely on the treatment of St Martin's Island[113]. St Martin's was, unsurprisingly, treated by ITLOS on the basis that it was an island located in front of Myanmar's mainland coast. As those are characteristics not shared by Santa Elena, it is very unclear what Nicaragua thinks can be gleaned from that case.

18. Finally, a word on the cases and other materials that Mr. Reichler sought to rely on.

19. And you will recall that great weight was placed on the decision in the *Continental Shelf case (France/United Kingdom)* not to accord full weight to the Scilly Isles[114].

(a) As the tribunal there saw matters, and one can see this from a careful look at Nicaragua's sketch-map, which we have put back up on the screen [PR2-12a], in the Atlantic region, the situation geographically was one of two laterally related coasts, abutting on the same continental shelf, which extended from them a great distance seawards into the Atlantic Ocean[115]. The tribunal then had to deal with the oddity that both States had relatively small but populated islands in front of the relevant projections, but with Ushant only 10 miles, as opposed to the Scilly Isles 21 miles, from the respective mainland coasts.

(b) The tribunal was alive to the fact that the western tip of the English mainland already projected further into the Atlantic. In such circumstances, it appears unsurprising that the tribunal considered that, taking into account "that in other respects the two States abut on the same continental shelf with coasts not markedly different in extent and broadly similar in their relation to that shelf", the Scilly Isles should not be accorded full effect[116]. In the event, the tribunal of course ultimately accorded half-effect to the Scilly Isles, finding some confirmation in the fact that the distance that the Scilly Isles extended from the coastline of the mainland of the United Kingdom westwards onto the Atlantic continental shelf was slightly more than twice the distance that Ushant extended westwards the coastline of the French mainland[117].

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[113] *Ibid.*, p. 51, para. 18.

[114] *Continental Shelf* case *(France/United Kingdom), RIAA*, Vol. XVIII, p. 114, paras. 249-251.

[115] *Ibid.*, p. 114, para. 241.

[116] *Ibid.*, para. 244.

[117] *Ibid.*, para. 251.

(c) But none of this is of much more than academic interest, save to note that the actual English mainland was *not* discounted in any way. In the current case, there are no competing islands, one of which has an inequitable effect largely because it happens to be twice as far out to sea.

(d) Mr. Reichler sought to make something of the fact that the *Continental Shelf* arbitration was cited in *Qatar* v. *Bahrain*[118]. He said as follows: "In the Court's language, what is to be avoided is a situation in which 'a remote projection of . . . [the] coastline . . . which, if given full effect, would 'distort the boundary and have disproportionate effects'". Well, sort of. The Court was in fact describing "Fasht al Jarim as a remote projection of Bahrain's coastline in the Gulf area, which, if given full effect, would 'distort the boundary and have disproportionate effects'", and it went on to explain that "such a distortion, due to a maritime feature located well out to sea and of which at most a minute part is above water at high tide, would not lead to an equitable solution"[119]. Mr. Reichler concluded on *Qatar* v. *Bahrain* saying: "That is the case here."[120] But clearly not if you look at the Court's reasoning in full. And Costa Rica, unsurprisingly, considers it important to look at what the Court, and other tribunals, have said by reference to the *actual* geography that they were looking at.

20. Mr. Reichler then referred to the 1989 writings of Prosper Weil, and a statement that "courts will seek to ascertain whether a minor geographical feature, which is out of line with the general configuration of the coast, has a disproportionate effect on the equidistance line"[121]. Well, one wonders where, in this case, is the "minor geographical feature, which is out of line with the general configuration of the coast"? It is not Santa Elena, and it is not the Nicoya Peninsula. And what, anyway, did Professor Weil have in mind? He explained that "courts do not intend every geographical feature to be taken into account for correcting the original line of equidistance, but only those which are special, unusual, non-essential, insignificant". Well, these are not the attributes of Santa Elena or the Nicoya Peninsula. Professor Weil then looked at the question of which sort of deviations should be corrected because they produce an inequity, saying that the aim

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[118]CR 2017/11, p. 53, para. 25.

[119]*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, pp. 114-115, paras. 247-248.

[120]CR 2017/11, p. 53, para. 25.

[121]*Ibid.*, p. 53, para. 26.

was the modest one "to erase the most flagrant and most obvious ones"[122]. Again, none of this assists Nicaragua.

21. Mr. Reichler then referred to the same passage from Mr. Beazley's 1994 paper that Professor Lowe relied on, and I have already dealt with that.

22. Finally, Mr. Reichler turned to the recent award in *Croatia* v. *Slovenia*, albeit to refer to passages that concern only the territorial sea. Somehow the tribunal's findings in that case, concerning the very particular configuration before it and the need not to exacerbate the boxing in of Slovenia in the territorial sea, was said to offer "precisely the solution to the problem that Nicaragua has proposed"[123]. Apparently, if a tribunal finds that a given cape in Croatia should not be given full effect as to the territorial sea, so as not to exacerbate an exceptional boxing-in effect within the already crowded box at the top of the Adriatic Sea, that provides "precisely the solution" so far as concerns the alleged irregularities of Santa Elena and Nicoya in delimiting the EEZ and continental shelf in the wide open spaces of the Pacific. Well, we do not see that. And it was notable that Professor Lowe, who knows the award rather better, and who has no affection for developing weak points, said markedly less.

23. Mr. President, Members of the Court, a short word by way of conclusion. Costa Rica seeks equidistance, and nothing more, because that is what it understands to result from the application of the relevant ***principles*** to the actual coastal geography. Its case is moderate and conservative. Nicaragua, by contrast, has elected to follow a different and possibly, it might be thought, rather more traditional approach of putting forward an extreme position seemingly in the hopes that the Court will come down somewhere in the middle — although quite where that middle might be has yet to be fairly depicted. Costa Rica, however, considers that time has moved on and that such an approach underestimates the rigour with which the Court approaches any exercise of delimitation before it. On that basis, Nicaragua's claims in the Pacific Ocean should be emphatically rejected***, and*** regardless of what new attempts at presentation or messages *sotto voce*, or otherwise, you may hear on Thursday.

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[122]Prosper Weil, The Law of Maritime Delimitation — Reflections (1989), pp. 226-227.

[123] CR 2017/11, p. 54, paras. 28 ff.

Mr. President, Members of the Court, I thank you for your attention, and I ask that you give the floor to Professor Kohen to continue Costa Rica's response, starting off with the outstanding issues on the land boundary, unless of course, Mr. President, you consider it appropriate to take the morning pause now.

Le PRESIDENT : Merci, Monsieur Wordsworth. Je vais maintenant donner la parole au professeur Kohen pour sa plaidoirie. Monsieur le professeur Kohen, vous avez la parole.

M. KOHEN :

L'AFFAIRE D'*ISLA PORTILLOS* DANS SES CONTOURS PRÉCIS

A. Introduction

1. Monsieur le président, Mesdames et Messieurs les juges, s'il fallait apporter une preuve supplémentaire de la volonté du Nicaragua de rouvrir une affaire déjà décidée par vous, nos adversaires l'ont fait de manière éclatante lors du premier tour. Pour justifier la répétition de leur revendication de la plage d'Isla Portillos, ils ont déployé les mêmes arguments qui vous sont si familiers à ce stade. Mais, contrairement au théâtre, *bis repetita* n'a pas de place dans la grande salle de justice du Palais de la Paix.

2. Cette situation de *déjà-vu* est exacerbée par le fait que, comme dans l'affaire tranchée en 2015, le Nicaragua change une nouvelle fois de position au cours de la procédure. Son contre-mémoire du 18 avril 2017 disait que la frontière passait par un chenal reliant le fleuve à la lagune. Une pièce de procédure élaborée même après que les Parties eurent accompagné les experts dans leur descente sur les lieux. Comme ce chenal n'existe pas, le défendeur appelle à la rescousse d'autres arguments. L'argument à présent est que le chenal «n'a pas entièrement disparu» et que la frontière devrait suivre de manière approximative ce qui aurait été la rive sud de l'ancien chenal[124].

3. Le fait est que le chenal a entièrement disparu d'une manière graduelle, fruit de l'action naturelle. Au sens en question ici, un chenal est une voie d'eau reliant deux espaces. Je n'entrerai même pas dans le débat sur le point de savoir si les petites lagunes se trouvant sur la plage seraient

[124] CR 2017/10, p. 17, par. 27 (Argüello) ; CR 2017/12, p. 31, par. 53 (Martin).

ou non les vestiges d'un chenal. Nous avons attiré l'attention des experts sur notre avis selon lequel ces lagunes ne sont pas les vestiges du «premier chenal rencontré» par Alexander. Les experts, dans leurs observations à nos commentaires, se sont abstenus de discuter notre position, contrairement à d'autres points mentionnés dans nos commentaires[125]. Que ces lagunes soient ou non les vestiges d'un chenal, elles ne sont plus un chenal reliant le San Juan à la lagune Los Portillos. Rien dans le droit applicable ne permet de les attribuer au Nicaragua.

4. La faiblesse de cette nouvelle argumentation d'une frontière terrestre suivant l'ancien chenal est démontrée par son développement de dernière minute. En effet, s'il était vrai que la prétendue souveraineté sur la plage, que le Nicaragua revendique pour la deuxième fois devant vous, ne dépend pas de l'existence du chenal qui relierait la lagune au fleuve, pourquoi alors l'avoir inventé de toutes pièces il y a à peine trois mois ? La réponse est facile à comprendre : parce que le Nicaragua sait que la seule possibilité sérieuse d'invoquer sa souveraineté en conformité au régime frontalier existant passe par un cours d'eau qui pousserait le Costa Rica vers la rive droite de celui-ci.

5. Ce nouvel argument d'une frontière essentiellement «sèche» défie la lettre et l'esprit du régime frontalier forgé autour du traité de 1858. Ce régime est clair et inclut deux points essentiels : *primo*, ce qui est à droite du fleuve depuis son embouchure et jusqu'à un point situé à trois milles de Castillo Viejo est costa-ricien. *Secundo*, un chenal reliant la lagune Los Portillos à l'embouchure du fleuve doit être navigable pour que la frontière suive sa rive droite. Vous avez déjà déclaré ces deux points fondamentaux du régime dans votre arrêt de 2015 ; je n'ai donc aucune raison d'y revenir[126].

6. Maintenant qu'il devient évident que la position nicaraguayenne d'un chenal reliant le fleuve à la lagune est intenable, le Nicaragua sort l'idée selon laquelle «la zone» de la lagune Los Portillos était une partie importante du «système du fleuve» et que, par conséquent, elle devrait être nicaraguayenne[127]. Je voudrais bien croire que cette référence à la zone ne constitue pas une

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[125] Observations écrites du Costa Rica au rapport des experts concernant le paragraphe 106 ; réponse des experts aux observations écrites du Costa Rica, commentaire 4 concernant le paragraphe 106.

[126] *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)* et *Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica), arrêt, C.I.J. Recueil 2015 (II)*, p. 700, par. 76.

[127] CR 2017/10, p. 17, par. 28 (Argüello).

nouvelle tentative de revendication de l'ensemble de la partie septentrionale d'Isla Portillos. La lagune constituait en effet le débouché en mer du fleuve. Personne ne conteste aujourd'hui que tel n'est plus le cas. [Projection n° 1] Qui plus est, il suffit de comparer la couleur brunâtre du San Juan en sa qualité de fleuve qui charrie une forte charge sédimentaire et la couleur verdâtre de la lagune Los Portillos pour s'apercevoir que ces deux cours d'eau sont aujourd'hui séparés et distincts. La photographie satellite que vous voyez à l'écran est parlante à cet égard et me dispense d'autres commentaires [fin de la projection n° 1]. Rien ne justifierait un lien de souveraineté «sec», je veux dire par là strictement terrestre, comme le prétend le défendeur aujourd'hui. Les tentatives passées du Nicaragua consistant à l'établir artificiellement, par voie aquatique, ont été mises en échec par vos décisions obligatoires dans l'affaire relative à *Certaines activités du Nicaragua dans la région frontalière*.

7. Je voudrais relever une contradiction dans l'argumentation nicaraguayenne sur la disparition des cours d'eau et son impact sur les questions de frontières. Il s'agit des manifestations de l'agent à propos de la baie de San Juan del Norte. L'ambassadeur Argüello a considéré que cette baie a disparu et a renvoyé au contre-mémoire dans l'affaire relative à *Certaines activités menées par le Nicaragua dans la région frontalière*[128]. Dans cette affaire, le Nicaragua a voulu introduire, par voie de demande reconventionnelle, une revendication de souveraineté exclusive sur la baie de San Juan del Norte, contraire à l'article IV du traité de 1858 selon lequel cette baie et celle de Salinas «seront communes aux deux Républiques». Pour justifier sa revendication de souveraineté exclusive, le Nicaragua affirmait ceci : «l'ancienne baie de San Juan del Norte située à l'ouest de la frontière entre les deux Parties a disparu, et les prétentions du Costa Rica sur cette zone n'ont donc plus lieu d'être»[129]. [Projection n° 2 — Carte INETER 2011] Je relève que, *contrairement au chenal reliant le fleuve à la lagune Los Portillos*, la baie de San Juan del Norte n'a pas disparu. Vous voyez à l'écran la carte officielle de l'INETER de 2011 montrant la revendication nicaraguayenne de la frontière suivant le *caño* construit peu avant[130]. [Zoom à la baie de San Juan del Norte] On y voit clairement que la baie de San Juan del Norte existe toujours — et même pour

[128] CR 2017/10, p. 19, par. 33 (Argüello).

[129] *Certaines activités*, CMN, par. 9.34.

[130] *Certaines activités*, MCR, vol. 5, annexe 196.

le Nicaragua —, certes, à un emplacement qui n'est plus celui de 1858. Les photographies satellite que vous trouvez à foison dans le dossier montrent également cet espace aquatique [fin de la projection n° 2].

8. Laissons donc de côté l'affirmation erronée de la disparition de la baie de San Juan del Norte. Concentrons-nous sur l'argumentation juridique. Si, comme le prétend le Nicaragua, «la baie de San Juan del Norte a disparu et les prétentions du Costa Rica n'ont donc plus lieu d'être», le Nicaragua devrait également reconnaître que le «premier chenal rencontré» ou que tout chenal reliant le San Juan à la lagune a lui aussi «disparu et [que] les prétentions du [Nicaragua] n'ont donc plus lieu d'être». Il semblerait que la perception juridique de l'impact de la disparition des espaces aquatiques varie pour le Nicaragua selon que cela puisse l'aider ou non à étendre sa souveraineté.

9. Je n'abuserai pas de votre patience, Mesdames et Messieurs de la Cour, avec la cartographie. Sans parler de la valeur limitée de la cartographie selon votre jurisprudence[131], celle présentée par le Nicaragua ne sert pas à justifier sa prétention actuelle : outre le fait que ces cartes sont dépassées, aucune d'elles, je répète — aucune — ne montre le «cordon littoral séparant Isla Portillos de la mer des Caraïbes» (pour utiliser l'euphémisme du défendeur pour se référer à la plage)[132], constituant une unité avec la terre ferme et étant attribué au Nicaragua. Elles ne montrent, encore moins, aucune ligne qui constituerait une frontière terrestre dans le sens strict du terme, c'est-à-dire «sèche», sur le sol, contrairement à une frontière fluviale ou lacustre, à la rive, tel qu'établie par le traité de 1858 dans cette zone.

10. Je ne consacrerai pas non plus beaucoup de temps pour me référer au long et hasardeux exercice auquel s'est adonné M[e] Martin pour tenter de démontrer que la plage d'Isla Portillos serait constituée de territoires qui étaient autrefois nicaraguayens[133]. En réalité, c'est le même argument que l'ambassadeur Argüello avait développé sans succès en 2015 pour justifier la prétendue souveraineté nicaraguayenne sur la partie septentrionale d'Isla Portillos[134]. Au-delà du caractère

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[131] *Différend frontalier (Burkina Faso/République du Mali), arrêt, C.I.J. Recueil 1986*, p. 582, par. 54 ; *Ile de Kasikili/Sedudu (Botswana/Namibie), arrêt, C.I.J. Recueil 1999 (II)*, p. 1098, par. 84 ; *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 667, par. 88.

[132] CR 2017/12, p. 13, par. 11 (Samson).

[133] *Ibid.*, p. 28, par. 40 et p. 31-32, par. 54-59 (Martin).

[134] CR 2015/15, p. 15, par. 26, p. 16, par. 31 *a)* et p. 23-24, par. 60, point 3 (Argüello) ; MCR, p. 25, par. 2.26.

totalement contestable de cette argumentation du point de vue factuel, elle est également fausse et dangereuse sur le plan juridique. Fausse, car elle ne tient pas compte des changements physiques intervenus sur le terrain et du fait que la frontière suit ces changements, comme les deux Parties se sont lassées de le répéter devant vous Mesdames et Messieurs les juges. Dangereuse aussi, car cela équivaudrait à ouvrir le champ à des analyses, ici ou là, pour savoir si chaque lopin de terre qui aujourd'hui se trouve d'un côté ou de l'autre du fleuve a été par le passé costa-ricien ou nicaraguayen. Par exemple, si la baie de San Juan del Norte est aujourd'hui totalement entourée de territoire nicaraguayen, cela n'était pas le cas au moment de la conclusion du traité de 1858, quand le territoire costa-ricien bordait une partie de la baie. L'interprétation nicaraguayenne, si elle était suivie, ouvrirait la voie à des conflits sans fin et réduirait à néant le principe de stabilité des frontières, lequel est applicable aussi aux frontières susceptibles de changements physiques.

11. Monsieur le président, conformément à vos prescriptions de vendredi dernier, je vais uniquement aborder deux points. Un premier, relatif aux difficultés du Nicaragua avec la lecture du paragraphe 69 de votre arrêt de 2015. Et un deuxième, corollaire du précédent, concernant nos conclusions sur l'entorse faite au principe de l'autorité de la chose jugée par le Nicaragua.

Si vous le voulez bien, Monsieur le président, je pense que c'est un moment opportun pour faire une pause.

Le PRESIDENT : Vous pouvez poursuivre, Monsieur le professeur.

B. Les difficultés du Nicaragua avec la lecture du paragraphe 69 de l'arrêt de 2015

12. Merci, Monsieur le président. Je commence donc par le paragraphe 69. Le Nicaragua prétend que votre définition du territoire litigieux est «incomplète». Pour parvenir à cette conclusion, M. Samson a dit que vous n'aviez pas précisé les limites des accidents géographiques que vous mentionnez, à savoir : la rive droite du *caño* litigieux, la rive droite du fleuve jusqu'à son embouchure et la lagune de Harbor Head ou Los Portillos[135]. Vos ordonnances et arrêt eux-mêmes parlent de «la définition du territoire litigieux». Comme vous l'avez soutenu dans l'affaire

[135] CR 2017/11, p. 17, par. 28 (Samson).

Libye/Tchad, «[d]éfinir un territoire signifie définir ses frontières»[136]. A en croire M. Samson, toute définition d'un territoire ne précisant pas exactement par où passent ou se situent les accidents géographiques y mentionnés serait incomplète. C'est une manière périlleuse d'interpréter les choses et qui pose là encore problème du point de vue du principe des frontières stables et définitives. Vous avez indiqué trois accidents géographiques ; où qu'ils passent ou seraient reliés, c'est par là que le territoire est défini. Cela n'est pas très difficile à comprendre.

13. J'aborde maintenant un problème fondamental et insoluble pour le Nicaragua. Il ne peut pas expliquer pourquoi il a été condamné pour violation de la souveraineté territoriale du Costa Rica du fait de l'emplacement du campement militaire *sur la plage d'Isla Portillos.* [Projection n° 3] Je cite M. Samson :

> «Le Costa Rica fait par ailleurs grand cas du campement militaire nicaraguayen mentionné dans la dernière phrase du paragraphe 69. La Cour a effectivement considéré que ce campement se trouvait sur le territoire litigieux. Est-ce que cela signifie que l'ensemble du cordon littoral s'y trouvait également ? Certainement pas ! Le paragraphe 69 ne dit pas cela. Il vise le campement militaire, à l'exclusion du cordon littoral.»[137]

14. Arrêtons-nous un instant sur cette manière particulière de lire votre arrêt. Le Nicaragua ne peut pas nier — en fait, il n'a pas le choix — que le campement militaire nicaraguayen «se trou[vant] sur la plage elle-même à la lisière de la végétation», à proximité d'un des *caños* dragués en 2013, était situé «sur le territoire litigieux tel que défini par [la Cour] dans son ordonnance du 8 mars 2011»[138]. Selon le Nicaragua, cela ne signifie pas «que l'ensemble du cordon littoral» — c'est-à-dire ce que vous Mesdames et Messieurs les juges appelez «la plage» — s'y trouvait également. C'est un raisonnement curieux, Monsieur le président.

15. Apparemment, si l'on en croit M. Samson, pour des raisons plutôt obscures, seuls les quelques mètres carrés de la plage où se trouvait le campement militaire feraient partie du territoire litigieux, mais pas le reste de la plage. Où est la logique de ce raisonnement ? Le paragraphe 70 ne sert pas d'explication : il ne fait aucune distinction, tout simplement parce que le paragraphe 70 n'a

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[136] *Différend territorial (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994*, p. 26, par. 52.

[137] CR 2017/12, p. 17-18, par. 30 (Samson).

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

pas exclu la plage du territoire litigieux, comme nous l'avons expliqué la semaine dernière[139]. «La plage elle-même à la lisière de la végétation», disent votre ordonnance du 22 novembre 2013 et votre arrêt du 16 décembre 2015. Y aurait-il une différence entre le secteur de la plage où se trouvait le campement militaire en 2013 et le reste de «la plage à la lisière de la végétation» d'Isla Portillos ? Rien ne l'indique et il n'y a aucune raison de faire une quelconque distinction [fin de la projection n° 3].

16. Il est intéressant d'examiner un peu plus en détail l'emplacement de ce *campement militaire*, comme vous l'avez appelé dans vos décisions, et que le Nicaragua appelle maintenant «poste d'observation»[140]. [Projection n° 4] Mesdames et Messieurs les juges, ce campement était placé à proximité de l'une des lagunes existantes dans la région. Vous le voyez à l'écran dans la photographie satellite du 5 octobre 2013[141]. Monsieur le président, votre Cour n'a fait aucune distinction, quant à l'existence ou non de lagunes, pour dire que «la plage», «à la lisière de la végétation», faisait partie du territoire litigieux. Et qu'elle est donc costa-ricienne [fin de la projection n° 4].

C. La revendication nicaraguayenne est contraire au principe de l'autorité de la chose jugée

17. [Projection n° 5] M. Samson vous a montré une photographie satellite du 17 janvier 2017 dans laquelle le Nicaragua décrit en rose ce qui serait selon lui «la zone en litige»[142]. Vous la voyez de nouveau à l'écran [fin de la projection n° 5]. [Projection n° 6] Je vous montre de nouveau la photo du campement militaire dans son emplacement du 5 septembre 2013, que vous avez considéré comme constituant une violation de la souveraineté territoriale du Costa Rica [fin de la projection n° 6]. [Projection n° 7] Maintenant, plaçons ce campement militaire tel qu'il était en septembre 2013 sur la photographie satellite qu'utilise le Nicaragua pour présenter sa revendication aujourd'hui. [Zoom] On voit le *caño* oriental de 2013 asséché, on voit la lagune à l'extrémité de ce *caño* et on voit que l'emplacement du campement militaire se trouve sur le territoire dont le

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[139] CR 2017/8, p. 16-18, par. 21-27 (Kohen).

[140] CR 2017/10, p. 20, par. 39 (Argüello) ; CR 2017/12, p. 11, par. 7-8 (Samson).

[141] *Certaines activités*, demande de nouvelles mesures conservatoires, onglet n° 2 de vos dossiers (16 octobre 2013).

[142] Nicaragua, onglet n° 4 de vos dossiers (6 juillet 2017).

Nicaragua veut que vous disiez aujourd'hui qu'il est nicaraguayen. En d'autres termes, le Nicaragua vous demande aujourd'hui d'adopter une position en contradiction flagrante avec ce que vous aviez décidé en 2015 [fin de la projection n° 7].

18. Si l'on suit le défendeur, vous vous seriez trompés en le condamnant pour violation de la souveraineté territoriale costa-ricienne du fait de l'installation du campement militaire sur la plage d'Isla Portillos. Or, vous ne vous êtes pas trompés, Mesdames et Messieurs les juges. Je ne me mettrai évidemment pas dans la situation ô combien maladroite de vous flatter. Donc, je ne vous dirai pas que vous êtes infaillibles. Je rappellerai seulement la phrase du juge Robert H. Jackson, lorsqu'il était membre de la Cour suprême des Etats-Unis d'Amérique : «We are not final because we are infallible, but we are infallible only because we are final.»[143] 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*[144].

19. L'attitude du Nicaragua est inadmissible à plus d'un titre. Non seulement parce que le Costa Rica a droit à voir votre jugement respecté et appliqué, mais aussi car elle sape votre autorité, Mesdames et Messieurs les juges. La «sainteté» de la chose jugée, comme elle a été appelée dans la célèbre sentence arbitrale sur la *Fonderie du Trail*[145], va au-delà même des parties et de votre haute juridiction. Elle concerne les fondements mêmes du droit international et du règlement pacifique des différends. Il doit y avoir un terme à un différend. Ce n'est pas possible de plaider encore et encore ce qui a déjà été décidé avec caractère obligatoire et sans recours. Il y va de l'idée même de la justice internationale, de la sécurité et de la stabilité des relations internationales.

D. La tâche de la Cour

20. Dans la présente affaire, la question n'est donc pas de savoir à qui appartient la plage d'Isla Portillos : vous avez déjà décidé qu'elle est costa-ricienne. La tâche qui vous incombe dans cette affaire est celle de préciser la frontière dans la région, en tenant compte du fait que la plage

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[143] *Brown* v. *Allen*, 344 U.S. 443, 540.

[144] *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt, C.I.J. Recueil 2007 (I)*, p. 93, par. 120.

[145] *Affaire de la Fonderie du Trail, sentence du 11 mars 1941, Recueil des sentences arbitrales (RSA)*, vol. III, p. 1950.

d'Isla Portillos est costa-ricienne. Sur un point, M. Samson a raison. Il a affirmé que «[l]'arrêt [de 2015] ne précise ni l'emplacement de l'embouchure du fleuve ni les limites de la lagune ou de son banc de sable»[146]. Ce que nous vous prions d'établir ce sont les points qui marquent les limites du banc de sable qui ferme ou semi-ferme la lagune Los Portillos. C'est là, la manière de préciser la frontière dans la région. A part cette enclave, le territoire sur la rive droite du fleuve San Juan est costa-ricien. Cela est déjà clairement établi par le traité de 1858, tel qu'interprété par les sentences Cleveland et Alexander et par votre arrêt de 2015.

[Projection n° 8]

21. Vos experts vous ont donné des indications précises quant aux deux points extrêmes de la plage : à l'embouchure du fleuve San Juan et au point extrême nord-ouest de la lagune Los Portillos, enclave — ou *exclave* si M[e] Martin préfère — reconnue nicaraguayenne en territoire costa-ricien. Il en va de même de l'autre point extrême de la lagune, qui la sépare du reste du territoire costa-ricien. Ce sont les points A, B et C que vous voyez à l'écran. Ce n'est pas nécessaire pour votre Cour de préciser le point A : quel que soit l'emplacement de l'embouchure du fleuve, toute sa rive droite depuis son commencement est costa-ricienne.

22. Le Nicaragua affirme que l'existence de ces trois points frontière serait contraire au régime frontalier existant, qui ne prévoyait qu'un seul point de départ[147]. Sans aucun doute, le traité de 1858, les sentences Cleveland et Alexander et votre arrêt de 2015 ont défini un seul point de départ de la frontière. Il se trouve toujours à l'embouchure du fleuve San Juan. Si aujourd'hui il y a trois points frontière dans la région, c'est à cause des changements naturels intervenus, qui ont conduit à l'enclavement de la lagune Los Portillos. Les deux autres points dont il est question ici signalent le commencement et la fin de cette enclave ou *exclave*, reliés par le contour de la lagune.

23. Je ne m'attarderai pas sur les considérations de M[e] Martin à propos du prétendu caractère «déraisonnable» et «absurde» de cette situation. Si la lagune Los Portillos, aujourd'hui enclavée, ne constitue plus le débouché du San Juan en mer et n'est plus reliée au fleuve, ce n'est pas la faute du Costa Rica. Nous prenons simplement en considération la situation géographique tel qu'elle est et appliquons à cette situation le régime frontalier obligatoire pour les Parties. Le conseil du

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[146] CR 2017/12, p. 18-19, par. 33 (Samson).

[147] CR 2017/10, p. 61-65, par. 44-56 (Argüello) ; CR 2017/12, p. 22, par. 6 et p. 24, par. 16 (Martin).

Nicaragua parle des difficultés pratiques et administratives et des «complications» de cette frontière[148]. Peut-être pourrait-il se poser la question de savoir ce que signifierait, du point de vue du «raisonnable» et des tensions possibles, l'introduction d'une frontière «sèche» à la lisière de la végétation, comme il le propose, reliant les lagunes existantes par une ligne invisible qui séparerait les deux Etats.

24. M[e] Martin s'est aussi adonné à une longue et tortueuse interprétation de la première sentence arbitrale Alexander — encore une ! — prétendant que même si la lagune n'est plus reliée au San Juan, peu importe ; la plage d'Isla Portillos devrait être nicaraguayenne[149]. Pour la énième fois, la Partie adverse oublie obstinément que la lagune et l'embouchure du fleuve constituaient une unité et que l'arbitre Alexander cherchait à donner au Costa Rica une sortie ininterrompue à la mer. M[e] Martin vous invite à la revision de votre arrêt de 2015 et à changer d'avis, Mesdames et Messieurs les juges, quant à votre interprétation du traité de 1858 et des sentences Cleveland et Alexander[150]. Ce sur quoi je ne reviens pas non plus [fin de la projection n[o] 8].

25. Le Nicaragua ne conteste pas l'emplacement des trois points que je viens de mentionner [projection n[o] 9], comme le montre le graphique de la zone prétendument en litige présenté vendredi[151]. Il revendique l'ensemble du territoire allant du point A au point C, ce qui porte atteinte au principe de l'autorité de la chose jugée pour ce qui est de la plage se situant entre A et B, comme on l'a déjà expliqué. Le Costa Rica vous prie de préciser de manière verbale les points B et C, comme M[e] Wordsworth vous l'a expliqué la semaine dernière. Nous vous renvoyons respectueusement à ses explications[152] [fin de la projection n[o] 9].

Conclusions

26. En conclusion, Mesdames et Messieurs de la Cour, le respect du principe de l'autorité de la chose jugée impose de déclarer irrecevable la revendication du Nicaragua présentée dans cette

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[148] CR 2017/12, p. 24, par. 17, p. 25, par. 23-25 (Martin).

[149] *Ibid.*, p. 28-30, par. 41-48 (Martin).

[150] Cf. CR 2017/12, p. 30, par. 48-50 (Martin) et *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)* et *Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica), arrêt, C.I.J. Recueil 2015 (II)*, p. 700, par. 76.

[151] Nicaragua, onglet n[o] 4 de vos dossiers (7 juillet 2017).

[152] CR 2017/8, p. 29, par. 31 (Wordsworth).

affaire. A la suite du paragraphe 70 de votre arrêt de 2015, le Costa Rica vous prie de préciser la frontière dans cette zone qui a été témoin de plusieurs actions illicites du Nicaragua, dans l'espoir de voir cet Etat se conformer une bonne fois pour toutes à la frontière découlant du traité de 1858, pierre angulaire des relations entre les deux pays.

27. Je vous remercie de votre attention, Mesdames et Messieurs les juges, et vous prie, Monsieur le président, cette fois-ci — probablement après la pause — de donner la parole à l'ambassadeur Sergio Ugalde.

Le PRESIDENT : Merci, Monsieur le professeur. Nous allons à présent faire une pause de quinze minutes. L'audience est suspendue.

L'audience est suspendue de 11 h 35 à 11 h 50.

Le PRESIDENT : Veuillez vous asseoir. Je donne à présent la parole à l'ambassadeur Sergio Ugalde. Excellence, vous avez la parole.

Mr. UGALDE:

THE BACKGROUND TO THE PRESENT DISPUTE AND THE VIOLATION OF COSTA RICA'S TERRITORIAL SOVEREIGNTY

A. Introduction

1. Merci. Mr. President, Members of the Court, I am tasked with responding to the arguments advanced by Nicaragua during the first round on the background to the land boundary dispute, and the violation of Costa Rica's territorial sovereignty. First, I will address the statements made by Nicaragua's Agent concerning the bringing of this dispute before the Court and, second, I will address Nicaragua's positioning of a military camp on the beach of Isla Portillos.

2. With your permission, let me first refer to a graphic that Ambassador Argüello presented to you at tab 42 of Nicaragua's judges' folders on Thursday, which aims to show that Costa Rica is currently claiming a territorial line it originally proposed to General Alexander in 1897[153]. It is rather surprising that the experienced Ambassador presented that image, as it is obvious that there

[153]CR 2017/10, p. 68, para. 72 (Argüello).

is no direct correlation between what was claimed in 1897 and what you decided was indeed Costa Rican territory in your 2015 Judgment. Obviously, Costa Rica is not claiming the 1897 line.

B. How the present dispute arose

3. Ambassador Argüello took aim at the reasons why Costa Rica presented an Application on 16 January 2017 in the *Land Boundary* case. However, in what seems a rather curious approach, he referred to a meeting of the Agents and the President of the Court on 28 January 2016[154].

4. By January 2016, it was apparent to Costa Rica that the Court's observations at paragraph 70 of the 2015 Judgment, in the *Certain Activities* case, appeared to leave some matters open. The Court, having declared that the "disputed territory" belonged to Costa Rica, observed that "[n]either party requested the Court to define the boundary more precisely with regard to this coast — that is, the Caribbean coast — Accordingly, the Court will refrain from doing so."[155] Costa Rica was concerned that the undefined status of the sandbar separating the Los Portillos/Harbor Head Lagoon from the Caribbean Sea would impede the Court from making a full maritime delimitation on the Caribbean side.

5. Costa Rica wished — and continues to wish — to bring to a close all the matters in dispute with Nicaragua before the Court. For reasons of procedural economy, it considered appropriate to allow the Court to address fully this unresolved aspect within the confines of the *Maritime Delimitation* case. Accordingly, on 28 January 2016, Costa Rica proposed to Nicaragua to agree that the matters left open at paragraph 70 of the Court's 2015 Judgment be addressed in the *Maritime Delimitation* case, and it did so during the meeting with the President of the Court, with the Registrar, staff from the Registry, and delegates from both countries in attendance. Nicaragua's position was to reject this proposal. Thus, it was Nicaragua who rejected the proposal made by Costa Rica, and not the Court which ignored it, as Ambassador Argüello incorrectly stated[156].

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[154]CR 2017/10, p. 11, para. 7 (Argüello).

[155]*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II),* p. 697, para. 70.

[156]CR 2017/10, p. 11, para. 7 (Argüello).

6. Less than ten months after the matter was discussed at this meeting with the President of the Court, Costa Rica discovered that Nicaragua had relocated a military camp[157], previously located on the sandbar separating Isla Portillos/Harbor Head Lagoon from the Caribbean Sea, to the Isla Portillos beach. This was a deliberate military action taken by Nicaragua, at a time when it was aware that questions concerning that area were going to be addressed by the Court at the same time it would hear the *Maritime Delimitation* case.

7. The inconvenience that Nicaragua complains about concerning this case was of its own doing. The issues that the Court set out at paragraph 70 of its Judgment could have been resolved by Nicaragua, agreeing, that the Court address those issues in the *Maritime Delimitation* case. Instead, Nicaragua took military action by repositioning an encampment on territory, that, it then claimed, as its own in November 2016.

8. I note in passing that the critical date of this dispute is the date of Nicaragua's response to Costa Rica's letter of protest[158], dated ***17*** November 2016[159]. It was at this moment that the dispute about the Isla Portillos beach crystallized, even though this was a matter that Costa Rica considered, and continues to consider, to have been resolved in the Court's 2015 Judgment. Therefore, the critical date is not 16 January 2017, as Mr. Martin wrongly suggested[160].

C. Violation of Costa Rica's territorial sovereignty

9. I turn now to the arguments put forward by Nicaragua during the first round of oral hearings concerning the violation of Costa Rica's territorial sovereignty. The Court will have noted that neither Mr. Samson nor Mr. Martin responded to Dr. Del Mar's submissions about the Nicaraguan military camp it claimed in its Counter-Memorial to have stationed on the Isla Portillos beach in 2010[161]. Mr. Samson referred in passing to the 2010 photographs[162], but said nothing in response to Dr. Del Mar's arguments about these photographs or about Figure 4.22 in Nicaragua's

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[157] *Land Boundary*, MCR, Ann. 56, Letter from Costa Rica to Nicaragua, Ref. DM-AM-584-16, 14 Nov. 2016.

[158] *Ibid.*

[159] *Land Boundary*, MCR, Ann. 57, Letter from Nicaragua to Costa Rica, Ref : MRE/DMC/250/11/16, 17 Nov. 2016.

[160] CR 2017/12, p. 34, para. 74 (Martin).

[161] *Land Boundary*, CMN, paras. 4.33-4.34.

[162] CR 2017/12, p. 11, para. 8 (Samson).

Counter-Memorial[163]. This decision not to rebut Dr. Del Mar's argument underscores the fact that Nicaragua did not have a presence on the beach of Isla Portillos in 2010.

10. The only evidence that Nicaragua can produce, alleging that it stationed a military camp on the Isla Portillos beach, dates from *after* the further Order of the Court of 2013, indicating new provisional measures[164]. Mr. Samson said if the camp had been on Costa Rican territory then it was for Costa Rica to protest its repositioning at the time that that Order was in force and the *Certain Activities* case was *sub judice*[165].

11. Mr. President, distinguished Members of the Court, the suggestion that Costa Rica should have continued to write protest letters to Nicaragua on this point is frankly absurd. At that moment in time, Nicaragua was not only denying the presence of its personnel on the northern part of Isla Portillos[166], it was making clear misrepresentations to Costa Rica about it. Allow me to recall the situation at that time:

(a) First, Costa Rica expended substantial resources in bringing the proceedings in the *Certain Activities* case, following a violation of its territorial sovereignty by Nicaragua in 2010.

(b) This included seeking provisional measures on two occasions: in 2011, and then in 2013, in response to Nicaragua's blatant violation of the Court's 2011 Order as a result, incidentally, to the positioning and re-positioning of Nicaraguan military personnel in the "disputed territory", including the beach. The Court will recall that Nicaragua failed to give prompt and frank explanations to Costa Rica in the context of the 2013 request for provisional measures, as it responded to Costa Rica, when prompted[167], that it had not sent personnel to the disputed

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[163]*Land Boundary*, CMN, pp. 52-53, fig. 4.21 *"Military Camp 2010"*, and at p. 53, fig. 4.22, *"Repositioning of the Military Camp in 2010"*. See CR 2017/8, pp. 38-41, paras. 10-17 (Del Mar).

[164]*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Provisional Measures, Order of 22 Nov. 2013, I.C.J. Reports 2013*.

[165]CR 2017/12, p.12, para.10 (Samson).

[166]*Request by Costa Rica for the Indication of new Provisional Measures*, 24 Sept. 2013, Attachment PM-5, Diplomatic Note sent by Samuel Santos López, Minister for Foreign Affairs, Nicaragua, to Enrique Castillo Barrantes, Minister for Foreign Affairs and Worship, Costa Rica, 18 Sept. 2013.

[167]*Ibid.*, Attachment PM-1, Diplomatic Note sent by Enrique Castillo Barrantes, Minister for Foreign Affairs and Worship, Costa Rica, to Samuel Santos López, Minister for Foreign Affairs, Nicaragua, 16 Sept. 2013, Ref. DM-AM-536-13.

territory[168], when in fact it had. That led Costa Rica to make the further request for provisional measures, which the Court indicated[169].

(c) In its 2013 Order, the Court found that a Nicaraguan military camp was stationed on the beach of Isla Portillos, and therefore, it was located on the "disputed territory" in that case[170].

(d) Finally, Costa Rica was confident that the Court's Judgment on the merits in the *Certain Activities* case would bring an end to Nicaragua's conduct in that area.

12. That was the situation at the time. It cannot now reasonably be suggested that Costa Rica should have continued to expend considerable resources to request new provisional measures when diplomatic correspondence would inevitably fail to produce any reasonable response from Nicaragua. The Judgment on the merits was pending imminently, and Costa Rica hoped it would resolve the matter once and for all.

13. What *is* telling is the way in which Nicaragua reacted to the Court's Judgment on the merits in the *Certain Activities* case. Following the Court's declaration that the territory in question was indeed Costa Rican, Nicaragua did not station any military camps on the Isla Portillos beach. Rather, it stationed a camp on the sandbar separating the Harbor Head Lagoon from the Caribbean Sea. Dr. Del Mar spent some time showing the Court satellite images and aerial photographs evidencing this location of the Nicaraguan military camp on the sandbar in the period following the Court's Judgment in 2015[171]. Both Mr. Samson and Mr. Martin chose not to respond in their speeches to that shift in Nicaraguan conduct.

14. Dr. Del Mar also showed the Court that Nicaragua deliberately repositioned its camp from a location between Points B and C on the sandbar, to a location north-west of Point B on the Isla Portillos beach on or around 4 August 2016. Mr. Samson and Mr. Martin's rebuttal to

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[168] *Ibid.*, Attachment PM-5, Diplomatic Note sent by Samuel Santos López, Minister for Foreign Affairs, Nicaragua, to Enrique Castillo Barrantes, Minister of Foreign Affairs and Worship, Costa Rica, 18 Sept. 2013.

[169] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Provisional Measures, Order of 22 Nov. 2013, I.C.J. Reports 2013*.

[170] *Ibid., I.C.J. Reports 2013*, p. 365, para. 46.

[171] *Land Boundary*, Costa Rica's first round of oral arguments, judges' folders, tabs 94-96.

Dr. Del Mar was to say that the entire coastline in question is not Costa Rican[172]. But that, of course, is not an answer. There are a number of serious contradictions in Nicaragua's argument.

15. First, Nicaragua must accept that a military camp was stationed on a *beach* that forms part of the northern part of Isla Portillos, which was the "disputed territory" in the *Certain Activities* case. Mr. Samson tried to put this as neutrally as possible, noting that in 2013 the Court ordered Nicaragua to remove its camp from the "disputed territory"[173], omitting, of course, that this was from a location on the *beach*, as stated in terms by the Court[174]. That was the Court's position in its Order of 22 November 2013, reiterated in its Judgment on the merits in the *Certain Activities* case[175]. Nevertheless, Nicaragua now lays claim to "the *entirety* of the beach" of the northern part of Isla Portillos[176]. That is in complete contradiction with the said Order and Judgment on the merits, as has been explained by Professor Kohen.

16. Second, Mr. Samson accepts that Nicaragua's repositioned military encampment lies north-west of the sandbar separating the Los Portillos/Harbor Head Lagoon from the Caribbean. He put this image on your screens [show Nic tab 3]. The green part indicates the location of the sandbar. That is clear from his speech, in which he refers to this part as being "le banc de sable de la lagune"[177]. The military camp is located here, clearly north-west of the sandbar, and on an area that Mr. Samson refers to as being the "prétendue plage d'Isla Portillos"[178]. This is the geo-referenced position of the Court-appointed expert's marker[179], showing the west endpoint of the lagoon, both co-ordinates taken by Nicaragua in December 2016 and March 2017, respectively, which are superimposed on Mr. Samson's marked-up satellite image of 17 January 2017. This corresponds to Costa Rica's Point B. The Nicaraguan camp is clearly outside the green area

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[172]CR 2017/12, p. 13, para. 11 (Samson); *ibid.*, p. 34, para.72 (Martin).

[173]*Ibid.*, p. 12, para. 10 (Samson).

[174]*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013,* p. 365, para. 46.

[175]*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II),* pp. 696-697, para. 69.

[176]CR 2017/12, p. 34, para. 72; *ibid.*, p. 35, para. 81 (Martin).

[177]*Ibid.*, p. 15, para. 20 (Samson).

[178]*Ibid.*

[179]Expert's Opinion, 30 Apr. 2017, p. 40.

Mr. Samson recognizes, on behalf of Nicaragua, as being the sandbar separating the lagoon from the Caribbean Sea.

17. A word or two about Mr. Martin's argument that the military camp must have been located on Nicaraguan territory[180]. Mr. Martin reiterated Nicaragua's primary and contradictory argument according to which the "entire beach belongs to Nicaragua"[181]. Mr. Martin then, understandably, presented Nicaragua's subsidiary argument, according to which the military camp is located on the sandbar, and not on the beach[182]. According to Nicaragua, the sandbar is identifiable by the presence of water running behind a section of the beach, which drained from the lagoon, as well as the wetland more generally, into the Caribbean Sea in the aftermath of Hurricane Otto in late 2016[183]. To be clear, Nicaragua is not arguing here that the lagoon was running behind the military camp. That would be in obvious contradiction with the position of the Court-appointed experts[184]. Mr. Martin accepts that it is only a channel of water behind the military camp. However, this attempt to fashion the location of the sandbar from water run-off following a hurricane is hopeless. It would mean that one needs to wait for a hurricane to hit the area in order to prove the existence of the sandbar. According to the Court-appointed experts, by March 2017, "the channel that was draining the lagoon during the first visit was closed by a sandy beach deposit"[185]. To follow Nicaragua's argument to its logical conclusion, by March 2017 the sandbar no longer existed in the place where Nicaragua said it must have been a few months earlier.

18. It is obvious that the camp was not located on the "sandbar", which Nicaragua itself defined in its letter of 30 November 2016 as "the sandbar that separates Harbor Head Lagoon from the Caribbean Sea"[186]. Mr. Samson already showed that it was not located on that green area he coloured to mark the sandbar that corresponds to Nicaragua's own definition of the sandbar. To define the sandbar in the way Mr. Martin was suggesting is completely unworkable, and frankly

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[180]CR 2017/12, pp. 34-35, paras. 73-78 (Martin).

[181]*Ibid.* p. 34, para.72 (Martin).

[182]*Ibid.*, para.73 (Martin).

[183]CR 2017/12, pp. 34-35, paras. 74-78 (Martin).

[184]Expert's Opinion, 30 Apr. 2017, p. 5, para. 19, and p. 26, para. 101.

[185]*Ibid.*, p. 26, para. 101.

[186]*Land Boundary*, MCR, Ann. 57, letter from Nicaragua to Costa Rica, Ref.: MRE/DMC/250/11/16, 17 Nov. 2016.

absurd, as grains of sand could fall from one day to the next within Costa Rican or Nicaraguan territory, depending on heavy rainfall from hurricanes and the consequent run-off of flooded areas into the Caribbean Sea.

D. Costa Rica's request for a declaration

19. Mr. President, concerning Costa Rica's request for a declaration, it is entirely appropriate that the Court declares that Nicaragua violated Costa Rica's sovereignty and the prohibition on the use of force. Mr. Martin did not go so far as to argue that Nicaragua was mistaken when it repositioned its military camp. Indeed, he could not. Yet he deployed an apologetic tone when explaining to the Court the changing geographic situation on the ground as if this was a justification for Nicaragua's conduct. This explanation evidently undermines Nicaragua's claim to the beach of Isla Portillos. For the reasons Costa Rica has explained, that claim is entirely without basis. But there was no mistake, Mr. President. The camp may be small, the incursion is not deep, but this is a deliberate military action.

20. Thank you Mr. President, and distinguished Members of the Court, for your kind attention. Mr. President, I would be very grateful if you could ask that the floor be given to Mr. Brenes, who will address the starting-point of the maritime delimitation.

Le PRESIDENT : Merci, Monsieur l'ambassadeur. Je donne maintenant la parole à M. Brenes.

Mr. BRENES:

THE STARTING-POINT OF THE MARITIME DELIMITATION

1. Mr. President, Members of the Court, my task today is to address the location of the starting-point for the maritime delimitation in the Caribbean.

2. I will deal with Nicaragua's position as to the starting-point, before dealing with the inappropriateness of Marker I, as fixed by General Alexander, as being the starting-point for the maritime delimitation, as well as making brief observations upon Costa Rica's proposed starting-point at point SP-C.

3. Before doing so, however, in the light of Nicaragua's first round, it is necessary to spend a little time on "Punta de Castilla" and how the position of that point has shifted over the course of the years.

A. The location of Punta de Castilla

4. Nicaragua's approach has been to attempt to suggest that, subject to the effects of coastal retreat, Punta de Castilla has always been situated in the location it now claims[187]. It is correct that, in the years since the First Alexander Award, the point to the east of Harbor Head Lagoon has often been referred to as Punta de Castilla. However, the location known as Punta de Castilla has changed.

5. In this context, it is necessary to correct a matter arising from a footnote in the written version of Ambassador Argüello's speech. Referring to the northern part of Isla Portillos, Ambassador Argüello orally said to you that "Costa Rica understood in the nineteenth century that that area was called Punta de Castilla"[188]. That is unobjectionable, so far as it goes.

6. What is objectionable, however, both formally and as a matter of substance, is that in the accompanying footnote of the printed version of his speech, reference was made to Costa Rica's pleadings preceding the First Alexander Award and a new and entirely separate point was there developed.

7. The relevant footnote, which you can see on the screen [tab 206] purports to quote Costa Rica as having argued before General Alexander that "(Punta de) Castilla" was "to the east of the Lagoon today called Harbor Head". On that basis, the footnote suggests that "[s]ince the land in dispute is to the west of Punta de Castilla (so called Isla Portillos by Costa Rica) it was never part of Punta Castilla or Isla Portillos"[189].

8. This is a misrepresentation of Costa Rica's position before Alexander. The actual text of Costa Rica's pleading, is now on screen [tab 207]; the text differentiates and explains three different things: (1) Castilla, (2) Punta de Castilla, and (3) the extremity of Punta de Castilla. In the English translation now on screen [tab 207], the passage quoted by Ambassador Argüello in the

[187]CR 2017/10, p. 58, para. 31 (Argüello); CR 2017/12, p. 31, paras. 54-55 (Martin).

[188]*Ibid.*, p. 58, para. 31 (Argüello).

[189]CR 2017/10, p. 58, fn. 157 (Argüello).

footnote is highlighted. As you can see, the words "Punta de" in parentheses in the passage quoted are simply not there; the relevant passage referred only to "Castilla". And, as you can see, "Punta de Castilla" was argued by Costa Rica to be "the tongue of soil, or rather of sand, which, as an appendix or accretion of Castilla, was formed over the years between the waters of the Ocean and those of the Port of San Juan del Norte".

9. The map now on screen — and at tab 208 of your folders — shows this very clearly; this is a map which is apparently based on the same source as the 1840 map shown to you by Mr. Martin on Friday, although this map is updated to 1848. I note in parentheses that this map was evidently not before General Alexander.

10. The sand spit or island in front of the town of San Juan on this map is labelled "Isla de Castilla". And, as you can see, the end of the sand spit, to the west, is labelled "Punta de Castilla".

11. It is also necessary to deal with the 1840 map presented by Nicaragua in order to illustrate the location of Punta de Castilla. [Tab 209]. The label added by Mr. Martin places "Punta de Castilla" on the coast at the eastern end of the Harbor Head Lagoon. Mr. Martin very carefully said that the point he was adding was "*Punta de Castillo* as determined by General Alexander"[190]. [End slide]

12. Three observations are called for as regards the placement of this label.

(a) First, General Alexander did not refer in his Award to the point he regarded as the starting-point of the land boundary as "Punta Castilla", or even as "Punta de Castillo";

(b) Second, it is incorrect, on a map dating from 1840, to place "Punta Castilla" at this point on the coast, even if it is to indicate the location that General Alexander believed had been the likely location of Punta de Castillo some 58 years later;

(c) Third, as a consequence, this figure is liable to mislead to the extent that it might be taken to suggest that Punta de Castilla has always been located on the east shore of Harbor Head Lagoon. That is particularly the case when coupled with Ambassador Argüello's footnote and misquotation of Costa Rica's position as to the extent of Punta de Castilla in the pleadings before General Alexander.

[190]CR 2017/12, p. 31, para. 54 (Martin) and Nicaragua's judges' folder, 7 July 2017, 3 p.m., tab 24 (LM1-19).

B. Nicaragua's case as to the starting-point

13. Ambassador Argüello set out Nicaragua's case as to the starting-point of the maritime boundary. His first argument was that General Alexander had "not been looking for the mouth of the river but for the location of Punta Castilla"[191].

14. This position is directly contrary to the clear terms and logic of the Alexander Award, as interpreted in your 2015 Judgment in *Certain Activities*, to which Mr. Wordsworth took you last week, in particular General Alexander's conclusion that the scheme of the Treaty was that the boundary was to run along the river "unbroken to the sea"[192], and your finding that the boundary extends to the mouth of the river[193].

15. Ambassador Argüello simply asserted that, to the contrary, General Alexander "took great pains in identifying where this *punta* was located"[194]. Mr. Martin likewise focussed on General Alexander's discussion of the original location of Punta Castilla in 1858, without any reference to the other relevant portions of your 2015 Judgment and the Awards to which you had been taken[195]. All in all, one might be forgiven for thinking that Nicaragua had simply forgotten that your 2015 Judgment exists.

16. The only minor exception was that, in the context of the land boundary, Mr. Martin further suggested that it was Costa Rica's position that the first channel met had to be "navigable as an 'outlet for commerce'"[196]. His attempt to explain away the relevant passages of the First Alexander Award, however, again runs up against the fundamental problem that it is not only Costa Rica's understanding of the First Alexander Award, but that of the Court in *Certain Activities*[197].

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[191]CR 2017/10, p. 53, para. 15 (Argüello); see also p. 53, paras. 16-18; CR 2017/12, p. 22, para. 6 (Martin).

[192]First Award under the Convention between Costa Rica and Nicaragua of 8 April 1896 for the Demarcation of the Boundary between the Two Republics, 30 Sept. 1897, *RIAA*, Vol. XXVII, pp. 215-221 (First Alexander Award**)** (also reproduced in *Land Boundary*; MCR Ann. 48 and CMN Ann. 2), p. 217; see also CR 2017/8, pp. 23-24, paras. 13-15 (Wordsworth).

[193]*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 700, para. 76; see CR 2017/8, pp. 25-26, paras. 18-19 (Wordsworth).

[194] CR 2017/10, p. 53, para. 15 (Argüello).

[195]CR 2017/12, p. 23, paras. 12-13 (Martin).

[196]*Ibid.*, p. 30, para. 49 (Martin).

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

17. Nicaragua's second argument, building on the first, was that General Alexander had intended to designate a fixed point; Ambassador Argüello's suggestion was that General Alexander had "agreed with Costa Rica and decided that the starting-point was fixed and he proceeded to locate it on the ground"[198]. There are two points in this regard;

(a) first, if, the relevant consideration for the determination of the boundary was the mouth of the river as an "outlet for commerce", as General Alexander held and as you recognized in *Certain Activities*, that necessarily implies that he regarded the course of the boundary, including its terminal point, as being subject to change should the mouth of the river shift;

(b) second, and self-evidently, the position adopted by Costa Rica (or indeed by Nicaragua) in their submissions prior to the First Alexander Award are of little relevance; what is relevant is what General Alexander in fact did and held. And General Alexander did not hold that either the boundary or its starting-point were fixed.

18. Ambassador Argüello also placed great emphasis on the fact that Alexander had stated that it was necessary "to specify more minutely, in order that the said line may be *exactly located and* permanently *marked*"[199]. This, however, takes Nicaragua nowhere: First, Alexander was referring to the "line"; Second, "exactly locating" a boundary and "permanently marking" it does not imply that the boundary is to be fixed for all time, regardless of any changes in the geography. That is particularly so in circumstances in which it had been explicitly recognized that the boundary was likely to be mobile. The simple point is that he was not looking to establish any fixed immovable point or points. That is plain from the first Award.

19. And it is no less plain from General Alexander's Second and Third Awards. It was very notable that Ambassador Argüello did not take you to the Second and Third Awards, although he threatened to do so in the second round[200]; he merely asserted that Costa Rica had misread their terms, and that they were limited in scope to the possibility of changes in the course of the boundary, and not a change in location of the starting-point[201].

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[198]CR 2017/10, p. 52, para. 13 (Argüello).

[199]*Ibid*., p. 53, para. 16 (Argüello).

[200]*Ibid*., p. 61, para. 40 (Argüello).

[201]*Ibid*.

20. Mr. Martin likewise did not deal with the Second Award in any great detail, although, rather curiously, he did quote the passage from the Second Award quoted by the Court in *Certain Activities* as to "wholesale changes" in the channels of the river[202], and expressly accepted that General Alexander had said that the impact of future changes to the San Juan would have to be determined on a case-by-case basis[203]. He did not deal with our point that the Second Award shows plainly that Alexander saw demarcation as helpful, but nothing more, and was in no sense seeking to establish any fixed immovable point[204]. Mr. Martin's only point of substance in this regard appeared to be that Costa Rica had made no reference to the applicable principles of international law[205].

21. Costa Rica has no need to do so as the evidence shows that the general situation is one of the erosion and disappearance of Nicaragua's former territory (and of course, now, the erosion of Costa Rica's territory)[206]. And it was very noticeable that Mr. Martin himself shied away from dealing at all with the applicable principles of accretion; no doubt if those principles helped Nicaragua's case in any manner at all, Nicaragua would have devoted some of the ample time left over on Friday afternoon to that topic.

22. Similarly, Mr. Martin made only passing reference to the Third Award, and simply asserted that it did not support the proposition for which Mr. Wordsworth had cited it[207]. But yet again, he did not take you to the passage actually relied on, i.e. the passage from *Certain Activities* quoting the Third Award to which you had been taken[208]. He did not engage in its substance in any way.

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[202]CR 2017/12, p. 27, para. 35, (Martin) quoting Second Award under the Convention between Costa Rica and Nicaragua of 8 April 1896 for the Demarcation of the Boundary between the Two Republics, 20 Dec. 1897, *RIAA*, Vol. XXVII, pp. 223-225 (Second Alexander Award) (also reproduced in *Land Boundary*; CRM, Ann.49 and NCM, Ann. 2), p. 224).

[203]CR 2017/12, p. 32, paras. 60-61 (Martin).

[204]CR 2017/8, p. 25, paras. 16-17 (Wordsworth).

[205]CR 2017/12, p. 32, paras. 61 (Martin).

[206]CR 2017/8, p. 34, paras. 44-45 (Wordsworth), and Expert Report, 30 April 2017, pp. 34-35, figs. 39 and 40.

[207]CR 2017/12, p. 32, para. 62 (Martin).

[208]See CR 2017/8, p. 24, para. 17 (Wordsworth), quoting *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 700, para. 75.

23. Ambassador Argüello further suggested that, following the First Alexander Award, the Parties had regarded it as determining "a specific and immovable spot as the starting-point"[209]. His recital of the steps taken by the Demarcation Commission to fix Marker I[210], and the concerns of the Costa Rican Commissioner in relation to the unreliability of the marker at the centre of Plaza Victoria[211], require little comment — General Alexander having designated the starting-point, it was of course natural that the Parties should attempt to mark its location, and that, the initial marker having disappeared, that they should attempt to mark its location for the future.

24. That does not, however, lead to the conclusion that Costa Rica regarded the starting-point of the boundary as being fixed for all time. In light of Alexander's Second Award, which is dated 20 December 1897 and therefore pre-dates all but one of the events invoked by Ambassador Argüello, there could have been no doubt that, in the words of the Second Award, the "only effect obtained from measurement and demarcation is that the nature and extent of future changes may be easier to determine"[212].

25. Professor Kohen has already briefly touched upon the maps shown to you by Ambassador Argüello[213]; the key point for present purposes is that they show the configuration of the coast as it was in the past. That configuration has, however, undoubtedly changed. It is notable that there was no response to Mr. Wordsworth's observations based on the 1988 map and the 2013 satellite image at Figures 2.8 and 2.9 of Costa Rica's Memorial, which evidenced the disappearance of the sandbar which was previously in front of Costa Rica's territory[214].

26. It also bears noting that Nicaragua's position now is directly at odds with that which it adopted before you in 2015 in the *Certain Activities* case. Professor Pellet made clear Nicaragua's position then, that «dans l'esprit d'Alexander, c'est d'une frontière mobile qu'il s'agit, appelée à changer en fonction des fluctuations à long terme du fleuve et de ses chenaux»[215].

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[209]CR 2017/10, p. 54, para. 19 (Argüello).

[210]*Ibid*., p. 54-55, paras. 20-23 (Argüello).

[211]*Ibid*., p. 56-57, paras. 25-26 (Argüello).

[212]Second Alexander Award, p. 224.

[213]CR 2017/10, p. 66, para. 63, and pp. 67-68, para. 70.

[214]CR 2017/8; p. 34, para. 43 (Wordsworth); Costa Rica's judges' folder, 3 July 2017, 3 p.m., tabs 91 and 92 (*Land Boundary*; MCR, figs. 2.8 and 2.9).

[215]CR 2015/5, p. 24, para. 9; and see also p. 25, para. 13 (Pellet).

27. Having made express reference in this regard to the passage from the Second Award quoted by the Court in 2015[216], Professor Pellet later stated explicitly that Alexander's goal was "*not* to define the boundary *ne varietur*"[217]. He continued: «En d'autres termes, la sentence du 30 septembre 1897 établit les principes et la méthode de détermination de la frontière mais l'emplacement précis de celle-ci dépend de la situation sur le terrain au moment où le problème surgit.»[218]

28. Finally, a word needs to be said about Ambassador Argüello's suggestion that adopting a location for the delimitation other than that determined by Alexander "would be in fact declaring that decision null and void or at least irrelevant"[219]. That submission is, of course, premised on the flawed argument that the starting-point of the boundary was fixed once and for all. Given that, as explained by Professor Pellet back in 2015, General Alexander in his Awards determined "the principles and method of determination of the boundary" [220], that argument has no basis.

C. The inappropriateness of Marker I as the starting-point for the delimitation

29. I turn then to the inappropriateness of Marker I as the starting-point for the delimitation. Quite apart from the fact that it is not to be regarded as a fixed point, it is evident 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, even if rebaptized by Professor Lowe for these purposes as the "Alexander Point"[221].

30. First of all, there is no suggestion (and nor could there be) that the intention of the parties in concluding the 1858 Treaty of Limits was anything other than to identify the starting-point of a boundary delimiting their respective *land* territories. It follows that President Cleveland and General Alexander, in their relevant respective awards, were only concerned with the terminus/starting-point of the land boundary in the Caribbean at the mouth of the San Juan River.

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[216]CR 2015/5, p. 24, para. 9 (Pellet).

[217]*Ibid*., p. 25, para. 13 (Pellet).

[218]*Ibid*., p. 25, para. 13 (Pellet).

[219]CR 2017/10, p. 62, para. 48 (Argüello).

[220]CR 2015/5, p. 25, para. 13 (Pellet).

[221]CR 2017/11, p. 18, para. 49 (Lowe).

31. Whilst Alexander in his first Award talked about the "terminus" of the boundary, that was because he was approaching the issue, as it were, coming down-stream; but his focus remained firmly on the land boundary and he did not continue on out to sea.

32. Second, Ambassador Argüello's justification for using the location of Marker I in the end boiled down to little more than the assertion that the "starting-point of the delimitation was located at sea and not on land" such that therefore "the location of this point at sea" renders it "the unquestionable fixed point for starting the maritime boundary"[222].

33. The mere fact, however, that Marker I had disappeared under the waves of the Caribbean by 1899 does not change its character. In particular, it does not somehow transform it from a land boundary point into a maritime boundary starting-point.

34. Further, the use of Marker I as the starting-point for a maritime delimitation is supported by neither principle nor practice. Starting a maritime delimitation offshore by reference to a supposedly fixed point resulting from an old land boundary delimitation, when there is no longer any land in the relevant location, is not consistent with any principle of international law. It is unsurprising that no precedent was cited in which any pair of States had adopted a similar approach, or any international court or tribunal had adopted such a solution.

35. There was something vaguely surreal about Professor Lowe's suggestion that "the Alexander Point is the indisputably and permanently fixed point *on the Caribbean coast* in this case"[223]. Of course, the whole point is that Marker I is no longer on the Caribbean coast, and has not been since shortly after it was placed there in 1898.

36. As a consequence, having suggested that the maritime boundary should start out to sea at Marker I, Nicaragua's counsel attempted to justify linking it back to the supposed land boundary. Professor Lowe's suggestion of a straight line from Marker I to the land boundary[224], is undoubtedly simple and extremely pragmatic. But it does not follow the land boundary supposedly permanently fixed by Alexander. Further, it is likewise unsupported by either practice or principle, and there was no more than a faint attempt to suggest otherwise.

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[222]CR 2017/10, p. 57, para. 28; and see also p. 60, para. 37 (Argüello).

[223]CR 2017/11, p. 18, para. 50 (Lowe); emphasis added.

[224]*Ibid*., p. 19, para. 53 (Lowe).

37. Nicaragua has attempted to bolster its case by suggesting that there was agreement between Nicaragua and Costa Rica to use Marker I as the starting-point for the maritime delimitation. In the Counter-Memorial, this argument was made in a single sentence, referring to the unsigned document purporting to be a minute of the Fourth Technical Meeting of the Sub-Commission on Limits and Cartography[225]. Last Thursday, Ambassador Argüello disclaimed any reliance on that unsigned document, and Nicaragua's case shifted to invoking solely the minutes annexed to Costa Rica's Memorial[226]. None of those minutes, or the quotes from them displayed by Ambassador Argüello, go any further than showing that it was agreed to seek to identify the location of Alexander's Marker I.

38. Such a course of action was of course sensible, and readily explicable by the fact that, in order to start to discuss the maritime delimitation, it was necessary to ascertain the present situation of the land boundary.

39. As to Nicaragua's proposed starting-point of the land boundary at the eastern side of the lagoon, both Ambassador Argüello, and Professor Lowe referring back to him, suggested that the only point on the coast which was not subject to "frequent variation" was the solid land at the headland of the so-called "Punta de Castilla"[227]. The reference to "frequent variation" is taken from the experts' description of the sand spit[228]; however, neither Ambassador Argüello, nor Professor Lowe, were able to point to anything in the experts' opinion stating that the headland itself was stable.

40. Whilst it may be the case that the so-called "headland" to the east of Harbor Head Lagoon may not be affected by the sea to quite the same extent as the sandbar closing Los Portillos Lagoon, it is, however, equally subject to the process of coastal retreat which affects the coast in this area generally, as identified by the experts[229]. Indeed, [tab 210] as shown by the georeferenced satellite image on the screen, dated 18 March 2016, even Nicaragua's proposed starting-point at the

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[225] *Maritime Delimitation*, CMN, para. 3.51.

[226] CR 2017/10, p. 66, para. 65 (Argüello).

[227] *Ibid*., p. 63, para. 51 (Argüello); CR 2017/11, p. 19, para. 52 (Lowe).

[228] Expert Opinion, 30 Apr. 2017, para. 184.

[229] Expert Opinion, 30 Apr. 2017, paras. 192-193.

eastern corner of Harbor Head Lagoon as given in its Counter-Memorial dated 8 December 2015 (marked with red dot) was located in the sea just over three months later.

D. Costa Rica's starting-point

41. There was very little discussion by Nicaragua specifically of Costa Rica's proposed starting-point SP-C, save for rather general observations as to the possible effects of continuing coastal retreat on the location of the mouth of the river in the future[230]. In light of the Alexander Awards, as interpreted by you in *Certain Activities*, however, Costa Rica's proposed starting-point is the only one which is consistent with the relevant legal instruments.

42. Nicaragua's counsel did not respond at all to the point that, in principle, a maritime boundary is to be fixed on the basis of the situation on the ground as at the time of delimitation[231]. Nor was there any real suggestion that the coast in the region of the mouth of the river was insufficiently stable to provide base points for the construction of a provisional equidistance line for the purposes of delimitation[232]. The situation is thus clearly distinguishable from that which faced you in *Nicaragua* v. *Honduras*[233].

43. Costa Rica's position remains that, notwithstanding the possibility of further coastal retreat in the future, the appropriate approach — and that which is in accordance with principle and established practice — is to construct a provisional equidistance line starting from Point SP-C, corresponding to Point Pv, at the base of the Isla Portillos sand spit, at the mouth of the river. Costa Rica maintains its position that this is the most stable point in the region of the mouth.

44. As a subsidiary matter, should the Court be minded to start the maritime boundary at some distance offshore so as to take account of coastal instability, then Costa Rica maintains its position that an appropriate point would be Point FP-1, located on the provisional equidistance line calculated from the relevant base points on the coast, at a distance of 3 nautical miles offshore, with a mobile line then joining that point to the current mouth of the river. This is so because, in accordance with the 1858 Treaty, the mouth of the river is the starting-point of the land boundary

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[230]CR 2017/10, pp. 58-59, paras. 33-35 (Argüello); CR 2017/12, p. 26, paras. 29-31 (Martin).

[231]CR 2017/9, p. 39, para. 17 (Lathrop).

[232]*Ibid.*

[233]See CR 2017/8, pp. 53-54, paras. 36-37 (Brenes).

between the two countries[234], and so as to give effect to Costa Rica's right to navigation on the San Juan River for the purposes of commerce[235]. It must also be recalled that the treaty envisaged that at the starting-point of the land boundary at the mouth of the river, in the bay of San Juan del Norte, the waters would be common, as in the Pacific[236].

45. Even though the bay of San Juan del Norte is now enclaved in Nicaraguan territory close to the coast, these characteristics resulting from the 1858 Treaty are a relevant factor militating in favour of not displacing the starting-point of the maritime delimitation from the mouth of the river.

46. Finally, I would observe that, in the context of joining the so-called Alexander Point to the coast, Nicaragua indicated that it was amenable to a mobile line for the last sector[237]. Costa Rica concurs at least to the point of agreeing that delimiting the entirety of the boundary is desirable so as to minimize the potential for future conflicts.

47. Mr. President, distinguished Members of the Court, that concludes my remarks. I thank you for your kind attention. Mr. President, I would ask you to please call Professor Kohen.

Le PRESIDENT : Merci, Monsieur Brenes. Je donne la parole au professeur Kohen pour la dernière plaidoirie de la matinée. Monsieur le professeur.

M. KOHEN :

LES VAINS EFFORTS DU NICARAGUA POUR FAIRE JOUER UN RÔLE À DES TRAITÉS CONCLUS PAR DES ETATS TIERS

1. Monsieur le président, Mesdames et Messieurs les juges, je vais maintenant aborder les efforts — les vains efforts — du Nicaragua pour faire jouer un rôle en sa faveur, dans la présente affaire, à des traités conclus par des Etats tiers. Mon collègue et ami Antonio Remiro Brotóns a essayé de donner force et vigueur au traité non ratifié de 1977 et a essayé de s'appuyer pour ce faire sur le traité Costa Rica/Panama de 1980. Mon non moins ami M[e] Paul Reichler a cru pouvoir invoquer le traité de 1977 comme circonstance pertinente à prendre en considération dans la

[234]Article II, Treaty of Limits 1858; *Maritime Delimitation*, MCR, Ann. 1.

[235]Article VI, Treaty of Limits 1858; *Maritime Delimitation*, MCR, Ann. 1.

[236]Article IV, Treaty of Limits 1858; *Maritime Delimitation*, MCR, Ann. 1.

[237]CR 2017/11, p. 19, para. 54 (Lowe).

deuxième étape de la délimitation dans la mer des Caraïbes. Il a aussi cru pouvoir tirer profit du traité Colombie/Panama de 1976 pour contrer les positions costa-riciennes dans cette mer. Tous les deux se sont adonnés à une spectaculaire spéculation sur les droits de la Colombie et du Panama résultant de ces accords.

2. Je dois même avouer qu'à un moment donné, je me suis demandé si je me trouvais bien aux audiences de cette affaire ou d'une autre concernant d'autres Etats. C'était cocasse de voir un conseil du Nicaragua faire une défense passionnée de ce qu'il entend être la position de la Colombie. Il a invoqué «la ténacité» du Costa Rica pour «se débarrasser de ses obligations envers la Colombie»[238], comme si nous étions face à un traité en vigueur et comme s'il était l'avocat et conseil d'une autre partie que la sienne dans cette affaire. Je laisse de côté les arrière-pensées et autres accusations sans fondements et même contradictoires. Je me demande toutefois si le respect dû à l'autre partie et aux Etats tiers à l'affaire n'impose pas une certaine retenue.

A. Le Nicaragua n'a apporté la moindre preuve d'une renonciation costa-ricienne à ses titres aux espaces maritimes

3. Je vais commencer mon exposé en répondant aux considérations faites à l'égard du traité de 1977. Monsieur le président, Mesdames et Messieurs les juges, le Nicaragua reconnaît que le traité de 1977 n'est pas en vigueur, qu'il est *res inter alios acta* pour le Nicaragua, et donc qu'il ne crée ni droits ni obligations pour lui[239]. Il n'a pas contesté que ce traité ne délimite point un territoire nicaraguayen et un territoire costa-ricien. Le Nicaragua invoque que, prétendument, par sa conduite, le Costa Rica aurait renoncé à ses titres aux espaces maritimes situés au-delà de la ligne du traité. Pour le dire avec les mots de M[e] Reichler, «le Costa Rica serait forclos de revendiquer des espaces maritimes au-delà des limites établies par ce traité»[240]. Malgré de longues analyses parfois amusantes, mais pas pertinentes du tout, le Nicaragua n'a pas avancé une seule preuve d'une prétendue renonciation costa-ricienne à faire valoir ses titres aux espaces maritimes à l'égard du Nicaragua. En fait, il n'a pas répondu aux arguments développés par le Costa Rica au premier tour et qui gardent toute leur valeur.

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[238] CR 2017/10, p. 42, par. 25 (Remiro Brotóns).

[239] *Ibid*., p. 36, par. 2 (Remiro Brotóns).

[240] CR 2012/11, p. 40, par. 62 (Reichler).

4. Il s'est attaqué à la note du Costa Rica à la Colombie en date du 27 février 2013[241]. Cette note fait état du caractère impraticable du traité de 1977 et de son inefficacité, et invite la Colombie à négocier un nouveau traité, cette fois-ci limité à la coopération maritime. Le conseil de la Partie adverse a émis des doutes quant au but de cette note. Peut-on dégager de celle-ci quelque chose d'autre qu'il n'y aurait pas de ratification du traité de 1977 ? Dans cette note, le Costa Rica invite la Colombie à conclure un nouveau traité de coopération maritime. Le contenu proposé ne fait aucune mention d'une quelconque nouvelle délimitation. On mentionne la possibilité d'une patrouille conjointe. Y a-t-il quelque chose de répréhensible ? Pour cela, on n'a pas besoin d'avoir des frontières maritimes communes, comme c'est le cas de patrouilles conjointes de plusieurs Etats dans différentes régions du monde. Le conseil du Nicaragua suggère pourtant que «le Costa Rica tente en réalité de maintenir un voisinage direct avec la Colombie»[242]. C'est tout à fait faux, Mesdames et Messieurs les juges. Un simple regard à la délimitation que le Costa Rica soutient devant vous montre que cette ligne s'arrête avant la délimitation effectuée par votre arrêt de 2012 entre le Nicaragua et la Colombie. Donc, en adoptant la ligne revendiquée par le Costa Rica dans cette affaire, il n'existe aucune possibilité de frontière maritime commune colombo-costa-ricienne.

5. La note du 27 février 2013 à la Colombie, soit trois mois après votre arrêt de 2012, est la matérialisation de ce que le Costa Rica avait annoncé à la Colombie et au Nicaragua : il allait attendre le règlement du différend entre ces deux Etats avant de prendre une décision quelconque sur la délimitation des espaces maritimes dans la mer des Caraïbes[243]. Quelles que furent les positions de la Colombie ou du Nicaragua durant la procédure d'intervention, auquel le conseil nicaraguayen a fait grand cas, le Costa Rica a fait valoir ses droits et n'a pas renoncé d'un pouce à ses titres aux espaces maritimes dans la région, y compris les espaces situés au-delà du traité de 1977[244].

6. Je n'ai pas besoin de répondre aux spéculations infondées, aux positions d'autres Etats — réelles ou imaginées —, aux considérations tout à fait inappropriées sur la non-invocation de la

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[241] CR 2017/10, p. 43, par. 29-31 (Remiro Brotóns).

[242] *Ibid*., p. 44, par. 34 (Remiro Brotóns).

[243] CMN, annexe 21, p. 295, lettre 071-96-DVM en date du 1er mars 1996 adressée au ministre des affaires étrangères du Nicaragua par le ministre des affaires étrangères du Costa Rica.

[244] *Différend territorial et maritime (Nicaragua c. Colombie), requête du Costa Rica à fin d'intervention, arrêt, C.I.J. Recueil 2011 (II)*, p. 364, par. 55.

nullité, de l'erreur, du changement fondamental de circonstances ou de l'impossibilité d'exécution d'un traité qui n'est jamais entré en vigueur. J'avoue, Monsieur le président, que la prétention selon laquelle la manifestation de l'intention de ne pas ratifier un traité est «tardive» et qu'elle «ne peut produire les effets voulus»[245] me paraît pour le moins surprenante. On m'a appris dans mon premier cours de droit international public qu'un traité soumis à une procédure de ratification a besoin d'être ratifié pour pouvoir entrer en vigueur. Que je sache, la non-ratification d'un traité durant un laps de temps prolongé ne transforme pas cette non-ratification en ratification implicite.

7. Certes, le Nicaragua avance que les effets du traité (en l'occurrence, une délimitation maritime impossible) «[ont] été déjà généré[s] par une autre voie»[246]. Cela aurait prétendument été le fait du comportement du Costa Rica. Je n'ai rien à ajouter à ce que j'ai dit il y a une semaine et qui n'a pas été réfuté. Quel que soit l'article de la convention de Vienne pertinent, respecter un traité non ratifié afin de ne pas le priver de son objet et de son but, ou même l'appliquer provisoirement, n'équivaut pas à transformer les droits et obligations découlant du traité en droits et obligations existant autrement. Qui plus est, dans le domaine de la délimitation du plateau continental et de la zone économique exclusive, les articles 74 et 83 de la convention de Montego Bay renvoient explicitement à «des arrangements provisoires de caractère pratique et pour ne pas compromettre ou entraver pendant cette période de transition la conclusion de l'accord définitif. Les arrangements provisoires sont sans préjudice de la délimitation finale». Un traité soumis à ratification n'est pas un arrangement définitif tant qu'il n'est pas ratifié. Va-t-on nous faire croire alors que si un Etat applique des arrangements provisoires, pendant un certain laps de temps, fut-il prolongé, la délimitation provisoire respectée deviendrait obligatoire ? Quoi qu'il en soit, comme je l'ai affirmé la semaine dernière sans être contredit, même si le traité était en vigueur, il ne produirait pas les effets voulus par le Nicaragua[247].

8. Mesdames et Messieurs les juges, c'est étonnant de voir autant de références au comportement costa-ricien et aucune preuve concrète de ce comportement, si ce n'est des positions prises par le Costa Rica dans des notes diplomatiques. S'il y a un aspect fondamental du

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[245] CR 2017/10, p. 44, par. 37 (Remiro Brotóns).

[246] *Ibid*., p. 44, par. 37 (Remiro Brotóns).

[247] CR 2017/9, p. 14-18, par. 18-22 (Kohen).

comportement costa-ricien à prendre en considération dans les presque quarante ans qui ont suivi la signature du traité de 1977, c'est précisément l'absence de ratification du traité. Chaque fois qu'il a été interpellé soit par la Colombie, soit par le Nicaragua, l'attitude a été la même : marteler que le traité devait encore suivre la procédure constitutionnelle de ratification.

9. La référence à peine voilée à l'*estoppel* faite par M[e] Reichler n'a aucune justification — il a dit, en anglais, que le Costa Rica «is precluded from claiming maritime areas» au-delà de la ligne du traité de 1977. Pas un seul argument n'a même été avancé pour expliquer une prétendue situation d'*estoppel*. De même, sa comparaison du traité de 1977 avec votre analyse d'une ligne *de facto* dans l'affaire *Tunisie/Libye* est dépourvue de pertinence.

10. La ligne *de facto* de votre arrêt de 1982 correspondait aux limites partagées des blocs de concessions pétrolières octroyées par les deux parties sur une période de dix ans et aussi à une ligne historique exprimant un *modus vivendi* établi entre la France et l'Italie, puissances responsables des relations extérieures de la Tunisie et de la Libye avant l'indépendance[248]. Rien de cela n'est pertinent dans notre affaire. D'abord, le comportement en question dans l'affaire *Tunisie/Libye* est un comportement entre les parties elles-mêmes ou entre leurs Etats prédécesseurs. Ici, il s'agit d'un traité non ratifié entre un Etat partie à l'affaire et un Etat tiers. Ensuite, 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.

11. En résumé, Mesdames et Messieurs les juges, malgré les efforts du Nicaragua pour tirer profit d'un traité non ratifié auquel il n'est pas partie, aucun de ses arguments ne peut être retenu. Le traité de 1977 n'a aucun rôle à jouer dans la présente espèce.

B. Les traités Costa Rica/Panama et Colombie/Panama

12. Monsieur le président, je n'ai pas besoin d'insister sur ce que j'ai dit sur la portée du traité Costa Rica/Panama de 1980[249]. Je signale simplement que la question de la délimitation entre les deux Etats au-delà de la ligne établie par ce traité est une question qui relève des deux parties et

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[248] *Plateau continental (Tunisie/Jamahiriya arabe libyenne), arrêt, C.I.J. Recueil 1982,* p. 84-85, par. 119.

[249] CR 2017/9, p. 18, par. 23-24 (Kohen).

aucunement de cette affaire. Rien dans la revendication costa-ricienne ne peut affecter les droits du Panama.

13. Pour sa part, M[e] Paul Reichler s'est adonné à un exercice douteux pour prétendre que le traité Colombie/Panama de 1976 suffirait à écarter l'effet d'amputation dont souffre le Costa Rica du fait de sa position centrale au fond du littoral concave centraméricain. Il s'est aussi prononcé sur ce qu'il considère être la position du Panama à l'égard du Nicaragua, après votre arrêt de 2012, au-delà de la ligne de délimitation accordée avec la Colombie. Ce traité, quel que soit son statut actuel, ne peut pas affecter les droits des Parties à la présente instance. Toute spéculation nicaraguayenne sur les positions panaméennes n'est que pure supposition et n'a aucune valeur dans la présente instance. Par exemple, le Nicaragua a mis l'accent sur une lettre de 2013 adressée par le Panama au Secrétaire général des Nations Unies[250]. Cette lettre n'avait pour destinataire ni la Colombie ni aucune des Parties à la présente instance. Cela n'a tout de même pas empêché M[e] Reichler d'affirmer que le Panama «considers itself precluded, from claiming any areas beyond its agreed boundary with Colombia»[251]. Le seul texte de cette communication ne permet pas de soutenir cette assertion. La position actuelle du Panama concernant l'étendue de ses espaces maritimes dans la mer des Caraïbes demeure inconnue et ne peut en aucun cas être déduite d'une lettre rédigée il y a près de quatre ans pour protester contre la revendication par le Nicaragua, auprès de la Commission des limites du plateau continental, d'un plateau continental étendu empiétant sur les espaces maritimes panaméens.

14. Pour répondre maintenant à l'interprétation de M[e] Reichler relative au rôle du traité Panama/Colombie sur l'effet d'amputation découlant de la concavité des côtes costa-riciennes, je me permets une référence jurisprudentielle.

15. Dans l'affaire *Bangladesh c. Inde*, l'Inde invoqua en sa faveur la ligne de délimitation établie en 2012 par le Tribunal international du droit de la mer entre le Bangladesh et le Myanmar. Selon elle, si le Bangladesh souffrait d'une amputation de ses espaces maritimes du fait de la concavité du golfe du Bengale, celle-ci avait déjà été corrigée et remédiée par la ligne Bangladesh/Myanmar de 2012. Ainsi, il n'y avait plus lieu, selon l'Inde, de procéder à un

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[250] Nicaragua, onglet n° 14 de vos dossiers (7 juillet 2017).

[251] CR 2017/11, p. 25, par. 15 (Reichler).

ajustement de la ligne d'équidistance qu'elle partageait avec le Bangladesh, en faveur de ce dernier[252].

16. Dans sa sentence de 2014, le Tribunal arbitral rejeta l'argument indien de la manière suivante :

[Projection n° 1]

> «More fundamentally, the Tribunal wishes to emphasize that the case before the International Tribunal for the Law of the Sea between Myanmar and Bangladesh and the present arbitration are independent of each other. They involve different Parties, separate proceedings, and different fora. Accordingly, the Tribunal must consider the Judgment of the International Tribunal for the Law of the Sea as *res inter alios acta*. This Tribunal will, therefore, base its decision solely on consideration of the relationship between Bangladesh and India and their respective coastlines. This decision is in line with the award in the case of *Barbados/Trinidad and Tobago*, where the arbitral tribunal refused to take into consideration a delimitation agreement between Trinidad and Tobago and Venezuela. The Tribunal will, however, take into consideration any compensation Bangladesh claims it is entitled to due to any inequity it suffers in its relation to India as a result of its concave coast and its location in the middle of two other States, sitting on top of the concavity of the Bay of Bengal.»[253]

[Fin de la projection n° 1]

17. Mesdames et Messieurs de la Cour, si une ligne de délimitation impliquant l'une des parties au différend et décidée par voie juridictionnelle n'est pas prise en compte et n'écarte pas l'appréciation de l'effet d'amputation généré par la concavité d'un littoral à trois Etats, à plus forte raison le même traitement devra être réservé au traité de 1976 entre le Panama et la Colombie dans la présente instance. Il devrait en être ainsi d'autant plus que ce traité concerne deux Etats tiers à la présente instance et que votre arrêt de 2012 peut avoir des implications à son égard.

C. La jurisprudence est constante sur le caractère bilatéral des traités et des décisions juridictionnelles en matière de délimitation maritime

18. Je dirais que tout cela s'inscrit dans une cohérence jurisprudentielle remarquable. Votre Cour et les Tribunaux internationaux ont systématiquement refusé de prendre en compte des traités conclus avec ou par des Etats tiers aux fins du tracé de la ligne de délimitation. Il en fut ainsi pour les traités Islande/Norvège de 1980 et 1981 invoqués par le Danemark dans l'affaire de *Jan Mayen*

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[252] *Bangladesh c. Inde, sentence du 7 juillet 2014, CPA*, p. 114, par. 391.

[253] *Ibid.*, p. 121, par. 411.

(Danemark c. Norvège)[254], les traités Trinité-et-Tobago/Venezuela de 1990 et France/République dominicaine de 1987 invoqués par Trinité-et-Tobago dans l'affaire *Barbade c. Trinité-et-Tobago*[255], les traités Honduras/Colombie de 1986 et Jamaïque/Colombie de 1993 invoqués par le Honduras dans l'affaire *Nicaragua c. Honduras*[256], les traités Turquie/URSS de 1978 et Turquie/Bulgarie de 1997 invoqués par la Roumanie dans l'affaire *Roumanie c. Ukraine*[257], et enfin les traités Colombie/Costa Rica de 1977, Colombie/Panama de 1976 et Colombie/Jamaïque de 1993 invoqués par la Colombie dans l'affaire «NICOL 1»[258].

19. Compte tenu de la pertinence particulière de cette dernière affaire, je me permets de citer votre arrêt de 2012 :

[Projection n° 2]

> «La Cour note que, si l'accord que la Colombie a signé avec le Costa Rica et ceux qu'elle a conclus avec la Jamaïque et le Panama concernent les relations juridiques entre les Etats parties à chacun de ces instruments, ils sont en revanche *res inter alios acta* à l'égard du Nicaragua. En conséquence, les droits et obligations du Nicaragua vis-à-vis du Costa Rica, de la Jamaïque ou du Panama ne sauraient être affectés par aucun de ces accords, qui ne peuvent pas davantage imposer d'obligations ni conférer de droits au Costa Rica, à la Jamaïque ou au Panama vis-à-vis du Nicaragua. Il s'ensuit que, en opérant une délimitation entre la Colombie et le Nicaragua, la Cour n'entend nullement définir ni mettre en cause les droits et obligations qui pourraient exister entre le Nicaragua et l'un quelconque de ces trois Etats.»[259]

[Fin de la projection n° 2]

20. Cette jurisprudence démontre, pour reprendre vos termes, qu'une délimitation entre deux Etats demeure exclusivement bilatérale et qu'elle ne peut avoir aucune incidence, soit-elle positive ou négative, sur les droits d'un Etat tiers. Cela est d'ailleurs confirmé par le traitement réservé par la jurisprudence aux délimitations établies avec un Etat tiers par voie juridictionnelle. Monsieur le

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[254] *Délimitation maritime dans la région située entre le Groenland et Jan Mayen (Danemark c. Norvège), arrêt, C.I.J. Recueil 1993*, p. 76-77, par. 86.

[255] *La Barbade c. Trinité-et-Tobago, sentence du 11 avril 2006, RSA*, vol. XVII, p. 104-105, par. 344-348.

[256] *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras), arrêt, C.I.J. Recueil 2007 (II)*, p. 732-733, par. 246, p.734, par. 251, p. 736, par. 255.

[257] *Délimitation maritime en mer Noire (Roumanie c. Ukraine), arrêt, C.I.J. Recueil 2009*, p. 119-120, par. 174-176.

[258] *Différend territorial et maritime (Nicaragua c. Colombie), arrêt, C.I.J. Recueil 2012 (II)*, p. 707, par. 227.

[259] *Ibid*., p. 685, par. 162.

président, j'en ai pour deux ou trois minutes et, si vous me le permettez, je continue — et je vous promets que le Costa Rica n'épuisera pas tout son temps cet après-midi.

21. Ceci étant, la jurisprudence est également très claire sur le rôle que peuvent jouer les traités conclus avec des Etats tiers dans la région où doit s'opérer une délimitation maritime. Ce rôle est double. D'un côté, ces accords peuvent servir à fixer les limites externes de la zone pertinente correspondant à la zone de chevauchement des revendications[260]. De l'autre, ils peuvent influencer l'emplacement du point terminal de la ligne de délimitation, celui-ci devant être défini de sorte à ne pas affecter les intérêts des Etats tiers[261]. Le Costa Rica a tenu compte de ces considérations dans son exercice de délimitation. En effet, il a utilisé l'accord conclu en 1980 avec le Panama pour fixer la limite sud de la zone pertinente. De plus, le point terminal de la ligne qu'il revendique (le point 14) a été placé sur la ligne d'équidistance hypothétique entre le Panama d'une part et le Costa Rica et le Nicaragua d'autre part, de telle manière à ce qu'il n'affecte pas les intérêts du Panama dans la zone[262].

Conclusion

22. Pour conclure, Mesdames et Messieurs les juges, sur la question des effets des traités conclus avec ou par des Etats tiers à la présente affaire, je vous invite à faire ce que le Nicaragua lui-même vous a invité à faire (et que vous avez fait), dans l'affaire *Nicaragua c. Honduras*. Je cite le mémoire nicaraguayen :

[Projection n° 3]

> «In the present case, the maritime boundary between the two States remains undetermined and has not been the subject of any agreement between them ; nevertheless, a number of bilateral agreements between the Parties are of some relevance to the present dispute . . . *Conversely, the bilateral treaties concluded between one Party and a third State, including the Colombia/Honduras Treaty of 2 August 1986, are* res inter alios acta *and should not to be taken into consideration by the Court in resolving the dispute before it.*»[263]

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[260] *La Barbade c. Trinité-et-Tobago, sentence du 11 avril 2006, RSA*, vol. XVII, p. 105, par. 349 ; *Différend territorial et maritime (Nicaragua c. Colombie), arrêt, C.I.J. Recueil 2012 (II)*, p. 685-686, par. 163.

[261] *Délimitation maritime en mer Noire (Roumanie c. Ukraine), arrêt, C.I.J. Recueil 2009*, p. 120, par. 177 et p. 129, par. 209.

[262] *Différend territorial et maritime (Nicaragua c. Colombie), arrêt, C.I.J. Recueil 2012 (II)*, p. 686, par. 165 (sur l'usage des lignes d'équidistance hypothétiques).

[263] *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des* Caraïbes, MN, p. 63, par. 3 ; les italiques sont de nous.

[Fin de la projection n° 3]

23. Mesdames et Messieurs les juges, je vous remercie encore de votre patience et de votre attention et vous prie, Monsieur le président, de donner la parole cet après-midi à mon collègue Coalter Lathrop.

The PRESIDENT: Merci, Monsieur le professeur. The Court will meet again this afternoon, at 3 p.m., to hear the conclusion of Costa Rica's second round of oral argument. At the end of the sitting, Costa Rica will present its final submissions.

Thank you. L'audience est levée.

The Court rose at 1.05 p.m.

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