



# INTERNATIONAL COURT OF JUSTICE

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## Summary

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2 February 2018

### **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)**

### **Summary of the Judgment of 2 February 2018**

#### **Procedural background** (paras. 1-44)

The Court begins by recalling that, on 25 February 2014, the Republic of Costa Rica (hereinafter “Costa Rica”) instituted proceedings against the Republic of Nicaragua (hereinafter “Nicaragua”) with regard to a dispute concerning the “establishment of single maritime boundaries between the two States in the Caribbean Sea and the Pacific Ocean, respectively, delimiting all the maritime areas appertaining to each of them, in accordance with the applicable rules and principles of international law” (hereinafter the “case concerning Maritime Delimitation”).

The Court then recalls that, by an Order dated 31 May 2016, it decided that an expert opinion would be arranged to inform it as to the state of the coast between the point suggested by Costa Rica and the point suggested by Nicaragua in their pleadings as the starting-point of the maritime boundary in the Caribbean Sea. By an Order dated 16 June 2016, the President of the Court appointed the following two experts: Mr. Eric Fouache, of French nationality, and Mr. Francisco Gutiérrez, of Spanish nationality. The experts conducted a first site visit from 4 to 9 December 2016.

The Court further recalls that, on 16 January 2017, Costa Rica instituted proceedings against Nicaragua in a dispute concerning “the precise location of the land boundary separating the Los Portillos/Harbor Head Lagoon sandbar from Isla Portillos” and “the . . . establishment of a military camp by Nicaragua on the beach of Isla Portillos” (hereinafter “the case concerning the Northern Part of Isla Portillos”). The Court explains that, by an Order dated 2 February 2017, it decided to join the proceedings in the case concerning Maritime Delimitation and the case concerning the Northern Part of Isla Portillos.

The Court observes that the experts conducted a second site visit from 12 to 17 March 2017 and submitted their report to the Court on 1 May 2017. That report was transmitted to the Parties, which were given an opportunity to comment on it.

Finally, the Court recalls that public hearings were held in the joined cases from Monday 3 July to Thursday 13 July 2017.

### **I. JURISDICTION OF THE COURT (PARAS. 45-46)**

The Court notes that, in both of the cases, Costa Rica invokes, as bases of jurisdiction, Article XXXI of the Pact of Bogotá and the declarations by which the Parties have recognized the compulsory jurisdiction of the Court under Article 36 of the Statute, and that Nicaragua does not contest the Court's jurisdiction to entertain Costa Rica's claims. The Court finds that it has jurisdiction over both cases.

### **II. GENERAL BACKGROUND (PARAS. 47-58)**

#### **A. Geography (paras. 47-50)**

The Court recalls the geographical context to the two cases. It explains in this regard that Isla Portillos, the northern part of which is the subject of the land boundary dispute, is an area (approximately 17 sq km) bounded to the west by the San Juan River and to the north by the Caribbean Sea. It observes that at the north-western extremity of Isla Portillos, a sandspit of variable length deflects the final course of the San Juan River, displacing its mouth towards the west. It notes that on the coast of Isla Portillos, approximately 3.6 km east of the mouth of the San Juan River, is a lagoon called Laguna Los Portillos by Costa Rica and Harbor Head Lagoon by Nicaragua, and that this lagoon is at present separated from the Caribbean Sea by a sandbar.

The Court observes that in the Caribbean Sea off the coast of Nicaragua there are several islands and cays, the most prominent of which are the Corn Islands, located approximately 26 nautical miles off its coast; these islands have an area of 9.6 sq km (Great Corn Island) and 3 sq km (Little Corn Island) and a population of approximately 7,400 inhabitants. The Court points out that on the Pacific side, the coast of Nicaragua is relatively straight and generally follows a north-west to south-east direction, whereas the Costa Rican coast is more sinuous and includes the peninsulas of Santa Elena (near the land boundary terminus), Nicoya and Osa.

#### **B. Historical context (paras. 51-56)**

The Court then describes the historical context to the present disputes. It observes in this regard that, following hostilities between the two States in 1857, the Governments of Costa Rica and Nicaragua concluded in 1858 a Treaty of Limits (hereinafter the "1858 Treaty"), which fixed the course of the land boundary between the two countries from the Pacific Ocean to the Caribbean Sea. Following challenges by Nicaragua on various occasions to the validity of this Treaty, Costa Rica and Nicaragua signed another instrument on 24 December 1886, whereby the two States agreed to submit the question of the validity of the 1858 Treaty, as well as various other points of "doubtful interpretation", to the President of the United States of America, Grover Cleveland, for arbitration. The Court notes that, in the Award he handed down in 1888, President Cleveland, *inter alia*, confirmed the validity of the Treaty, and found that the boundary line between the two States on the Atlantic side "begins at the extremity of Punta de Castilla at the mouth of the San Juan de Nicaragua River, as they both existed on the 15th day of April 1858". Subsequent to that decision, in 1896, Costa Rica and Nicaragua agreed to establish two national Demarcation Commissions, which were to include an engineer, who "shall have broad powers to decide whatever kind of differences may arise in the course of any operations and his ruling shall be final". United States General Edward Porter Alexander was so appointed. During the demarcation process (which began in 1897 and was concluded in 1900), General Alexander rendered five Awards. The Court recalls that, in his First Award, dated 30 September 1897,

General Alexander determined the starting segment of the land boundary near the Caribbean Sea in light of geomorphological changes that had occurred since 1858. Following Alexander's First Award, the Demarcation Commissions recorded the co-ordinates of the starting-point of the land boundary determined by General Alexander by reference to the centre of Plaza Victoria in old San Juan de Nicaragua (Greytown) and other points on the ground.

The Court explains that since the time of the Alexander Awards and the work of the Demarcation Commissions, the northern part of Isla Portillos has continued to undergo significant geomorphological changes. It recalls that, in 2010, a dispute arose between Costa Rica and Nicaragua with regard to certain activities carried out by Nicaragua in that area. The Court further recalls that, in its 2015 Judgment in the case concerning Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) (hereinafter the "2015 Judgment"), it considered the impact of some of these changes on the issue of territorial sovereignty. The Court stated in its 2015 Judgment "that the territory under Costa Rica's sovereignty extends to the right bank of the Lower San Juan River as far as its mouth in the Caribbean Sea". The Court thus concluded in the 2015 Judgment that Costa Rica had sovereignty over a 3 sq km area in the northern part of Isla Portillos, although noting in its description of this area that it did "not specifically refer to the stretch of coast abutting the Caribbean Sea which lies between the Harbor Head Lagoon, which lagoon both Parties agree is Nicaraguan, and the mouth of the San Juan River". The Court observes that the course of the land boundary on this stretch of coast is one of the subjects of dispute between the Parties in the present joined cases.

With respect to maritime areas, the Court recalls that a bilateral Sub-Commission was established by the two Parties in May 1997 to carry out preliminary technical studies regarding possible maritime delimitations in the Pacific Ocean and the Caribbean Sea. It held five meetings between 2002 and 2005, after which negotiations on maritime delimitations between the two States stalled.

### **C. Delimitations already effected in the Caribbean Sea and the Pacific Ocean (paras. 57-58)**

The Court points out that, in the Caribbean Sea, Costa Rica concluded, on 2 February 1980, a treaty with Panama delimiting a maritime boundary; this treaty entered into force on 11 February 1982. Costa Rica negotiated and signed a maritime delimitation treaty with Colombia in 1977, but never ratified that instrument. Nicaragua's maritime boundaries with Honduras (to the north) and Colombia (to the east) have been established by Judgments of the Court in 2007 and 2012, respectively. Colombia and Panama also concluded a maritime delimitation treaty establishing their boundary in the Caribbean Sea on 20 November 1976.

The Court further observes that the 1980 treaty between Costa Rica and Panama also delimited their maritime boundary in the Pacific Ocean. For its part, Nicaragua has not concluded any treaty establishing a maritime boundary in the Pacific Ocean.

## **III. LAND BOUNDARY IN THE NORTHERN PART OF ISLA PORTILLOS (PARAS. 59-78)**

### **A. Issues concerning territorial sovereignty (paras. 59-73)**

The Court explains that the case concerning the Land Boundary in the Northern Part of Isla Portillos raises issues of territorial sovereignty which it is expedient to examine first, because of their possible implications for the maritime delimitation in the Caribbean Sea.

The Court observes that the Parties express divergent views on the interpretation of the 2015 Judgment and advance opposing claims to sovereignty over the coast of the northern part of Isla Portillos. The Court recalls that the operative part of its 2015 Judgment stated that “Costa Rica has sovereignty over the ‘disputed territory’, as defined . . . in paragraphs 69-70” of that Judgment. The term “disputed territory” was described in those paragraphs as including “the northern part of Isla Portillos, that is to say, the area of wetland of some 3 square kilometres between the right bank of the disputed caño, the right bank of the San Juan River up to its mouth at the Caribbean Sea and the Harbor Head Lagoon”. The Court noted in the 2015 Judgment, however, that “[t]he above definition of the “disputed territory” does not specifically refer to the stretch of coast abutting the Caribbean Sea which lies between the Harbor Head Lagoon, which lagoon both Parties agree is Nicaraguan, and the mouth of the San Juan River”. The Court further noted in the 2015 Judgment that the Parties

“did not address the question of the precise location of the mouth of the river nor did they provide detailed information concerning the coast. Neither Party requested the Court to define the boundary more precisely with regard to this coast. Accordingly, the Court will refrain from doing so.”

In the present Judgment, the Court is of the view that these passages indicate that no decision was taken in its 2015 Judgment on the question of sovereignty concerning the coast of the northern part of Isla Portillos, since this question had been expressly excluded. This means that it is not possible for the issue of sovereignty over that part of the coast to be res judicata. Therefore, the Court explains, it cannot declare inadmissible Nicaragua’s claim concerning sovereignty over that stretch of coast of Isla Portillos.

The Court recalls that, in its 2015 Judgment, it interpreted the 1858 Treaty as providing that “the territory under Costa Rica’s sovereignty extends to the right bank of the Lower San Juan River as far as its mouth in the Caribbean Sea”. However, the Court states, the absence of “detailed information”, which had been observed in the 2015 Judgment, had left the geographical situation of the area in question somewhat unclear with regard to the configuration of the coast of Isla Portillos, in particular regarding the existence of maritime features off the coast and the presence of a channel separating the wetland from the coast.

For the Court, the assessment made by the Court-appointed experts, which was not challenged by the Parties, dispels all uncertainty about the present configuration of the coast and the existence of a channel linking the San Juan River with Harbor Head Lagoon. The experts ascertained that “[o]ff the coastline, there are no features above water even at low tide” and that, west of Harbor Head Lagoon, “the coast is made up of a broad sandy beach with discontinuous and coast-parallel enclosed lagoons in the backshore”, while “[i]n the westernmost portion, close to the mouth of the San Juan River, there are no lagoons with free-standing water in the backshore”. Significantly, the experts observed that there is no longer any water channel connecting the San Juan River with Harbor Head Lagoon. For the Court, since there is no channel, there cannot be a boundary running along it; Nicaragua’s contention that “the boundary should continue to be defined by the approximate location of the former channel” linking the river with Harbor Head Lagoon ignores the fact that the channel in question, as it existed at the time of the Alexander Awards, was running well north of the present beach and has been submerged by the sea, as the Court-appointed experts noted, explaining that “such . . . continuous channel has disappeared due to coastal recession”. In light of these findings, the Court determines that Costa Rica has sovereignty over the whole of Isla Portillos up to where the river reaches the Caribbean Sea, and that the starting-point of the land boundary is the point at which the right bank of the San Juan River reaches the low-water mark of the coast of the Caribbean Sea, currently located at the end of the sandspit constituting the right bank of the San Juan River at its mouth.

The Court recalls, however, that the Parties agree that Nicaragua has sovereignty over Harbor Head Lagoon. According to the Court-appointed experts, “Los Portillos/Harbor Head

Lagoon is commonly separated from the sea by [a] sand barrier”, although there may be “temporary channels in the barrier”. The Court observes that this assessment, which implies that the barrier is above water even at high tide, was not challenged by the Parties. The Court therefore considers that the Parties agree that both Harbor Head Lagoon and the sandbar separating it from the Caribbean Sea are under Nicaragua’s sovereignty. According to the experts, the sandbar extends between the points at the edge of the north-eastern and north-western ends of the Lagoon. The current location of these points has been identified by the experts in their report as points Ple2 and Plw2 with respective co-ordinates of 10° 55' 47.23522" N, 83° 40' 03.02241" W and 10° 56' 01.38471" N, 83° 40' 24.12588" W in WGS 84 datum. The Court concludes that the sandbar extends between the points located at the north-eastern and north-western ends of the Lagoon, currently between points Ple2 and Plw2, respectively; from each of these two points, the land boundary should follow the shortest line across the sandbar to reach the low-water mark of the coast of the Caribbean Sea, as depicted on sketch-map No. 2 (reproduced in Annex 2 of the present summary).

#### **B. Alleged violations of Costa Rica’s sovereignty (paras. 74-78)**

The Court recalls that Costa Rica’s Application includes the claim that, “by establishing and maintaining a new military camp on the beach of Isla Portillos, Nicaragua has violated the sovereignty and territorial integrity of Costa Rica, and is in breach of the Judgment of the Court of 16 December 2015 in the Certain Activities case”. Costa Rica requests the Court to declare that “Nicaragua must withdraw its military camp” and reserves its position with regard to further remedies. The Court notes that the experts have assessed that the edge of the north-western end of Harbor Head Lagoon lies east of the place where the military camp was located. The Court observes that it is now common ground that the military camp was placed by Nicaragua on the beach close to the sandbar, but not on it. The Court concludes that the installation of the camp thus violated Costa Rica’s territorial sovereignty as defined above. It follows that the camp must be removed from Costa Rica’s territory. However, there was no breach by Nicaragua of the 2015 Judgment because the boundary with regard to the coast had not been defined in that Judgment. The Court considers that the declaration of a violation of Costa Rica’s sovereignty and the order addressed to Nicaragua to remove its camp from Costa Rica’s territory constitute appropriate reparation.

### **IV. MARITIME DELIMITATION IN THE CARIBBEAN SEA (PARAS. 79-166)**

#### **A. Starting-point of the maritime delimitation (paras. 80-89)**

The Court observes that, since the starting-point of the land boundary is currently located at the end of the sandspit bordering the San Juan River where the river reaches the Caribbean Sea, the same point would normally be the starting-point of the maritime delimitation. However, the great instability of the coastline in the area of the mouth of the San Juan River, as indicated by the Court-appointed experts, prevents the identification on the sandspit of a fixed point that would be suitable as the starting-point of the maritime delimitation. It is preferable, the Court reasons, to select a fixed point at sea and connect it to the starting-point on the coast by a mobile line. Taking into account the fact that the prevailing phenomenon characterizing the coastline at the mouth of the San Juan River is recession through erosion from the sea, the Court deems it appropriate to place a fixed point at sea at a distance of 2 nautical miles from the coast on the median line.

With regard to the enclave under Nicaragua’s sovereignty, the Court notes that the sandbar separating Harbor Head Lagoon from the Caribbean Sea is a minor feature without vegetation and characterized by instability. In relation to this sandbar, the Court determines that the question of the starting-points of the maritime delimitation is bound up with the effects, if any, of this feature on

the maritime delimitation. The Court addresses this latter issue later in its Judgment, taking into account the characteristics of the feature in question.

### **B. Delimitation of the territorial sea (paras. 90-106)**

The Court recalls that, in accordance with its established jurisprudence, it proceeds in two stages to delimit the territorial sea: first, the Court draws a provisional median line; second, it considers whether any special circumstances exist which justify adjusting such a line.

The Court states that it will construct the provisional median line only on the basis of points situated on the natural coast, which may include points placed on islands or rocks. The base points used by the Court are located on salient points that are situated on solid land and thus have a relatively higher stability than points placed on sandy features. The Court observes that Paxaro Bovo and Palmenta Cays do not affect the construction of the median line in the territorial sea.

The Court considers that, for the delimitation of the territorial sea, the combined effect of the concavity of Nicaragua's coast west of the mouth of the San Juan River and of the convexity of Costa Rica's coast east of Harbor Head Lagoon is of limited significance and does not represent a special circumstance that could justify an adjustment of the median line under Article 15 of UNCLOS.

However, the Court considers that a special circumstance affecting maritime delimitation in the territorial sea consists in the high instability and narrowness of the sandspit near the mouth of the San Juan River which constitutes a barrier between the Caribbean Sea and a sizable territory appertaining to Nicaragua. The instability of this sandspit does not allow one to select a base point on that part of Costa Rica's territory, as Costa Rica acknowledges, or to connect a point on the sandspit to the fixed point at sea for the first part of the delimitation line. The Court is of the view that it is more appropriate that the fixed point at sea on the median line be connected by a mobile line to the point on solid land on Costa Rica's coast which is closest to the mouth of the river. The Court observes that this point has been identified by the Court-appointed experts as point Pv but there may be geomorphological changes over time. For the present, the Court concludes, the delimitation line in the territorial sea extends from the fixed point at sea landwards to the point on the low-water mark of the coast of the Caribbean Sea that is closest to point Pv. From the fixed point seawards, the delimitation line in the territorial sea is the median line as determined by the base points selected in relation to the present situation of the coast.

The Court considers that another special circumstance is relevant for the delimitation of the territorial sea. The instability of the sandbar separating Harbor Head Lagoon from the Caribbean Sea and its situation as a small enclave within Costa Rica's territory call for a special solution. Should territorial waters be attributed to the enclave, they would be of little use to Nicaragua, while breaking the continuity of Costa Rica's territorial sea. Under these circumstances, the delimitation in the territorial sea between the Parties will not take into account any entitlement which might result from the enclave.

The Court concludes that the delimitation line in the territorial sea is obtained by joining landwards the fixed point at sea (with the co-ordinates given in paragraph 106 of the Judgment) with the point on solid land on Costa Rica's coast that is closest to the mouth of the river and by joining seawards with geodetic lines the points set out in paragraph 106 of the Judgment, as depicted on sketch-map No. 5 (reproduced in Annex 2 of the present summary).

**C. Delimitation of the exclusive economic zone and the continental shelf** (paras. 107-166)

The Court then proceeds to the delimitation of the exclusive economic zones and continental shelves appertaining to Costa Rica and Nicaragua, for which both Parties requested the Court to draw a single delimitation line.

**(a) Relevant coasts and relevant area** (paras. 108-122)

**(i) Relevant coasts** (paras. 108-114)

The Court recalls that the relevant coasts for the delimitation are those that generate projections which overlap with projections from the coast of the other party. In the present case, the Court considers that the entire mainland coast of Costa Rica is relevant. In the Court's view, the mainland coast of Nicaragua is relevant up to Punta Gorda (north), where the coast shows a significant inflexion. The coasts of the Corn Islands that do not face north also have to be included when determining the length of the relevant coasts. On the other hand, no evidence concerning the capacity of the Cayos de Perlas to "sustain human habitation or economic life of their own" as required by Article 121 of UNCLOS was supplied by Nicaragua to support its assertion that "the Cayos de Perlas generate maritime projections". Therefore their coasts should not be included among the relevant coasts. Given the fact that the relevant coasts of Nicaragua and Costa Rica are not characterized by sinuosity, the length of the relevant coasts should preferably be measured on the basis of their natural configuration. This results in a total length of the coasts of 228.8 km for Costa Rica and of 465.8 km for Nicaragua, with a ratio of 1:2.04 in favour of Nicaragua.

**(ii) Relevant area** (paras. 115-122)

The Court recalls that the relevant area comprises that part of the maritime space in which the potential entitlements of the Parties overlap. Here, the Court considers that, except for the space attributed to Colombia in the 2012 Judgment, the area where there are overlapping projections in the north includes the whole maritime space situated within a distance of 200 nautical miles from Costa Rica's coast. In the south, the situation is more complicated because of the presence of claims of third States on which the Court cannot pronounce itself. The impact of the rights of third States in the areas that may be attributed to one of the Parties cannot be determined, but the spaces where third States have a claim may nevertheless be included. The Court further analyses the issue of the relevant area in the Caribbean Sea later in its Judgment (see sub-section (e) below).

**(b) Relevance of bilateral treaties and judgments involving third States** (paras. 123-134)

The Court observes that the 1976 Treaty between Panama and Colombia involves third States and cannot be considered relevant for the delimitation between the Parties. With regard to the 1977 Treaty between Costa Rica and Colombia, there is no evidence that a renunciation by Costa Rica of its maritime entitlements, if it had ever taken place, was also intended to be effective with regard to a State other than Colombia.

**(c) Provisional equidistance line** (paras. 135-145)

The Court recalls that it delimits the exclusive economic zone and the continental shelf pursuant to its established methodology in three stages. First, it provisionally draws an equidistance line using the most appropriate base points on the relevant coasts of the Parties. Second, it considers whether there exist relevant circumstances which are capable of justifying an adjustment of the equidistance line provisionally drawn. Third, it assesses the overall equitableness of the

boundary resulting from the first two stages by checking whether there exists a marked disproportionality between the length of the Parties' relevant coasts and the maritime areas found to appertain to them.

The Court then turns to the construction of the provisional equidistance line in the case at hand, observing that the Parties are generally in agreement with regard to the selection of base points, but are divided on two issues. The first issue concerns the placement of base points on the Corn Islands, and the second concerns the placement of base points on Paxaro Bovo and Palmenta Cays. The Court concludes that base points should be placed on the Corn Islands for the purpose of constructing a provisional equidistance line. It observes in this respect that these islands have a significant number of inhabitants and sustain economic life; they therefore amply satisfy the requirements set forth in Article 121 of UNCLOS for an island to be entitled to generate an exclusive economic zone and continental shelf. With regard to the Palmenta Cays and Paxaro Bovo, the Court notes that these features may be assimilated to the coast and thus it considers it appropriate to place base points on them for the construction of the provisional equidistance line. The Court concludes that the provisional equidistance line shall follow a series of geodetic lines described in paragraph 145 of the Judgment, as depicted on sketch-map No. 9 (reproduced in Annex 2 of the present summary).

**(d) Adjustment to the provisional equidistance line** (paras. 146-158)

The Court then considers whether there are factors calling for the adjustment of the provisional equidistance line in order to achieve an equitable result. In the case of the Corn Islands, the Court considers that, given their limited size and significant distance from the mainland coast, it is appropriate to give them only half effect. This produces an adjustment of the equidistance line in favour of Costa Rica. The Court decides that the other arguments advanced by the Parties to support an adjustment of the provisional equidistance line cannot be accepted. Nicaragua's alleged combination of a convex coast of Costa Rica near Punta de Castilla and of its own concave coast has a limited effect on the boundary line, especially at a distance from the coast, and is not sufficiently significant to warrant an adjustment of the line. The overall concavity of Costa Rica's coast and its relations with Panama cannot justify an adjustment of the equidistance line in its relations with Nicaragua. When constructing the maritime boundary between the Parties, the relevant issue is whether the seaward projections from Nicaragua's coast create a cut-off for the projections from Costa Rica's coast as a result of the concavity of that coast. This alleged cut-off is not significant, even less so once the equidistance line has been adjusted by giving a half effect to the Corn Islands.

The resulting adjusted equidistance line is described in paragraph 156 of the Judgment and depicted on sketch-map No. 10 (reproduced in Annex 2 of the present summary). The Court recalls that this line is constructed without prejudice to any claims that a third State may have on part of the area crossed by the line. Given the complexity of that line, the Court considers it more appropriate to adopt a simplified line, on the basis of the most significant turning points. The resulting simplified line is set out in paragraph 158 of the Judgment and depicted on sketch-map No. 11 (reproduced in Annex 2 of the present summary).

**(e) Disproportionality test** (paras. 158-166)

The Court observes that the attribution of some maritime space to a third State will affect the part of the relevant area that appertains to each Party. Since the maritime space appertaining to third States cannot be identified in the present proceedings, it is impossible for the Court to calculate precisely the part of the relevant area of each Party. However, for the purpose of verifying whether the maritime delimitation shows a gross disproportion, an approximate calculation of the



relevant area is sufficient. In the present case, the Court finds it appropriate to base this calculation on the “notional extension of the Costa Rica-Panama boundary” as suggested by Costa Rica.

The Court then observes that the relevant area identified would be divided by the maritime boundary into 73,968 sq km for Nicaragua and 30,873 sq km for Costa Rica, with a resulting ratio of 1:2.4 in favour of Nicaragua. The Court concludes that a comparison with the ratio of coastal lengths (1:2.04 also in favour of Nicaragua) does not show any “marked disproportion”.

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The Court therefore finds that the delimitation concerning the exclusive economic zone and the continental shelf between the Parties in the Caribbean Sea shall follow the line described in paragraph 158 of the Judgment, as depicted on sketch-map No. 13 (reproduced in Annex 2 of the present summary).

## **V. MARITIME DELIMITATION IN THE PACIFIC OCEAN (PARAS. 167-204)**

The Court then moves to the delimitation of the maritime boundary between the Parties in the Pacific Ocean. As with the maritime delimitation in the Caribbean Sea, the Court was requested with respect to the Pacific Ocean to delimit the boundary for the territorial sea, the exclusive economic zone and the continental shelf.

### **A. Starting-point of the maritime delimitation (para. 169)**

With regard to the starting-point of the maritime delimitation in the Pacific Ocean, the Court observes that Costa Rica and Nicaragua agree that it is the midpoint of the closing line of Salinas Bay. In the oral proceedings, Costa Rica raised no objection to using the co-ordinates indicated by Nicaragua in its Counter-Memorial for the purposes of identifying the starting-point of the maritime boundary in the Pacific Ocean. Therefore, on the basis of the agreement between the Parties, the Court finds that the maritime boundary between Costa Rica and Nicaragua in the Pacific Ocean shall start at the midpoint of the closing line of Salinas Bay, with co-ordinates 11° 03' 56.3" N, 85° 44' 28.3" W (WGS 84 datum).

### **B. Delimitation of the territorial sea (paras. 170-175)**

The Court next addresses the delimitation of the territorial sea. It notes that, for the construction of the provisional median line in the present case, Costa Rica and Nicaragua selected the same base points, which are located on certain prominent features on their coasts. The Court sees no reason to depart from the base points selected by both Parties.

The Court recalls, however, that the Parties differ on whether the configuration of the coast constitutes a special circumstance within the meaning of Article 15 of UNCLOS which would justify an adjustment of the provisional median line in the territorial sea. The issue is whether locating base points on the Santa Elena Peninsula has a significant distorting effect on the provisional median line which would result in a cut-off of Nicaragua’s coastal projections within the territorial sea. As the Court has noted in a previous case, “islets, rocks and minor coastal projections” can have a disproportionate effect on the median line. Such an effect can call for an adjustment of the provisional median line in the territorial sea. In the vicinity of Salinas Bay, however, the Court takes the view that the Santa Elena Peninsula cannot be considered to be a

minor coastal projection that has a disproportionate effect on the delimitation line. It observes that the coast of the Santa Elena Peninsula accounts for a large portion of Costa Rica's coast in the area in which the Court is requested to delimit the territorial sea. Moreover, it notes, the adjustment proposed by Nicaragua in the territorial sea would push the boundary close to Costa Rica's coast, thus significantly cutting off Costa Rica's coastal projections within the territorial sea. The Court concludes that the territorial sea in the Pacific Ocean shall be delimited between the Parties by means of a median line which shall follow a series of geodetic lines connecting the points set out in paragraph 175 of the Judgment, as depicted on sketch-map No. 15 (reproduced in Annex 2 of the present summary).

**C. Delimitation of the exclusive economic zone and  
the continental shelf (paras. 176-204)**

**(a) Relevant coasts and relevant area (paras. 177-185)**

**(i) Relevant coasts (paras. 177-181)**

With respect to the relevant coasts, the Court reasons that since in the Pacific Ocean the coast of Costa Rica is characterized by a certain degree of sinuosity, whereas the coast of Nicaragua largely develops along a straight line, it is appropriate to identify the relevant coast of both Parties by means of straight lines.

The Court notes that the Parties' positions do not differ significantly with respect to the identification of Nicaragua's relevant coast. It finds that the entire Nicaraguan coast, from Punta Arranca Barba to Punta Cosigüina, generates potential maritime entitlements overlapping with those of Costa Rica. The length of Nicaragua's relevant coast, thus identified and measured by the Court along a straight line, is 292.7 km long.

The Court observes that the Parties' arguments concerning Costa Rica's relevant coast differ significantly. The Court is of the view that the coast of Costa Rica between Punta Guiones and Cabo Blanco, as well as between Punta Herradura and Punta Salsipuedes, generates potential maritime entitlements overlapping with those of the relevant coast of Nicaragua as identified in the previous paragraph. Under the circumstances, the Court finds it appropriate to include within the relevant coast certain parts of Costa Rica's coast south of Punta Guiones. The Court notes that the coasts of Nicoya Gulf face each other and considers that they are not relevant for the purposes of delimitation. The Court concludes that the first segment of Costa Rica's relevant coast runs along the straight lines connecting Punta Zacate, Punta Santa Elena, Cabo Velas, Punta Guiones and Cabo Blanco. The second segment of Costa Rica's relevant coast runs along the straight lines connecting Punta Herradura, the Osa Peninsula, Punta Llorona and Punta Salsipuedes. Costa Rica's relevant coast, thus identified and measured by the Court along straight lines, is 416.4 km long.

**(ii) Relevant area (paras. 182-185)**

With respect to the relevant area, the Court is of the view that the potential maritime entitlements generated by both the northern and southern parts of Costa Rica's relevant coast overlap with the potential maritime entitlements generated by the relevant coast of Nicaragua. The Court considers that the relevant area is bordered in the north by a line starting at Punta Cosigüina and perpendicular to the straight line approximating the general direction of Nicaragua's coast. In the west and in the south, the Court determines that the relevant area is limited by the envelope of arcs marking the limits of the area in which the potential maritime entitlements of the Parties overlap. The relevant area thus identified measures approximately 164,500 sq km.

**(b) Provisional equidistance line** (paras. 186-189)

The Court next constructs a provisional equidistance line. The Court is satisfied that the base points selected by the Parties are appropriate for drawing a provisional equidistance line in the Pacific Ocean. It states that the provisional equidistance line for the exclusive economic zone and the continental shelf shall begin at the end of the boundary in the territorial sea, and thence it shall follow a series of geodetic lines as described in paragraphs 188-189 of the Judgment and depicted on sketch-map No. 19 (reproduced in Annex 2 of the present summary).

**(c) Adjustment to the provisional equidistance line** (paras. 190-201)

The Court then turns to the arguments of the Parties concerning the adjustment of the provisional equidistance line, which focus on whether either the Santa Elena Peninsula or the Nicoya Peninsula create an inequitable cut-off of Nicaragua's coastal projections.

With respect to the Santa Elena Peninsula, a protrusion lying close to the starting-point of the maritime boundary between the Parties, the Court states that while it did not consider any adjustment of the provisional median line was necessary for that peninsula within the territorial sea, the situation is different for the exclusive economic zone and the continental shelf, for which the base points placed on the Santa Elena Peninsula control the course of the provisional equidistance line from the 12-nautical-mile limit of the territorial sea up to a point located approximately 120 nautical miles from the coasts of the Parties. The Court considers that such base points have a disproportionate effect on the direction of the provisional equidistance line, which results in a significant cut-off of Nicaragua's coastal projections. In the view of the Court, this cut-off effect is inequitable. Therefore, the Court finds it appropriate to adjust the provisional equidistance line for the exclusive economic zone and the continental shelf by giving half effect to the Santa Elena Peninsula.

With respect to the Nicoya Peninsula, the Court observes that this is a feature with a large landmass, corresponding to approximately one seventh of Costa Rica's territory, and with a large population. It notes that the coast of that peninsula accounts for a sizeable portion of the coast of Costa Rica in the area to be delimited and, as a consequence, its direction cannot be said to depart from the general direction of Costa Rica's coast. The Court further notes that it has drawn the provisional equidistance line using Cabo Velas, located on the Nicoya Peninsula, as a base point, and that Cabo Velas controls the equidistance line for approximately 80 nautical miles. The Court recalls that, in Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), the Chamber rejected proposals to give less than full effect to certain substantial mainland features, in particular Nova Scotia and Cape Cod. The Court observes that the Nicoya Peninsula is a prominent part of Costa Rica's mainland and is comparable to the Nova Scotian Peninsula or to Cape Cod; therefore, the Court considers that it cannot be given less than full effect in delimiting the boundary in the exclusive economic zone and on the continental shelf. The Court finds that no adjustment of the provisional equidistance line is necessary on account of the presence of the Nicoya Peninsula.

The Court concludes that the maritime boundary in the exclusive economic zone and on the continental shelf between Costa Rica and Nicaragua in the Pacific Ocean follows an equidistance line starting at the endpoint of the boundary in the territorial sea and subsequently adjusted as just described. The adjusted line is described in paragraph 200 of the Judgment and depicted on sketch-map No. 20 (reproduced in Annex 2 of the present summary). Given the complexity of that line, the Court considers it more appropriate to adopt a simplified line, on the basis of the most significant turning points on the adjusted equidistance line, which indicate a change in the direction of that line. The resulting simplified line is described in paragraph 201 of the Judgment and is depicted on sketch-map No. 21 (reproduced in Annex 2 of the present summary).

(d) **Disproportionality test** (paras. 202-204)

The Court finally turns to the disproportionality test. It observes that the relevant coast of Costa Rica in the Pacific Ocean is 416.4 km long, and the relevant coast of Nicaragua in the Pacific Ocean is 292.7 km long. The two relevant coasts stand in a ratio of 1:1.42 in favour of Costa Rica. The Court finds that the maritime boundary it established between the Parties in the Pacific Ocean divides the relevant area in such a way that approximately 93,000 sq km of that area appertain to Costa Rica and 71,500 sq km of that area appertain to Nicaragua. The ratio between the maritime areas found to appertain to the Parties is 1:1.30 in Costa Rica's favour. The Court considers that, taking into account all the circumstances of the present case, the maritime boundary established between Costa Rica and Nicaragua in the Pacific Ocean does not result in gross disproportionality. Accordingly, the Court finds that the delimitation of the maritime boundary for the exclusive economic zone and the continental shelf achieves an equitable solution in accordance with Articles 74 and 83 of UNCLOS.

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The Court therefore concludes that the delimitation concerning the exclusive economic zone and the continental shelf in the Pacific Ocean shall follow the line described in paragraph 201 of the Judgment. The course of the maritime boundary in the Pacific Ocean is depicted on sketch-map No. 22 (reproduced in Annex 2 of the present summary).

**OPERATIVE PART (PARA. 205)**

THE COURT,

(1) By fifteen votes to one,

Finds that the Republic of Nicaragua's claim concerning sovereignty over the northern coast of Isla Portillos is admissible;

IN FAVOUR: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Gevorgian; Judges ad hoc Simma, Al-Khasawneh;

AGAINST: Judge Robinson;

(2) By fourteen votes to two,

Finds that the Republic of Costa Rica has sovereignty over the whole northern part of Isla Portillos, including its coast up to the point at which the right bank of the San Juan River reaches the low-water mark of the coast of the Caribbean Sea, with the exception of Harbor Head Lagoon and the sandbar separating it from the Caribbean Sea, sovereignty over which appertains to Nicaragua within the boundary defined in paragraph 73 of the present Judgment;

IN FAVOUR: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson; Judge ad hoc Simma;

AGAINST: Judge Gevorgian; Judge ad hoc Al-Khasawneh;

(3)(a) By fourteen votes to two,

Finds that, by establishing and maintaining a military camp on Costa Rican territory, the Republic of Nicaragua has violated the sovereignty of the Republic of Costa Rica;

IN FAVOUR: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson; Judge ad hoc Simma;

AGAINST: Judge Gevorgian; Judge ad hoc Al-Khasawneh;

(b) Unanimously,

Finds that the Republic of Nicaragua must remove its military camp from Costa Rican territory;

(4) Unanimously,

Decides that the maritime boundary between the Republic of Costa Rica and the Republic of Nicaragua in the Caribbean Sea shall follow the course set out in paragraphs 106 and 158 of the present Judgment;

(5) Unanimously,

Decides that the maritime boundary between the Republic of Costa Rica and the Republic of Nicaragua in the Pacific Ocean shall follow the course set out in paragraphs 175 and 201 of the present Judgment.

Judge TOMKA appends a declaration to the Judgment of the Court; Judge XUE appends a separate opinion to the Judgment of the Court; Judge SEBUTINDE appends a declaration to the Judgment of the Court; Judge ROBINSON appends a separate opinion to the Judgment of the Court; Judge GEVORGIAN appends a declaration to the Judgment of the Court; Judge ad hoc SIMMA appends a declaration to the Judgment of the Court; Judge ad hoc AL-KHASAWNEH appends a dissenting opinion and a declaration to the Judgment of the Court.

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### **Declaration of Judge Tomka**

Judge Tomka outlines in his declaration that he is not fully satisfied with the way in which the Court has delimited the maritime boundary between the Parties in the Caribbean Sea. He outlines that the Court, governed by Articles 74 and 83 of the 1982 United Nations Convention on the Law of the Sea, is obliged to achieve “an equitable solution” in delimiting the maritime boundaries between the Parties in the exclusive economic zone and continental shelf. Its Judgment in this respect substitutes for an agreement of the Parties, which they failed to reach.

Judge Tomka observes that the jurisprudence of the Court and other international tribunals establishes that a provisional equidistance line ought to be adjusted where that line would significantly cut off the maritime projections of the coast of one of the parties. In this case, he considers that the Court has not avoided the cut-off effect generated by the first part of the delimitation line in the Caribbean Sea. Indeed, that line has the effect of cutting off Nicaragua’s coastal projections as they relate to almost half of its significant concave coast in the Bahía de San Juan del Norte.

Judge Tomka considers that the Court’s solution is not fully equitable and that the Court should have adjusted the line to alleviate this cut-off by joining, by way of a straight line, the endpoint of the maritime boundary in the territorial sea to a point further along the delimitation line. He considers that this would have been particularly appropriate in light of the fact that the Court did not take into account any Nicaraguan maritime entitlements which might be generated by the sandbar separating Harbor Head Lagoon from the Caribbean Sea.

### **Separate opinion of Judge Xue**

Notwithstanding her vote on subparagraph (4) of the operative part of the Judgment, Judge Xue disagrees with the reasoning in relation to the location of the starting-point of the land boundary between the Parties and the way in which this issue is treated in the maritime delimitation in the case.

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

In this joint case, the identification of the starting-point of the land boundary is an essential issue, both for the determination of the territorial sovereignty of the coast in dispute and for the maritime delimitation between the Parties in the Caribbean Sea. In her view, the starting-point of the land boundary has to be determined in accordance with the 1858 Treaty of Limits, the Cleveland Award and the Alexander Awards.

Judge Xue points out that the report of the Court-appointed experts demonstrates that the initial segment of the land boundary, including its starting-point, remains identifiable and actually identified. What is left of Harbor Head Lagoon and the accreted sandbar separating the lagoon and the sea is a broken part of the land boundary, now enclaved within Costa Rica’s territory. The experts’ answer to the first question put forward by the Court in its Order of 31 May 2016 in fact identified the current location of the point at which the San Juan River reaches the sea, in other words, the place where the original land boundary breaks.

Contrary to the Court’s interpretation, Judge Xue takes the view that the Court has not determined the starting-point of the land boundary in its 2015 Judgment in the case concerning Certain Activities Carried Out by Nicaragua in the Border Area. Although the drafters of the

1858 Treaty and the arbitral awards well anticipated that the land boundary would necessarily be affected by gradual or sudden coastal changes in the future, they did not specifically spell out what principles of international law would apply in the event of such changes. The situation of what it now stands as partial disappearance of the watercourse was not envisaged. In her view, if the starting-point of the boundary is to be automatically determined by the river's outlet to the sea, it would be difficult to explain why both Parties agree that Harbor Head Lagoon belongs to Nicaragua rather than Costa Rica; since the watercourse has now reached the Caribbean Sea at the mouth of the San Juan River, what is on the right bank of the River, including Harbor Head Lagoon, should automatically be merged with Costa Rica's territory.

Judge Xue observes that when the Court determines that there is no longer any water channel connecting the San Juan River with Harbor Head Lagoon and therefore the coast of the northern part of Isla Portillos belongs to Costa Rica, it virtually states that the land boundary is disrupted at the mouth of the San Juan River by the natural change of the coast. In her view, the Court's decision that Harbor Head Lagoon and the sandbar separating it from the Caribbean Sea are under Nicaragua's sovereignty cannot simply be attributed to the agreement of the Parties; the underlying reason is Costa Rica's recognition that the line around Harbor Head Lagoon still constitutes part of the land boundary, albeit disconnected with the rest of the land boundary.

Situations with water boundaries vary from case to case. There is no established rule of customary international law governing the legal impact of watercourse change on boundaries. In the present case, Judge Xue considers that so far as the land boundary is concerned, two relevant factors should be taken into account. First, the starting-point of the land boundary, even after being relocated, remains in an unstable situation. To maintain stability and certainty of the boundary, more weight should be given to its legal title than to the factual change on the ground. Second, the enclave resulting from the break-up of the land boundary is not a self-standing geographical feature as such; until the Court's present decision on the sovereignty of the coast of the northern part of Isla Portillos, it formally constituted part of the land boundary.

The enclave, as it currently stands, should form part of the geomorphological circumstances of the coast for the maritime delimitation. Although the Court takes cognition of the great instability of the coastline in the area of the mouth of the San Juan River, Judge Xue considers that the Court does not give sufficient consideration to the coastal relationship between the Parties. With Costa Rica's coast now situated between Nicaragua's territories, Harbor Head Lagoon on the eastern side and the river mouth on the western side, it would be difficult, if not impossible, to choose a starting-point on land that would genuinely reflect a median point. Either way, there would be some cut-off effect to the detriment of one Party.

Recalling the Court's statement in the Nicaragua v. Honduras case that "[n]othing in the wording of Article 15 suggests that geomorphological problems are *per se* precluded from being 'special circumstances' within the meaning of the exception, nor that such 'special circumstances' may only be used as a corrective element to a line already drawn" (Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007 (II), p. 744, para. 280), Judge Xue takes the view that the geomorphological conditions of the coast of the northern part of Isla Portillos and the break-up of the land boundary constitute such special circumstances.

While she agrees with the majority that given the prevailing circumstances of the coast and the current location of the mouth of the San Juan River, it is reasonable and equitable to draw the provisional median line from the coast on the western side of Isla Portillos near the mouth of the San Juan River, Judge Xue doubts the wisdom to select as the starting-point of the maritime boundary a point on the solid land closest to the mouth of the river, currently identified as point Pv, because that point is equally unstable, and moreover, by selecting that starting-point, the Court would provide Nicaragua with no access to the enclave.

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

In order to overcome the difficulty arising from the repositioning of the starting-point of the land boundary at the mouth of the San Juan River as a result of the disappearance of the watercourse along the coast, Judge Xue is of the view that the maritime boundary may start from a fixed point (the same as the hinge point) on the median line at a distance of 2 nautical miles from the coast without being connected with a mobile line to a point on land. Although with 2 nautical miles’ territorial sea undelimited, she considers that this approach would place the Parties in a better position to manage their coastal relations, particularly in respect of navigation. It would not be the first time that a delimitation begins at some distance out to the sea; the judicial and arbitral practices support such a resolution where there is an uncertain land boundary terminus.

### **Declaration of Judge Sebutinde**

Judge Sebutinde concurs with all aspects of the Court’s decision as stated in the operative paragraph 205 of the Judgment, but considers that in respect of the case concerning the Land Boundary in the Northern Part of Isla Portillos (Part III) the Court should, in its reasoning, have addressed more fully all the issues underlying its decisions in that case.

First, whilst Judge Sebutinde agrees with the Court’s conclusion in paragraph 69 that the issue of territorial sovereignty over the coast of Isla Portillos is not res judicata, she notes that the present Judgment omits to address another important and related issue, namely, whether or not the Court in its Judgment of 16 December 2015 in the case concerning Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), I.C.J. Reports 2015 (II), p. 665 determined with the force of res judicata, the course of the land boundary in the northern part of Isla Portillos. Since this is part of the dispute between the Parties in the present case, the Court should in the interest of fully settling the case, have addressed this point. Her view is that the precise course of the land boundary in the northern part of Isla Portillos has never been determined by the Court and thus the matter is not res judicata.

Secondly, whilst she agrees with the land boundary in the northern part of Isla Portillos depicted in sketch-map No. 2 of the Judgment, Judge Sebutinde is of the view that the Court’s reasoning in paragraphs 70-73 does not adequately explain the geographical changes that have occurred in the area and their effect on the historical land boundary described in the 1858 Treaty of Limits. Furthermore, she notes that although both Parties in their written and oral pleadings requested the Court to “determine the course of the land boundary in the northern part of Isla Portillos”, the Court falls short of tracing the said boundary, focusing rather on the issue of territorial sovereignty over the coast of Isla Portillos. In her opinion, the Court should logically have determined the course of the said boundary before pronouncing itself on the related issue of territorial sovereignty.

Lastly, Judge Sebutinde opines that in determining the present course of the land boundary in the northern part of Isla Portillos as requested by both Parties, the Court should do so first, by reference to the historical land boundary as contained in the 1858 Treaty of Limits and interpreted by the various Cleveland and Alexander Awards, before taking into account any relevant geographical changes that may warrant an adjustment in the historical land boundary. In her view, such an approach results in a land boundary comprising two distinct sectors with three termini as depicted in sketch-map No. 2 of the Judgment. Judge Sebutinde does however, concur with



paragraph 71 of the Judgment that start of the maritime delimitation in the Caribbean Sea should, in principle, coincide with the point where “the right bank of the San Juan River reaches the low-water mark of the coast of the Caribbean Sea”, which point she considers the third terminus and starting-point of the second sector of the land boundary.

### **Separate opinion of Judge Robinson**

Judge Robinson’s separate opinion addresses a specific issue raised by Nicaragua in the proceedings, namely, whether there has been a “convergence in maritime delimitation methodology” in the delimitation of the territorial sea, EEZ and continental shelf, so that the principles for the delimitation of the EEZ and continental shelf as set out in Articles 74 and 83 of the United Nations Convention on the Law of the Sea (“the UNCLOS”) would apply equally to the delimitation of the territorial sea under Article 15.

The separate opinion argues that based on a proper interpretation of Articles 15, 74 and 83 of the UNCLOS, including in particular its drafting history, there has been no such convergence in the maritime delimitation methodology for the three zones. A proper interpretation of the UNCLOS shows that it calls for a dichotomous approach whereby the territorial sea is delimited on the basis of the median line/special circumstances method, while the EEZ and continental shelf are delimited on the basis of any method that would result in an “equitable solution”.

Judge Robinson comments that although it is possible for States to agree to utilize a uniform method under the UNCLOS, the difference in the legal régime for the territorial sea on the one hand, and for the EEZ and continental shelf on the other hand, explains why the Convention calls for a dichotomous approach in maritime delimitation methodology.

In Judge Robinson’s opinion, different values are attached to the various elements relevant to the delimitation in the various zones. Therefore, the provisional median line in the territorial sea has a different value from the provisional equidistance line in the EEZ and continental shelf and, similarly, special circumstances in the territorial sea will have a different value from relevant circumstances in the EEZ and continental shelf.

Judge Robinson also reiterates that the Court’s practice supports a dichotomous approach. In that regard, he finds it difficult to understand the statement of the Arbitral Tribunal in Croatia/Slovenia that the practice of the Court supports a uniform approach for the delimitation of all three zones.

### **Declaration of Judge Gevorgian**

In his declaration, Judge Gevorgian explains the reasons for his vote against the Court’s findings on the land boundary at northern Isla Portillos and comments on certain aspects of the Court’s delimitation of the maritime boundary in the Caribbean Sea.

In relation to the first question, Judge Gevorgian disagrees with the Court’s finding that Costa Rica has sovereignty over the beach of northern Isla Portillos (he does agree, however, with the Court’s determination of Nicaragua’s sovereignty over Harbor Head Lagoon).

In his opinion, it results from Article II of the 1858 Treaty of Limits concluded between Costa Rica and Nicaragua, as interpreted by the Cleveland and Alexander Awards, that the point named “Punta de Castilla” was meant to be the starting-point of the boundary. The fact that important geomorphological changes have occurred both after 1858 and 1897-1900 (the latter being the time when General Alexander demarcated the boundary) does not change this conclusion. For this purpose, Judge Gevorgian relies on the Awards rendered by General Alexander and refers

to the Court-appointed experts' findings on the existence of "discontinuous coast-parallel lagoons" that are the "remnants" of the channel that General Alexander took in 1897 as a reference to demarcate the boundary.

Judge Gevorgian also disagrees with the Court's finding that Nicaragua has violated Costa Rica's sovereignty as a consequence of its military camp on the beach of northern Isla Portillos. As the present Judgment indicates, the question of sovereignty over such a beach was not solved when the Court rendered its first Judgment on Isla Portillos in December 2015. So, the territory at stake until 2 February 2018, the date of delivery of the present Judgment, was "a disputed territory" and not a territory under the sovereignty of Nicaragua. Referring to his declaration on the 2015 Judgment and to the Court's case law, Judge Gevorgian considers that a statement on the sovereignty of this area (with which he does not agree, but which it is binding for the Parties) and an order to remove the camp from the beach would have constituted sufficient relief for the Applicant.

In relation to the maritime boundary in the Caribbean Sea, Judge Gevorgian agrees with the Court's delimitation line. At the same time, he is inclined to consider that the starting-point of the maritime boundary should have been situated at the "Alexander Point" (that is, the point at which General Alexander fixed the starting-point of the land boundary). But since the starting-point identified by the Court does not significantly move the course of the would-be boundary line, he has voted in favour of the Court's findings on this issue.

Finally, Judge Gevorgian suggests that some aspects of the case could have been addressed in more detail. He mentions in particular the questions of Nicaragua's territorial sea in Harbor Head Lagoon (which the Court did not consider in fixing the delimitation line), the legal effects of the bilateral boundary treaties respectively concluded in 1977 and 1980 between Costa Rica, on the one hand, and Colombia and Panama, on the other; and the different methodologies employed to delimit the territorial sea and the economic exclusive zone and continental shelf. However, overall, he believes that the Judgment strikes a fair balance between the respective entitlements of the two Parties in the Caribbean Sea and the Pacific Ocean.

#### **Declaration of Judge ad hoc Simma**

Judge ad hoc Simma has voted in favour of each of the Judgment's operative paragraphs. In his short declaration, he comments on the relevance of Article 102 of the Charter of the United Nations to this case.

He outlines that both Parties made reference to the Treaty Concerning Delimitation of Marine Areas and Maritime Cooperation between the Republic of Costa Rica and the Republic of Panama, which was signed on 2 February 1980 and entered into force on 11 February 1982, and which does not appear to have been registered with the United Nations Secretariat in accordance with the requirements of Article 102, paragraph 1, of the Charter.

While Judge ad hoc Simma observes that neither Party to this case was probably captured by the terms of Article 102, paragraph 2, of the Charter, which prevents a "party to any such treaty or international agreement which has not been registered" from "invok[ing] that treaty or agreement before any organ of the United Nations", it is nonetheless important that parties to treaties respect their obligations under the Charter. Judge ad hoc Simma would have wished for the Court to take the opportunity to acknowledge this in its Judgment.

## **Dissenting opinion and declaration of Judge ad hoc Al-Khasawneh**

Judge ad hoc Al-Khasawneh dissented on the land delimitation and wrote a separate declaration on maritime delimitation in the Pacific Ocean.

### **I**

In his dissenting opinion Judge ad hoc Al-Khasawneh started by stressing the importance of putting to rest on the basis of international law, a long-running dispute between the Parties that pre-dated the Treaty of Limits of 1858. The ambiguity in the treaty was responsible for a number of subsequent arbitrations, delimitation commissions and stalled diplomatic negotiations right up to the involvement of the Court, since 2005, in a number of cases dealing with various aspects of this dispute.

The Court is now faced with two conflicting sets of decisions, each possessing the force of res judicata. On the one hand, there is the Cleveland Award of 1888 and the First and Second Alexander Awards of 1897, in which the territorial delimitation was effected on the basis of the 1858 treaty even when the starting-point of that delimitation (the initial marker) had been submerged in the sea due to the general retreat of the coast. On the other hand, there is the 2015 Judgment, on which the findings in the present Judgment were predicated, namely that the so-called Alexander Point should be abandoned in favour of a new point at the mouth of the San Juan River as it presently stands.

Judge ad hoc Al-Khasawneh felt that there was no justification in the Court's approach, all the more so in view of the on-going general retreat of the Caribbean coast which may lead to the San Juan River emptying again into Harbor Head Lagoon, as it did in 1858, a possibility contemplated by the Court-appointed experts. The finality and permanence of territorial delimitation was not served by adopting a new point which is ephemeral.

Judge ad hoc Al-Khasawneh then analysed developments since 1858 to prove that the mouth of the river — after it had shifted — was not and could not have been the starting-point in the mind of arbitrator Alexander.

Turning to the existence or otherwise of a channel connecting Harbor Head Lagoon with the river, Judge ad hoc Al-Khasawneh, while acknowledging that at the time of their visit(s) no such channel existed, felt that the experts' reference to a channel like water gap in the recent past and the existence of discontinuous elongated lagoons parallel to the coast carries evidence that the Court should have taken into consideration. Moreover, in arid parts of the world, dried-up rivers are often used to delimit boundaries. He believed that this partly dried channel is the border between the Parties.

Similarly, the existence of Harbor Head Lagoon and the sand barrier enclosing it from the Caribbean is acknowledged by both Parties to be Nicaraguan, this attests that the whole shore had a priori to be Nicaraguan.

He disagreed with the majority regarding their decision not to give the sand barrier any maritime entitlements, a decision that was not reasoned at all, but which rested on the hope that the sands of the barrier will be submerged by the sea, which may or may not happen.

## II

With respect to maritime delimitation in the Pacific, Judge ad hoc Al-Khasawneh started by observing that maritime delimitation is, of necessity, a compromise between certitude of the law and the need to take cognizance of dissimilar situations.

While judges are enjoined not to “completely refashion nature” some refashioning must have been contemplated in the Law of the Sea Convention Articles 74 and 83. This attests to the discretion that the legislator must give the judge.

For their part, courts strive to decrease the space of their discretion and the three-stage technique favoured in recent cases is a prime example of this movement towards uniformity.

The low threshold of “no gross disproportionality” should not be the only criterion for what amounts to an equitable result.

In the case of the Nicoya Peninsula, a more equitable result would have been obtained by giving it considerable but not complete weight with regard to delimitation in the exclusive economic zone and the continental shelf, given that is not qualitatively different from the Santa Elena Peninsula and that considerations other than size, e.g. its proximity to the starting-point of delimitation should be taken into account. This may amount to some refashioning of nature, figuratively speaking, but certainly not a complete one.

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- Sketch-map No. 2: Land Boundary in the Northern Part of Isla Portillos
- Sketch-map No. 5: Delimitation of the Territorial Sea (Caribbean Sea)
- Sketch-map No. 9: Construction of the provisional equidistance line (Caribbean Sea)
- Sketch-map No. 10: The adjusted line (Caribbean Sea)
- Sketch-map No. 11: The simplified adjusted line (Caribbean Sea)
- Sketch-map No. 13: Course of the maritime boundary (Caribbean Sea)
- Sketch-map No. 15: Delimitation of the Territorial Sea (Pacific Ocean)
- Sketch-map No. 19: Construction of the provisional equidistance line (Pacific Ocean)
- Sketch-map No. 20: The adjusted line (Pacific Ocean)
- Sketch-map No. 21: The simplified adjusted line (Pacific Ocean)
- Sketch-map No. 22: Course of the maritime boundary (Pacific Ocean)

























