

Case Concerning *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, joined with the Case Concerning *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*

**Observations of Costa Rica upon the Report
prepared by the Court-appointed Experts**

Pursuant to the Court's communication dated 1 May 2017, reference 148491, in the case concerning *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, which has been joined with the case concerning the *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, Costa Rica files herewith its observations upon the report prepared by the Court-appointed experts dated 30 April 2017.

Costa Rica commends the experts on their professionalism, and the thorough and conscientious manner in which they have responded to the questions posed to them by the Court.

Costa Rica takes the opportunity afforded by the Court in order to make the following limited observations in respect of a number of specific points contained in the report.

Ad paragraph 15

Paragraph 15 refers to a temporary channel that was present in the beach at the time of the December 2016 site visit (located at "point Pch", as denominated by the experts), and which the experts describe as "*draining water from the [Los Portillos/Harbor Head] lagoon to the sea*". Similar references to water draining from the lagoon to the sea through the channel are made at paragraphs 19, 34, 101 and 188, as well as in the text accompanying Figures 2, 29, 30, and 31.

In that regard, it is undoubtedly true that the channel was draining excess water from the Lagoon, which was at an unusually high water level at that time as a result of the effects of Hurricane Otto (cf. paragraph 9). In the interests of completeness, however, Costa Rica would observe that it is equally true that the channel was also draining water from the wetlands of Isla Portillos, which at that time were flooded, again as a result of the unusually high water levels resulting from that exceptional event. That water from the wetlands was draining through the channel can be clearly seen in the photograph at Figure 29.

Ad paragraphs 25, 27, 153 and 161

Paragraph 25 refers to co-ordinates of the *"marker found by both Parties in 2003 on the beach near Los Portillos/Harbor Head Lagoon, which they saw on 21 February 2003, and for which they measured the co-ordinates on 25 November 2003"*, whilst paragraph 27 and the caption accompanying Figure 6 also state that the co-ordinates of this marker were measured by the Parties on 25 November 2003.

In addition, paragraph 153, in referring to the document entitled *"Minute of the Fourth Technical Meeting of the Sub-Commission on Limits and Cartography (San Juan del Norte, November 24 to 27, 2003)"* submitted by Nicaragua as Annex 15 to its Counter-Memorial in the *Maritime Delimitation* case, states that *"on 25 November 2003, a marker was located at Los Portillos/Harbour Head Lagoon"*, and that on that date it *"was measured by both Parties for 2.50 hours with hand-held GPS devices"*. Further, both the caption to Figure 56 and paragraph 161 make reference to the *"Marker found in the beach by the Sub-Commission on Limits and Cartography on 21 February 2003 and on 25 November 2003"* and state that it *"was measured by both Parties for 2:50 hours with hand-held GPS devices"*.

The source of the statements by the experts that measurements of the marker were taken by both Parties on 25 November 2003 would appear to be the so-called *"Minute"* submitted by Nicaragua as Annex 15 to its Counter-Memorial, discussed by the experts at paragraphs 151-156. In this regard, Costa Rica observes that this *"Minute"*

- a) is not signed by Costa Rica, and does not purport to be an agreed or joint document;
- b) does not contain the co-ordinates of any marker (including those resulting from the measurements which it states were taken on 25-26 November 2003); and
- c) does not contain the co-ordinates of the marker as measured by the Parties on 21 February 2003.

Costa Rica further observes that same Nicaraguan document makes clear that the Costa Rican delegation was not present on 25 November 2003 at the time when the marker (which is asserted by the *"Minute"* to be that previously found on 21 February 2003) was located and excavations carried out, and further, that the Costa Rican delegation was likewise not present at 10:00 am when measurements were taken of the marker *"for 2:50 hours"*. Instead, as the *"Minute"* states, the Costa Rican delegation was only incorporated much later in the morning, and once constituted thereafter *"proceeded to begin searching for other landmarks on the right bank of Portillo Lagoon"*. Thus, if the location of the marker found was indeed measured on 25 November 2003, those measurements were undertaken only by Nicaragua, and not by both Parties.

For the sake of clarity, Costa Rica notes that, by contrast, the coordinates corresponding to the marker located on 21 February 2003 were recorded by both Parties on that date. The coordinates taken by both Costa Rica and Nicaragua on 21 February 2003, as well as an average of their respective measurements, were subsequently recorded in a report prepared by Nicaragua's INETER dated 23 March 2003,¹ and it was those co-ordinates as recorded in that report that were provided to the experts for use as a reference for the field work undertaken on 7 December 2016 during the December 2016 site visit (see paragraphs 25-28) and which are recorded at paragraph 161 of the report. In this regard, Costa Rica recalls that, as the 23 March 2003 report did not form part of the pleadings, and had not been provided to the experts, the representatives of Costa Rica and Nicaragua agreed to use only the co-ordinates recorded at page 28 of the report for the purposes of trying to locate the marker during the December site visit, whilst reserving their respective positions as to the remainder of the report.

Finally, Costa Rica notes that the 23 March 2003 report was also the source of the co-ordinates provided by Costa Rica's IGN in its report of 19 December 2016, which was submitted to the Court on 21 December 2016² in response to a request for information from the Registrar of the Court following the first site visit.³

Ad paragraph 101

Paragraph 101 states that "*In the second site visit, the eastern and western extremities of the water body of the lagoon were measured at points Ple2 (Fig. 32) and Plew2 (Figs. 33, 34), respectively*".

Point "Plew2" is not referred to at any other point in the report. Costa Rica assumes that the reference to point "Plew2" is a typographical error, and that the experts intended to refer to point "Plw2", (i.e., the point corresponding to the western extremity of the water body of the lagoon). That conclusion is supported by the captions to Figures 33 and 34, to which the text of paragraph 101 cross-refers: both refer to "*the western extremity of the water body of Los Portillos/Harbour Head Lagoon*", whilst the caption to Figure 33 also refers to point "Plw2", the location which is marked on the photo.

¹ INETER, "Technical Report based on the agreements of the First Technical Cartographic Working Session of the Sub-Commission on Limits and Cartography, held on 16 January 2013, in Liberia, Costa Rica", 23 March 2003.

² Note by Ambassador Sergio Ugalde to the Registrar of the International Court of Justice, reference ECRPB-155-16 of 21 December 2016, and Annex.

³ Note by Phillipe Couvreur, Registrar of the International Court of Justice to Edgar Ugalde Alvarez, Agent of Costa Rica, reference 147804, 13 December 2016.

Ad paragraph 106

At paragraph 106 of the report, the experts describe the existence of “*discontinuous coast-parallel lagoons*”, which they consider to be “*essentially remnants of the channel-like water gap that used to exist in recent times between Isla Portillos and the spit of Los Portillos/Harbour Head Lagoon ...*”. In this regard, the experts make reference to the images at Figures 41 and 42 of the report.

Costa Rica notes that Figure 41 states that it is a screen capture from the video recording made by Nicaragua with a drone during the first site visit in December 2016. At that time, as Figure 41 shows, there were indeed a number of bodies of standing water parallel to the coast of Isla Portillos.

Costa Rica wishes to point out, however, that the first site visit took place not only during the rainy season (cf. paragraph 8), and during a period characterised by episodes of heavy rain (see e.g. paragraphs 27 and 35), but furthermore, that it took place only shortly after the exceptional event constituted by Hurricane Otto, which resulted in unusually high water levels of the river, Los Portillos/Harbor Head Lagoon, and the Isla Portillos wetlands (cf. paragraph 9). As a result, exceptionally large quantities of water had been deposited in the area as a result of high levels of precipitation.

Costa Rica further observes, that, as shown by Figure 42, the vast majority of the “coast-parallel lagoons” visible on Figure 41 which had been present during the first site visit had disappeared by the time of the second site visit in March 2017. Costa Rica thus considers that these ephemeral bodies of water are not the “remnants” of the “*first channel met*” described by the Umpire A.P. Alexander in his First Award of 30 September 1897.

Finally, Costa Rica observes that, as described by the experts at paragraph 106 and as depicted in Figure 43, in the western sector of Isla Portillos “*there are no lagoons with free-standing water*”.

Ad paragraph 139

The first sentence of paragraph 139 states that: “*The markers located at the Initial Point and the center of Plaza Victoria had iron pipes approximately 40 cm in diameter and 2 m long filled with concrete.*”

Costa Rica observes that this sentence should more accurately read:

“The reference markers located on the opposite margin of Los Portillos/Harbor Head Lagoon from the Initial Point and at the center of Plaza Victoria had iron pipes approximately 40 cm in diameter and 2 m long filled with concrete.”

Costa Rica considers that this should not be controversial. The experts make reference at paragraph 138 to the reference marker created by Alexander located on the opposite margin of the lagoon, and both parties have provided identical translations of the relevant part of Proceedings X of the Demarcation Commission chaired by Alexander, by which the demarcation of the two reference markers for the Initial Marker was agreed:

"The following type was agreed regarding the markers that will serve as reference points for the first monument, that is to say: for the first one on the right margin of the Harbor Head lagoon, an iron pipe, approximately 40 centimeters in diameter (filled with concrete) and two meters in length, buried one and a half meters and filled with concrete; for the second, in the center of Plaza Victoria in San Juan del Norte, the same iron pipe, buried so that its upper end appears at ground level".⁴

Ad paragraph 195

Having assessed at paragraphs 193 and 194 the main physical changes that may result from the current active coastal recession of the coast in the area of Isla Portillos, at paragraph 195 the experts state that other potential physical changes to take into consideration include the possibility of "*sharp deviations in the path of the San Juan River (avulsion) taking advantage of secondary channels (caños) located on its right margin in Isla Portillos*", and the possibility that such an avulsion might take advantage of "*the topographic depression of Los Portillos/Harbour Head Lagoon (i.e. the lagoon might become the mouth of the river)*".

Costa Rica observes in this regard that, as consistently shown by historical maps, and a comparison of those maps with recent satellite imagery, for at least a century the course of the lower reach of the San Juan River, up to a point just before its mouth, has been relatively stable from a geomorphological point of view; whilst erosion by the sea has resulted in significant changes to the location and configuration of the coast, there have been no corresponding changes significantly affecting the course of the river before it reaches its outlet into the Caribbean Sea. This is evident from Figure 86.

⁴ Proceedings of the Costa Rica-Nicaragua Demarcation Commissions (1897-1900), Proceedings X, translated and reproduced at Ann. 5 of Nicaragua's Counter-Memorial, Maritime Boundary, and at Ann. 52 of Costa Rica's Memorial, Land Boundary).