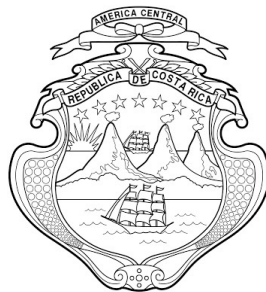


**INTERNATIONAL COURT OF JUSTICE**

***LAND BOUNDARY IN THE NORTHERN PART OF ISLA  
PORTILLOS  
(COSTA RICA v. NICARAGUA)***

**MEMORIAL OF COSTA RICA**



**2 MARCH 2017**



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## CHAPTER 1 INTRODUCTION

- 1.1. On 16 January 2017, Costa Rica instituted the present proceedings. By its Application, Costa Rica requests the Court to determine the precise location of the land boundary separating the Los Portillos/Harbor Head Lagoon sandbar from Isla Portillos, and to adjudge and declare that Nicaragua has violated the sovereignty and territorial integrity of Costa Rica by establishing a new military camp on the beach of Isla Portillos.
- 1.2. The Court, by Order of 2 February 2017, fixed 2 March 2017 as the time limit for the filing of the Memorial of the Republic of Costa Rica in the present case. By the same Order, the Court joined the proceedings in the present case with the case concerning *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* (“**Maritime Delimitation case**”). This Memorial is filed with the Court in accordance with the Order of 2 February 2017.

### A. ORIGIN AND SCOPE OF THE DISPUTE

- 1.3. In November 2010, Nicaragua invaded and occupied Costa Rican territory adjacent to the Caribbean Sea, in the northern area of Isla Portillos. Nicaragua subsequently claimed sovereignty over that area, which had previously been undisputed Costa Rican territory. The Court rejected Nicaragua’s claim of sovereignty 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)* (“**Certain Activities case**”). The Court confirmed that Costa Rica has sovereignty over the “disputed territory”.<sup>1</sup> The “disputed territory” was

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<sup>1</sup> *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*

defined by the Court in its Order of 8 March 2011 on Provisional Measures as

... 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.<sup>2</sup>

- 1.4. While that case remained pending before the Court, Nicaragua established a military camp on the beach of Isla Portillos. Nicaragua's conduct in doing so, as well as its construction of two new artificial *caños* on the disputed territory, led Costa Rica to seek and obtain a second Order on Provisional Measures, dated 22 November 2013. In that Order, the Court declared that the beach formed part of the "disputed territory" and ordered Nicaragua to remove the camp.<sup>3</sup> In its Judgment on the merits of 16 December 2015, the Court recalled that the beach where the Nicaraguan military camp was established was situated in the "disputed territory".<sup>4</sup>
- 1.5. Sometime after the Order of the Court of 22 November 2013, Nicaragua placed a military camp on the sandbar separating Los Portillos/Harbor Head Lagoon from the Caribbean Sea. Recently, it relocated this military camp to the beach of Isla Portillos, which is Costa Rican territory.

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*River (Nicaragua v. Costa Rica)* (hereinafter "*Certain Activities case*"), Judgment, 16 December 2015, paras 69-70, and 229(1).

<sup>2</sup> *Certain Activities case*, Request for the Indication of Provisional Measures, Order of 8 March 2011, *I.C.J. Reports 2011 (I)*, p. 19, para 55.

<sup>3</sup> *Certain Activities case*, Provisional Measures, Order of 22 November 2013, *I.C.J. Reports 2013*, p. 365, para 46.

<sup>4</sup> *Certain Activities case*, Judgment, 16 December 2015, para 69.

- 1.6. On 14 November 2016, Costa Rica wrote to Nicaragua to protest the presence of the camp on Costa Rican territory.<sup>5</sup> In a response of 17 November 2016, Nicaragua not only refused to remove its camp, but it also made a new claim of sovereignty over “the entire stretch of coast abutting the Caribbean Sea which lies between Harbor Head Lagoon and the mouth of the river”.<sup>6</sup> That claim to “the entire stretch of coast” is inconsistent with the Court’s Judgment of 16 December 2015, where it was declared – and is now a matter of *res judicata* – that the “disputed territory” (which includes the beach between Harbor Head Lagoon and the mouth of the San Juan River) is Costa Rican territory. Moreover, Costa Rica’s concern is that Nicaragua’s recent position forms part of a persistent course of conduct on its part, from its invasion and occupation of (and subsequent claim to) Costa Rican territory in late 2010, to its breach of the Court’s 2011 Order in the *Certain Activities* case (requiring Costa Rica to obtain a further Order in 2013), and now to its placement of yet another military camp on Costa Rica’s territory,<sup>7</sup> in breach of the Court’s Judgment of 2015, and its subsequent claim to that territory.
- 1.7. In these circumstances, and given Costa Rica’s concern about Nicaragua’s persistent course of conduct, Costa Rica attempted to resolve the dispute without delay. In further correspondence,

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<sup>5</sup> Letter from Costa Rica to Nicaragua, Reference DM-AM-584-16, 14 November 2016, **Annex 56**.

<sup>6</sup> Letter from Nicaragua to Costa Rica, Reference MRE/DMC/250/11/16, 17 November 2016, **Annex 57** (italics in original).

<sup>7</sup> On 24 November 2016, Hurricane Otto seriously affected the area of Isla Portillos and damaged Costa Rica’s police and environmental installations in that area. Costa Rica understands that Nicaragua removed the military camp before Hurricane Otto landed. However, following Hurricane Otto, Nicaragua re-established and continues to maintain a military camp on the beach of Isla Portillos.

Costa Rica rejected Nicaragua’s position (noting it was in breach of the Court’s Judgment of December 2015) and reserved its rights.<sup>8</sup> Nicaragua did not respond. Given the factual and legal positions adopted by Nicaragua, the futility of further negotiations was apparent, and Costa Rica has therefore been compelled to institute the present proceedings. Taking into account the close link with certain aspects of the dispute in the *Maritime Delimitation* case, Costa Rica requested, and the Court ordered, joinder of the two cases.<sup>9</sup>

1.8. This dispute between Costa Rica and Nicaragua submitted to the Court by Costa Rica concerns the precise location of the land boundary in the northern area of Isla Portillos, i.e. the boundary separating today the Los Portillos/Harbor Head Lagoon sandbar from Isla Portillos. It also concerns the illegal establishment of a military camp by Nicaragua on the beach of Isla Portillos, a territory belonging to Costa Rica as confirmed by the Court in its Judgment of 16 December 2015 in the *Certain Activities* case.<sup>10</sup>

1.9. For sake of completeness, Costa Rica notes that, by Order of 31 May 2016 in the *Maritime Delimitation* case, the Court exercised its power, in accordance with Articles 40 and 50 of its Statute, to obtain an expert opinion. The experts are asked to advise the Court “regarding the state of the coast” between the mouth of the San Juan River and Punta de Castilla,<sup>11</sup> and to

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<sup>8</sup> Letter from Costa Rica to Nicaragua, Reference DM-AM-629-16, 30 November 2016, **Annex 58**.

<sup>9</sup> *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, joined with *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)* (hereinafter “*Maritime Delimitation case*”), Order, 2 February 2017, para 18(2).

<sup>10</sup> *Certain Activities* case, Judgment, 16 December 2015, paras 69-70, and 229(1).

<sup>11</sup> *Maritime Delimitation* case, Order, 31 May 2016, para 8.



answer specific questions.<sup>12</sup> In order to fulfil their mandate, the two experts appointed by the Court conducted a first site visit in December 2016 and will conduct a second site visit in March 2017. In accordance with the Court's Order, they will produce a written report on the questions on which they have been asked to advise the Court. Costa Rica will of course provide comments and questions on the experts' opinion at the appropriate time.

## **B. THE COURT'S JURISDICTION**

1.10. The Court has jurisdiction over the present dispute in accordance with the provisions of Article 36, paragraph 2, of its Statute, by virtue of the operation of the declarations of acceptance made by Costa Rica, dated 20 February 1973, and by Nicaragua, dated 24 September 1929.

1.11. The Court also has jurisdiction over the present dispute in accordance with the provisions of Article 36, paragraph 1, of its Statute, by virtue of the operation of the American Treaty on Pacific Settlement of Disputes, Bogotá, 30 April 1948, Article XXXI (the *Pact of Bogotá*).<sup>13</sup> The Parties have expressed their commitment to the Pact of Bogotá through the Pact of Amity, Washington, 21 February 1949, Article III.<sup>14</sup>

## **C. STRUCTURE OF THIS MEMORIAL**

1.12. The structure of this Memorial is as follows:

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<sup>12</sup> *Maritime Delimitation* case, Order, 31 May 2016, para 10(2).

<sup>13</sup> 30 *United Nations Treaty Series* 55. Both Costa Rica and Nicaragua are parties to the Pact of Bogotá.

<sup>14</sup> 1465 *United Nations Treaty Series* 221.

- (a) **Chapter 2** depicts the current geography in the relevant area, explains why the repeated Nicaraguan territorial claim to the beach of Isla Portillos falls within the scope of the principle of *res judicata*, and addresses the legal basis of Costa Rica's sovereignty and the boundary requested; and
- (b) **Chapter 3** addresses Nicaragua's new breach of Costa Rica's territorial sovereignty through its establishment and maintenance of a military camp on the beach of Isla Portillos.
- (c) This Memorial concludes with Costa Rica's Submissions.

1.13. Attached to this Memorial are 26 documentary annexes. A list of the annexes is provided immediately after Costa Rica's Memorial, and the annexes are produced in this same volume (including Spanish originals, where required). Given that this case has been joined with the *Maritime Delimitation* case, and Costa Rica has submitted 45 annexes in that case, Costa Rica has commenced its numbering of Annexes to this Memorial at Annex 46.

## CHAPTER 2 SOVEREIGNTY ISSUES AND THE REQUESTED DELIMITATION

### A. INTRODUCTION

- 2.1. The present Chapter addresses the legal background and scope of the current dispute. It will demonstrate that the task of the Court consists only in the determination of the location of the boundary at each end of the currently existent sandbar seaward of Los Portillos/Harbor Head Lagoon, insofar as this sandbar remains above water at all times, and therefore is capable of appropriation.
- 2.2. This Chapter consists of three sections. **Section B** describes the geography relevant to the present dispute, particularly as it exists today. **Section C** discusses the Judgment of the Court of 16 December 2015 in the *Certain Activities* case: first explaining that Costa Rican sovereignty over the beach of Isla Portillos is *res judicata* and consequently the new territorial claim by Nicaragua is inconsistent with it. Part B also analyses paragraph 70 of that Judgment in order to explain why only the abovementioned location of the boundary must be determined by the Court. **Section D** addresses the legal materials relevant to certain sovereignty issues and the delimitation of the requested boundary. It further explains that, considering that the coastal geography in this area is likely to continue to undergo change, describing the requested boundary with specific coordinates is not appropriate, and rather a verbal description is sufficiently precise, and would allow the line to change with the geography, as envisioned in the Second Alexander Award.

### B. THE RELEVANT GEOGRAPHY

- 2.3. The geography in the vicinity of this dispute consists of the coastal zone of Costa Rica's Isla Portillos, including the mouth

of the San Juan River, the beach of Isla Portillos, the waters of Los Portillos/Harbor Head Lagoon, and the sandbar separating the Lagoon from the Caribbean Sea. Isla Portillos is bounded to the west by the San Juan River and to the north by the Caribbean Sea. The U-shaped Los Portillos/Harbor Head Lagoon is surrounded by Isla Portillos, except to the northeast where it faces the Caribbean Sea and is separated from the sea by a narrow sandbar (see Figure 2.1).

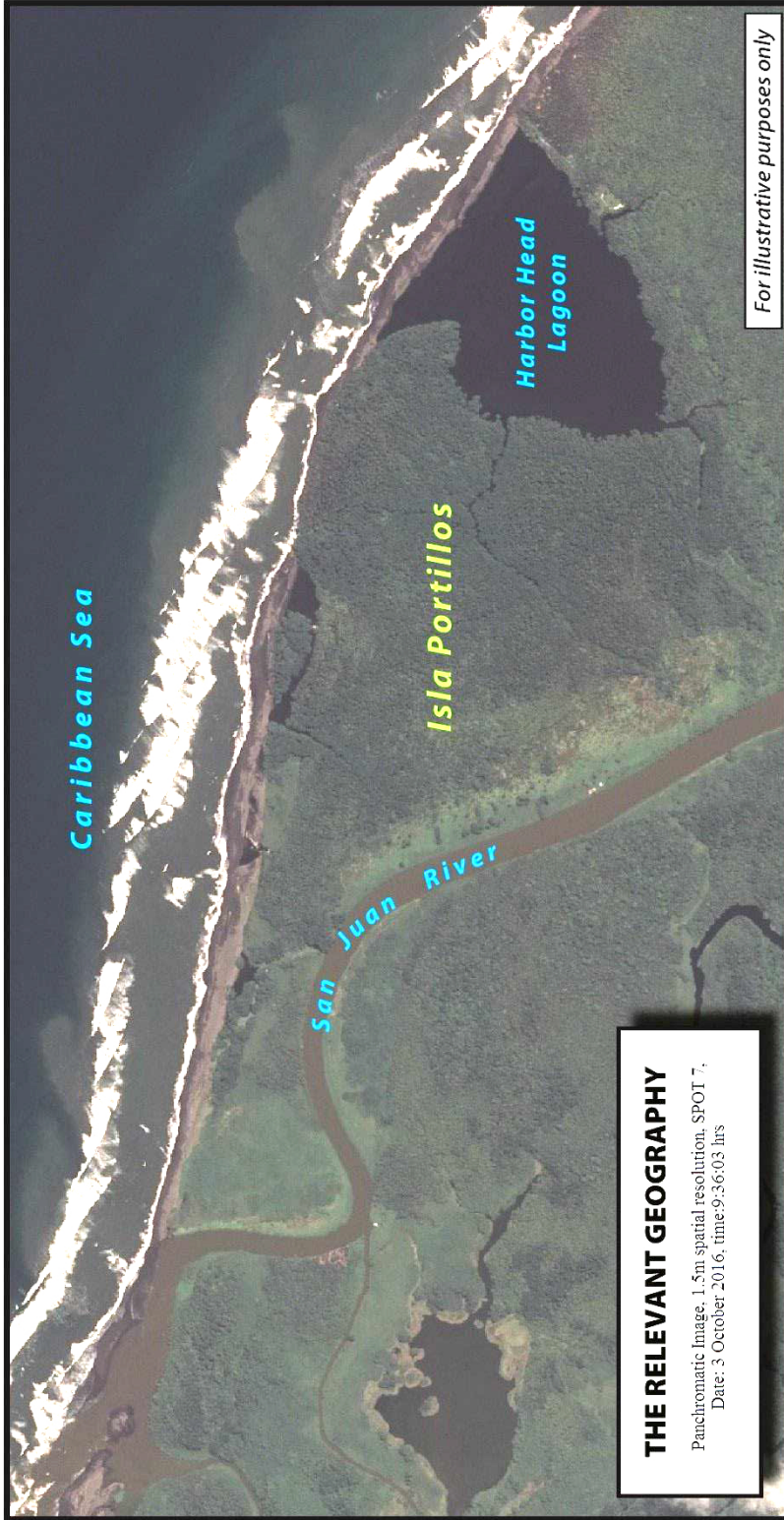


Figure 2.1: Satellite Image of 3 October 2016

- 2.4. Costa Rican and Nicaraguan territory in this area was delimited by the 1858 Treaty of Limits which established that “the dividing line between the two Republics, starting from the Northern Sea [the Caribbean Sea], shall begin at the end of Punta de Castilla, at the mouth of the San Juan de Nicaragua river, and shall run along the right bank of said river”.<sup>15</sup> At that time the San Juan River emptied into the Bay of San Juan del Norte before, in turn, emptying into the sea.
- 2.5. Substantial geomorphologic change occurred at and around the mouth of the San Juan River between the signing of the 1858 Treaty of Limits and the work of Alexander in the late 1890s. The configuration of the river, bay, various sandy features, and the sea at the end of the 19th Century is illustrated on the sketch map attached to the First Alexander Award, which is reproduced here at Figure 2.2. Several things may be noted on Alexander’s map. By the 1890s, the attenuated sand spit that created the bay had broken apart leaving a sandy feature to the northwest of Isla Portillos labelled “Old Is. of San Juan” and leaving a narrow finger of sand protruding from Costa Rica’s territory east of Harbor Head. The First Alexander Award distinguished between this ephemeral “bank of sand”<sup>16</sup> and “the northwestern extremity of what seems to be the solid land, on the east side of Harbor Head Lagoon”.<sup>17</sup> Between these sandy features an opening connected what came to be known as Harbor Head directly with

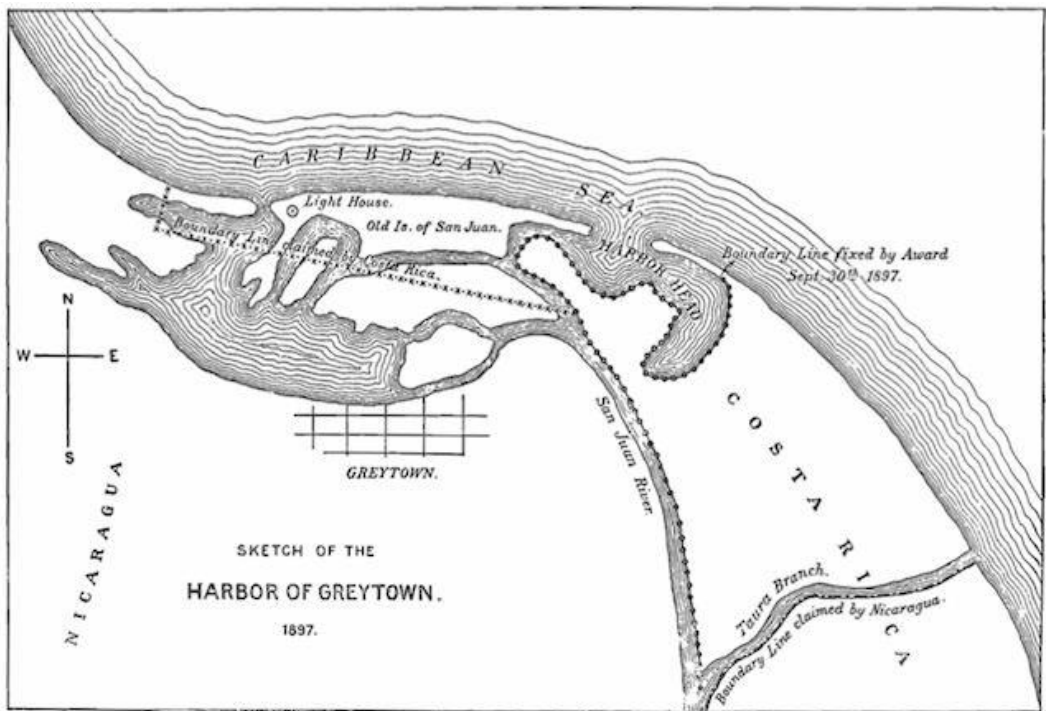
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<sup>15</sup> Treaty of Limits between Costa Rica and Nicaragua (Cañas-Jerez), San José, 15 April 1858 (hereinafter “*1858 Treaty of Limits*”), *Maritime Delimitation* case, **CRM Annex 1**, Article II.

<sup>16</sup> First Award of the Umpire EP Alexander in the boundary question between Costa Rica and Nicaragua, San Juan del Norte, 30 September 1897 (hereinafter “*First Alexander Award*”), **Annex 48**, p. 220.

<sup>17</sup> *Ibid.*

the sea. The San Juan River (the “river proper”<sup>18</sup>) can be seen to flow via an eastern channel into Harbor Head on its way to the sea. This is the channel referred to in the Second Alexander Award as “the first channel met” when tracing the boundary along the right/southern bank from Harbor Head toward the San Juan River.<sup>19</sup> On Alexander’s map that channel runs between Isla Portillos on the right/southern bank and the Old Island of San Juan on the left/northern bank.



**Figure 2.2:** Sketch map attached to the First Alexander Award

2.6. The configuration of the river, bay and coast in this area has continued to change during the 20th Century and into the early

<sup>18</sup> Second Award of the Umpire EP Alexander in the boundary question between Costa Rica and Nicaragua, San Juan del Norte, 20 December 1897 (hereinafter “*Second Alexander Award*”), **Annex 49**, p. 224.

<sup>19</sup> *Ibid.*

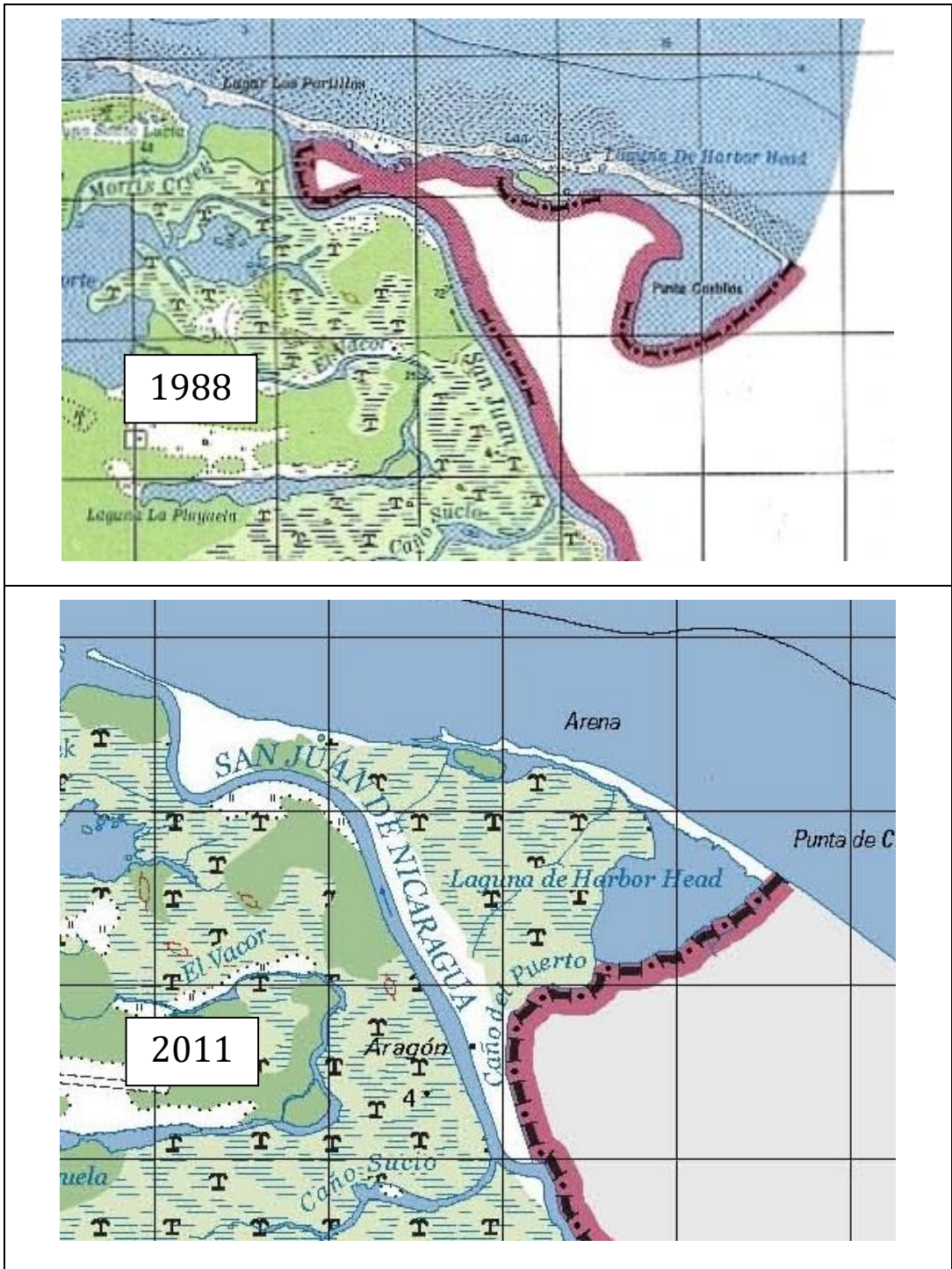
part of the 21st Century. Both Costa Rica's official IGN and Nicaragua's official INETER maps from 1988 show the last vestiges of a channel connecting the San Juan River with Harbor Head Lagoon.<sup>20</sup> On the 1988 maps the channel is formed by Isla Portillos (the right/southern bank), as it has been since the late 1890s, and by an exceedingly attenuated bank of sand stretching from the northeast corner of Harbor Head Lagoon across Isla Portillos (the left/northern bank). Nicaragua's official INETER map from 2011 (based in part on 2010 satellite imagery) illustrates the continuing erosion and disappearance of most of the bank of sand that formed the left/northern bank of the channel. On the 2011 Nicaraguan map that bank of sand has been reduced to a short protrusion stretching across the front of Los Portillos/Harbor Head Lagoon. The complete erosion of the left/northern bank of the channel has resulted in the elimination of any channel connecting the River with the lagoon, and, as illustrated on Nicaragua's 2011 map, Isla Portillos has emerged as coastal territory with an unobstructed coastal front on the Caribbean Sea, irrespective of the accuracy of its depiction of the northern part of Isla Portillos then claimed by Nicaragua. The relevant excerpts of the 1988 and 2011 INETER maps are shown at Figure 2.3.

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<sup>20</sup>

The sources listed for the INETER 1988 map indicates that it was compiled in 1960.





**Figure 2.3:** INETER San Juan del Norte Cartographic Sheet 1:50000 1988 and 2011, Detailed area

- 2.7. These trends have continued as illustrated by a satellite image from 3 October 2016 (see Figure 2.1 above) which shows the current coastal configuration in the area. Several things can be seen on this image.
- (a) First, the San Juan River clearly flows directly into the Caribbean Sea.
  - (b) Second, the channel that once connected the River with the lagoon has disappeared completely with the total erosion of what once formed the left/northern bank of that channel.<sup>21</sup>
  - (c) Third, Los Portillos/Harbor Head Lagoon is now closed by a narrow sandbar stretching between the solid land of Isla Portillos on the east side of the Lagoon and the solid land of Isla Portillos on the west side of the Lagoon.
  - (d) Fourth, the entire stretch of the coast of Isla Portillos from the mouth of the San Juan River to Los Portillos/Harbor Head Lagoon abuts directly on the Caribbean Sea.
- 2.8. As a result of these changing geographic circumstances Costa Rica's Isla Portillos is now coastal territory with an unobstructed projection into the Caribbean Sea, and the land boundary between the Parties now meets the Caribbean coast in three places. The primary intersection of the land boundary with the sea, the land boundary terminus, is on the right bank of the San

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<sup>21</sup> The Court has asked for an expert opinion to answer, *inter alia*, "Is there a bank of sand or any maritime feature between the points referred to in subparagraphs (a) and (b) above?": *Maritime Delimitation* case, Order, 31 May 2016, para 10(2). Based on site visits, aerial photography and satellite imagery Costa Rica is confident that the experts will find no bank of sand or any other feature seaward of Costa Rica's Isla Portillos.

Juan River at its mouth where the land boundary separates Costa Rica's land territory (here, Isla Portillos) from Nicaragua's waters of the San Juan River.<sup>22</sup> This location is labelled "A" on the map at Figure 2.4. As with other features along this coast, the sandspit that extends to the northwest at the mouth of the river is prone to changes in its shape and size. For example, on Nicaragua's 2011 map, the sandspit extends over 500 metres from the line of vegetation. On the 3 October 2016 satellite image, the sandspit extends over 600 metres from the line of vegetation. At times the sandspit has been significantly longer and at other times significantly shorter.<sup>23</sup> Nonetheless, the primary intersection of the land boundary with the sea is at the northwestern extremity of the territory of Isla Portillos where the river meets the sea.<sup>24</sup> The "A" symbol has been placed on the sandspit only to indicate the general location of this primary intersection. It is not intended to identify a specific point.

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<sup>22</sup> 1858 Treaty of Limits, *Maritime Delimitation* case, **CRM Annex 1**, Article II.

<sup>23</sup> Measurements taken during the experts' site visit in December 2016 indicate that, at that time, the sandspit was significantly shorter than it was in early October 2016 when the satellite image used to create this map was taken.

<sup>24</sup> The primary land boundary terminus is distinct from the starting point of the maritime boundary in the Caribbean which Costa Rica defined as a point "at the base of the sand spit extending northwest from Isla Portillos, because no reliable basepoints can be derived from this ephemeral, low-lying feature": *Maritime Boundary* case, CRM, para 4.15. The distinction between the land boundary terminus point and the starting point of the maritime delimitation results in Costa Rican coastal territory (the sandspit) with no maritime projection.



*For illustrative purposes only*

**Figure 2.4:** The Land Boundary on the Caribbean Coast (Based on 3 October 2016 Satellite Image)

- 2.9. The two other points where the land boundary between Costa Rica and Nicaragua would meet the sea are associated with the vestigial Los Portillos/Harbor Head Lagoon sandbar and the U-shaped land boundary separating the Lagoon from Isla Portillos. Those locations are labelled “B” and “C” on Figure 2.4 and are situated at the northwestern and northeastern limits of Los Portillos/Harbor Head Lagoon. As with the “A” symbol, the “B” and “C” symbols have been placed at the ends of the sandbar only to indicate the general location of these secondary intersections. They are not intended to identify specific points.
- 2.10. Between A and B is a nearly three kilometre-long stretch of the coast of Costa Rica’s Isla Portillos consisting of heavily vegetated wetland contiguous with a sandy beach which slopes to meet the Caribbean Sea at the low water line. The width of the beach between the vegetation line and the low water line varies from less than one metre to approximately 100 metres, having been nearly completely eroded in places. Between B and C is the narrow, currently approximately 750 metre-long sandbar that currently closes Los Portillos/Harbor Head Lagoon and separates it from the sea. This low-lying sandbar varies in width from 25 to 75 metres. This sandbar provides a tenuous separation between the waters of the Lagoon and the sea, and it is sometimes breached as seen in the photograph from June 2012 at Figure 2.5. East of location C, the coast of Costa Rica’s Isla Portillos resumes and is similar in its characteristics to the coast between A and B.



**Figure 2.5:** Laguna Los Portillos/Harbor Head Lagoon 10 June 2012, showing sandbar breach

### **C. THE JUDGMENT OF THE COURT OF 16 DECEMBER 2015**

- 2.11. This section focuses on paragraphs 69 and 70 of the 2015 Judgment in order to demonstrate (1) the *res judicata* character of the decision of the Court concerning Costa Rican sovereignty over the beach of Isla Portillos, (2) and that only the determination of the exact location of the boundary separating each end of the Los Portillos/Harbor Head Lagoon sandbar from the beach of Isla Portillos forms part of the task of the Court with regards to the first aspect of Costa Rica’s application.<sup>25</sup>

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<sup>25</sup>

The unlawful establishment and maintenance of a military camp by Nicaragua in the beach of Isla Portillos is discussed in Chapter 3 of this Memorial.

1. *Sovereignty over the beach of Isla Portillos is res judicata*

2.12. The Court is well aware of the facts which occurred in the northern area of Isla Portillos that led Costa Rica to institute proceedings against Nicaragua and to request the indication of provisional measures on 18 November 2010. Nicaragua invaded and occupied that Costa Rican territory, constructed an artificial *caño* and subsequently claimed sovereignty over that area. The Court indicated provisional measures in its Order of 8 March 2011, prohibiting the parties from introducing personnel, with the exception of Costa Rican personnel in charge of protection of the environment, in what the Court described as the “disputed territory”. The “disputed territory” was defined by the Court in that Order as:

...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.<sup>26</sup>

2.13. Disregarding that Order, Nicaragua established a military camp on the beach of Isla Portillos and constructed two new artificial *caños* in the “disputed territory” in 2013. This Nicaraguan conduct led Costa Rica to request new provisional measures. In the course of the oral hearings relating to this new request, Nicaragua claimed sovereignty over the beach of Isla Portillos on grounds independent of its “claim” of the course of the boundary running along the southern bank of the *caño* it constructed in 2010. According to Nicaragua, the beach of Isla

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<sup>26</sup>

*Certain Activities* case, Provisional Measures, Order of 8 March 2011, *I.C.J. Reports 2011 (I)*, p. 19, para 55.

Portillos did not form part of the “disputed territory” as defined by the Court’s Order of 8 March 2011.

- 2.14. The Court summarised the Nicaraguan claim of sovereignty over the beach in its Order on Provisional Measures of 22 November 2013 as follows:

Nicaragua argues that it has the right to station troops, or anyone else, on what it describes as a sand bank running along the beach in front of the disputed territory. In response to a question from a Member of the Court, Nicaragua states that it understands the beach north of the two new *caños* to be “the sand bank, or island, that has always been considered part of Nicaraguan undisputed territory”.<sup>27</sup>

- 2.15. The Court rejected Nicaragua’s claim in its Order on Provisional Measures of 22 November 2013 in the following terms:

Nicaragua acknowledges the presence of its military encampment on the beach north of the two new *caños* which it understands to be a sand bank (see paragraph 42 above). The Court considers however that, contrary to what Nicaragua alleges, this encampment is located on the beach and close to the line of vegetation, and is therefore situated in the disputed territory as defined by the Court in its Order of 8 March 2011 (see paragraph 44 above).<sup>28</sup>

- 2.16. In its 2015 Judgment on the merits, the Court made clear that the beach where the Nicaraguan encampment was established was

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<sup>27</sup> *Certain Activities* case, Provisional Measures, Order of 22 November 2013, *I.C.J. Reports 2013*, p. 364, para 42.

<sup>28</sup> *Ibid.*, p. 365, para 46.



situated on the “disputed territory”.<sup>29</sup> The relevant paragraph of the Court’s Judgment of 16 December 2015 provides as follows:

69. Since it is uncontested that Nicaragua conducted certain activities in the disputed territory, it is necessary, in order to establish whether there was a breach of Costa Rica’s territorial sovereignty, to determine which State has sovereignty over that territory. The “disputed territory” was defined by the Court in its Order of 8 March 2011 on provisional measures as “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’ (*I.C.J. Reports 2011(I)*, p. 19, para. 55). The *caño* referred to is the one which was dredged by Nicaragua in 2010. Nicaragua did not contest this definition of the “disputed territory”, while Costa Rica expressly endorsed it in its final submissions (para. 2 (a)). The Court will maintain the definition of “disputed territory” given in the 2011 Order. It recalls that its Order of 22 November 2013 indicating provisional measures specified that a Nicaraguan military encampment “located on the beach and close to the line of vegetation” near one of the *caños* dredged in 2013 was “situated in the disputed territory as defined by the Court in its Order of 8 March 2011” (*I.C.J. Reports 2013*, p. 365, para. 46).<sup>30</sup>

2.17. In the operative part of its 2015 Judgment, the Court:

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<sup>29</sup> *Certain Activities* case, Judgment, 16 December 2015, para 69.

<sup>30</sup> *Ibid.*

*Finds* that Costa Rica has sovereignty over the “disputed territory”, as defined by the Court in paragraphs 69-70 of the present Judgment.<sup>31</sup>

- 2.18. It follows from paragraphs 69 and 229, operative part (1), of the Court’s 2015 Judgment, that the beach of Isla Portillos belongs to Costa Rica. This decision possesses the force of *res judicata*, as reflected in Articles 59 and 60 of the Court’s Statute. In the case concerning the *Delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan coast*, referring to the meaning and scope of *res judicata*, the Court held that “[t]he Parties agree that the principle of *res judicata* requires an identity between the parties (*personae*), the object (*petitum*) and the legal ground (*causa petendi*). They likewise accept that this principle is reflected in Articles 59 and 60 of the Statute of the Court”.<sup>32</sup> The Court went on, stating that:

...[i]t is not sufficient, for the application of *res judicata*, to identify the case at issue, characterized by the same parties, object and legal ground; it is also necessary to ascertain the content of the decision, the finality of which is to be guaranteed. The Court cannot be satisfied merely by an identity between requests successively submitted to it by the same Parties; it must determine whether and to what extent the first claim has already been definitively settled.<sup>33</sup>

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<sup>31</sup> *Ibid.*, para 229 (1) (italics in original).

<sup>32</sup> *Question of the delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, 17 March 2016, para 55.

<sup>33</sup> *Ibid.*, para 59.

- 2.19. In the following paragraphs, Costa Rica submits that the current Nicaraguan claim falls within the scope of the principle of *res judicata* as recently defined by the Court.
- 2.20. As mentioned above, Costa Rica protested the recent establishment of a Nicaraguan military camp on the beach of Isla Portillos, about 100 metres beyond the western limit of the Los Portillos/Harbor Head Lagoon sandbar.<sup>34</sup> In its letter of 14 November 2016, Costa Rica provided Nicaragua with photographs which without any doubt show that the protested military camp is on the beach of Isla Portillos.<sup>35</sup> In its response of 17 November 2016, Nicaragua rejected Costa Rica's protest and (wrongly) alleged that

...both countries have always considered as part of Nicaraguan territory not only the sandbar in front of Harbor Head Lagoon but also the *entire stretch of coast abutting the Caribbean Sea which lies between Harbor Head Lagoon and the mouth of the river*.<sup>36</sup>

- 2.21. In an attempt to conceal its advancement of a claim of sovereignty that was already rejected by the Court in 2015, Nicaragua deliberately employed wording in its note of 17 November 2016 similar to that of paragraph 70 of the 2015 Judgment. The sub-section below will demonstrate that paragraph 70 cannot be read in any way as undermining the decision of the Court in paragraph 69 of its Judgement that, and as matter of *res judicata*, the beach of Isla Portillos is Costa Rican. In order to explain that Nicaragua's claim to the beach of Isla Portillos is

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<sup>34</sup> Letter from Costa Rica to Nicaragua, Reference DM-AM-584-16, 14 November 2016, **Annex 56**.

<sup>35</sup> See Annexes 3 and 4 to the Letter from Costa Rica to Nicaragua, Reference DM-AM-584-16, 14 November 2016, **Annex 56**.

<sup>36</sup> Letter from Nicaragua to Costa Rica, Reference MRE/DMC/250/11/16, 17 November 2016, **Annex 57**.

precluded by *res judicata*, it is useful to recall here the discussion of the matter in the *Certain Activities* case. This discussion occurred twice: first, during the second request for provisional measures in 2013 and second, at the oral hearings on the merits in 2015.

- 2.22. During the oral hearings concerning the new Costa Rican request for provisional measures in 2013, the Agent of Nicaragua, referring to the installation of a military camp in the beach of Isla Portillos during the construction of two new *caños*, advanced the following contention:

Costa Rican counsel also added that the installations placed by Nicaragua in this area had to be removed. There are no installations in the territory in dispute put up by the Government of Nicaragua. The references made by Costa Rican counsel to the installations along the sandbank running along the beach in front of Harbor Head Lagoon *and of the coastal area of the territory in dispute*. This area has never been in dispute.<sup>37</sup> (Emphasis added.)

- 2.23. Stressing this position, Counsel for Nicaragua asserted during the same audience:

Mr. Ugalde displayed this satellite photograph, indicating the location of a Nicaraguan military detachment (at the very top of the screen) encampment. [This is at tab 10.] But this one is *on the beach adjacent to the Caribbean Sea. This is outside the disputed area*, on land that Costa Rica has consistently recognized - at least until yesterday - as belonging to Nicaragua.<sup>38</sup> (Emphasis added.)

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<sup>37</sup> CR 2013/25, p. 31, para 15 (Argüello) (footnote omitted).

<sup>38</sup> CR 2013/25, p. 29, para 44 (Reichler).

2.24. The same Counsel referred to the area in which the military camp was established by Nicaragua as the “barrier beach”.<sup>39</sup>

2.25. At the oral phase on the merits, Nicaragua’s Agent, referring to the position of Costa Rica that only the sandbar closing Los Portillos Lagoon appertained to Nicaragua insofar as it is capable of appropriation by a State, asserted the following:

Professor Kohen indicated that the part of the surrounding feature (sandbank) located between Harbor Head Lagoon and the sea appertained to Nicaragua. We will say some more on this point when we respond to Judge Donoghue’s question. *Nicaragua’s position is that the whole area is part of its territory.*<sup>40</sup> (Emphasis added.)

2.26. The Agent of Nicaragua went on, contending that the northern part of Isla Portillos is what used to be the San Juan Island during the 19th century, an evidently unsustainable claim which was not even attempted to be seriously proven. In his own words: “the island of San Juan is located in the area in dispute and is indisputably Nicaraguan territory”.<sup>41</sup> In his speech, considered by the Agent to be the Nicaragua’s position with regard to the questions raised by Judges Yusuf and Donoghue, Ambassador Argüello explained the alleged Nicaraguan sovereignty over the northern part of Isla Portillos, including the beach of Isla Portillos, by saying:

I will not try to pontificate to the Court on the legal consequences emanating from the channel separating the island of San Juan from the mainland having

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<sup>39</sup> CR 2013/25, p. 29, para 45 (Reichler).

<sup>40</sup> CR 2015/15, pp. 10-11, paras. 4-5 (Argüello).

<sup>41</sup> CR 2015/15, p. 16, para 31(a) (Argüello).

diminished in size substantially or having totally disappeared. It is generally accepted that when a watercourse forming the limit between two sovereigns disappears, then the border between both areas continues to follow the original channel. So the land that comprised the Nicaraguan island of San Juan is still there, it still appertains to Nicaragua, and it is possible to establish its location on the ground.<sup>42</sup>

- 2.27. The answer of Nicaragua to the question raised by Judge Donoghue concerning the “sandy feature lying between the Caribbean Sea and the body of water known as Harbor Head Lagoon or Laguna Los Portillos” was even more specific in its claim of the beach of Isla Portillos. It included the following statement, claiming that the referred sandy feature extends beyond Los Portillos/Harbor Head Lagoon, i.e. including the beach of Isla Portillos:

The present feature extends from the border area marked by Alexander at the entrance of Harbor Head Lagoon to Isla de San Juan on Nicaraguan territory [Tab 14a on]. The evolution of this feature can be appreciated in this map drawn by the Binational Territorial Commission in 1897 where we can see the sandbar extending from the island of San Juan in the direction of the sandbank extending from Punta de Castilla. These banks have united and for more than a hundred years have been in the situation we at present appreciate.<sup>43</sup>

- 2.28. It is apparent that what Nicaragua calls “Isla de San Juan” and the sandy feature, and considers them to be Nicaraguan territory, is precisely the northern part of Isla Portillos and its beach. Nicaragua already claimed sovereignty over this beach in the

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<sup>42</sup> CR 2015/15, p. 15, para 26 (Argüello).

<sup>43</sup> CR 2015/15, pp. 23-24, para 60, point 3 (Argüello).

*Certain Activities* case. It lost its case. The Court decided otherwise. It declared that the beach is Costa Rican territory.

- 2.29. If Nicaragua persists in its claim to the beach of Isla Portillos, it will be a claim concerning the same parties (Costa Rica and Nicaragua), the same object (the beach of Isla Portillos, as part of the “disputed territory”) and the same ground (the different titles applicable to the boundary between the two countries: the 1858 Treaty of Limits, the Cleveland Award and the Alexander Awards), which has already been definitively settled by the 2015 Judgment. Such a claim should be declared inadmissible on the basis that it is *res judicata*.
- 2.30. The Court had the opportunity to stress the vital importance of the principle of *res judicata* in the following manner:

The fundamental character of that principle appears from the terms of the Statute of the Court and the Charter of the United Nations. The underlying character and purposes of the principle are reflected in the judicial practice of the Court. That principle signifies that the decisions of the Court are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose.<sup>44</sup>

- 2.31. The Court went on explaining the role and purposes of *res judicata* as follows:

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*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 90, para 115.

Two purposes, one general, the other specific, underlie the principle of *res judicata*, internationally as nationally. First, the stability of legal relations requires that litigation come to an end. The Court's function, according to Article 38 of its Statute, is to "decide", that is, to bring to an end, "such disputes as are submitted to it". Secondly, it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again. Article 60 of the Statute articulates this finality of judgments. Depriving a litigant of the benefit of a judgment it has already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes.<sup>45</sup>

2.32. Costa Rica is entitled to see that Nicaragua respects the final and binding Judgment of the Court concerning Costa Rica's sovereignty over the northern part of Isla Portillos, including its beach, and that Nicaragua consequently respects Costa Rica's territorial sovereignty. Any attempt at reopening this unfortunate dispute provoked by the forcible action of Nicaragua in 2010 is not only contrary to Costa Rican sovereignty but also to the principle of peaceful settlement of disputes and to the authority of the Court, as established by the Charter of the United Nations and the Court's Statute. Such an attempt must be firmly rejected.

2. *Only the precise location of the boundary at each end of the sandbar of Harbor Head Lagoon remains open*

2.33. In its 2015 Judgment, the Court noticed that there were different views with regard to the exact configuration of the coast in the area. Again, the Parties addressed this coastal configuration both at the hearings concerning the second request of provisional measures by Costa Rica and at the oral phase of the merits in the *Certain Activities* case. In order to avoid an

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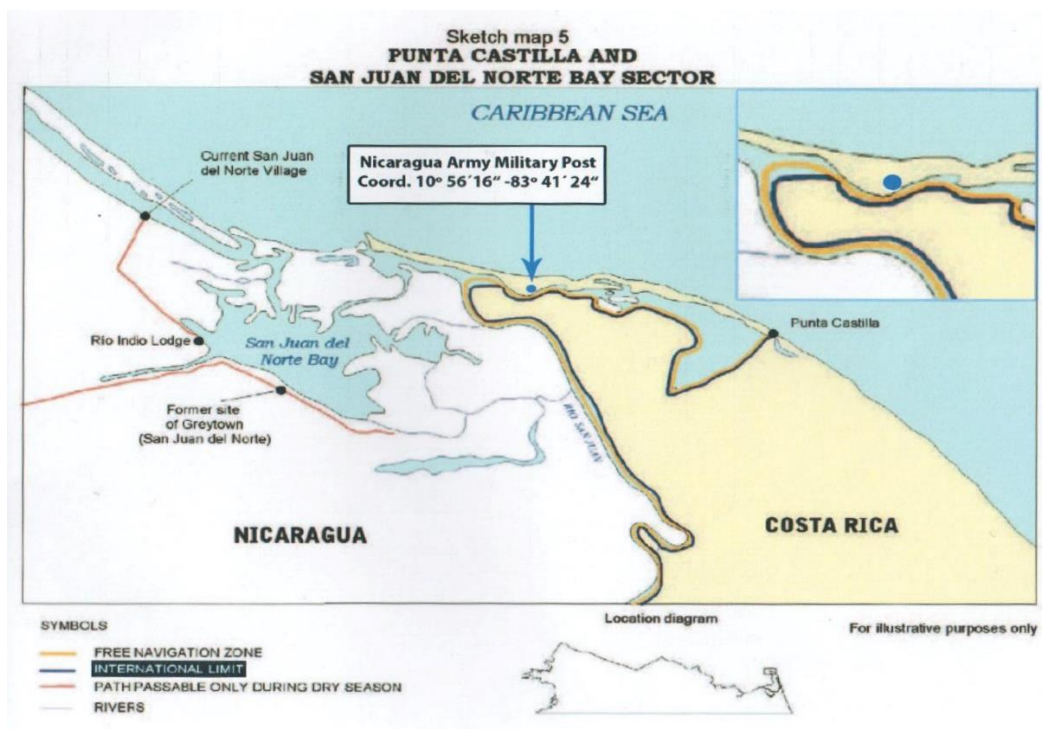
<sup>45</sup>

*Ibid.*, pp. 90-91, para 116.



adverse finding concerning its military presence in the disputed territory, and to obtain with regard to the maritime façade what it could not obtain from the construction of the first “caño”, Nicaragua invoked the existence of a sandbar running over the northern part of Isla Portillos that would be Nicaraguan. It relied heavily on old cartography that did not represent the current geography of the area.

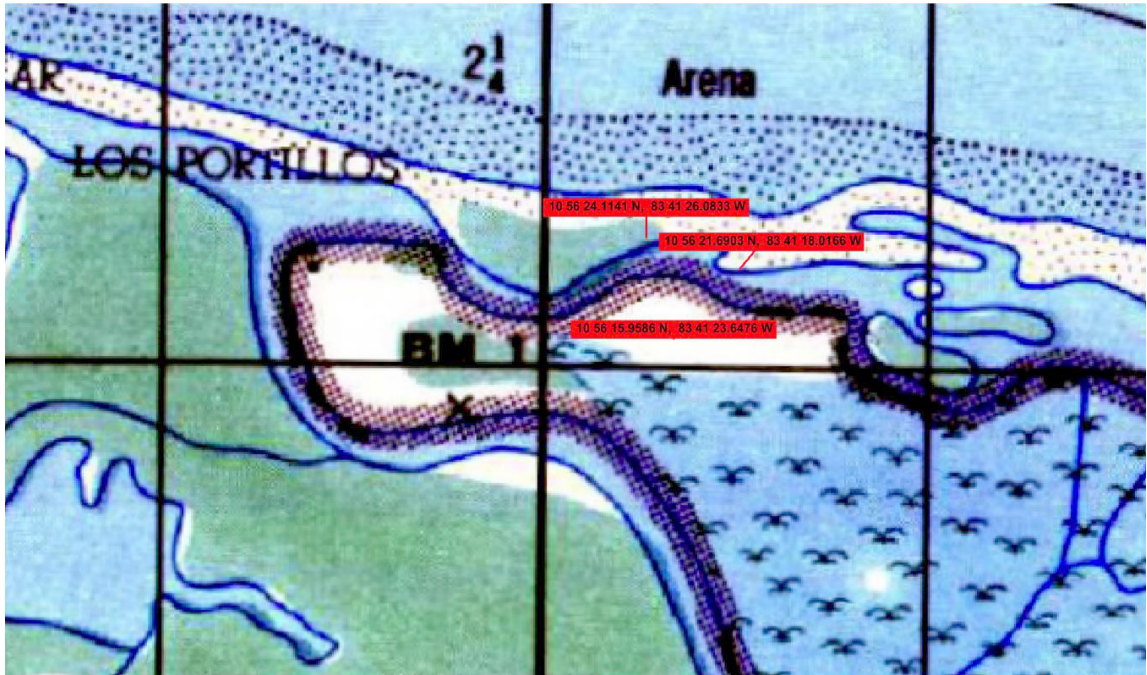
2.34. Figure 2.6 below is a sketch map with the alleged location of the military camp submitted to the Court by Nicaragua on 17 October 2013. This sketch-map was based on a sketch-map included in Costa Rica’s Memorial in the *Navigational and Related Rights* case that in turn was based on the above-mentioned 1988 maps. It is telling that Nicaragua did not use the official Nicaraguan INETER map of 2011.



AP. 1.2.

**Figure 2.6:** Location of the 2013 military camp invoked by Nicaragua. Source: *Certain Activities* case, Request for New Provisional Measures, Oral Hearings, Nicaragua’s Judges’ Folder, 17 October 2013, tab 27 (AP.1.2)

- 2.35. Figure 2.7 below is the 1988 IGN map of Punta Castilla, with coordinates of the sandbar as it existed in the past and of the 2013 Nicaraguan military camp, which was shown to the Court on 16 October 2013 by counsel for Costa Rica.



**Figure 2.7:** 1988 Cartographical Sheet, *Certain Activities* case, New Request for Provisional Measures, Oral Hearings, Costa Rica’s Judges’ Folder, 16 October 2013, Tab 4

- 2.36. Costa Rica explained, both in 2013 and 2015, through satellite photography<sup>46</sup> and Nicaraguan official cartography,<sup>47</sup> that what used to be the northern or left bank of “the first channel met” as identified by Alexander has naturally disappeared as a result of

<sup>46</sup> CR 2013/26, p. 20, para 39 (Crawford), Costa Rica’s Judges Folder of 16 October 2013, tab 5; CR 2015/14, p. 31, para 21 (Kohen), Costa Rica’s Judges Folder of 28 April 2015, tab 18 (Source: Satellite Image of 14 September 2013, Costa Rica, Request for Provisional Measures, 24 September 2013, Attachment PM-28 (true color)).

<sup>47</sup> CR 2015/14, p. 31, para 22 (Kohen); Nicaragua, INETER, Map “San Juan de Nicaragua”, 2011, **Annex 63**.

marine erosion.<sup>48</sup> A satellite image displayed during both the 2013 and 2015 oral hearings, as well as the Nicaraguan new map of 2011, are reproduced as Figures 2.8 and 2.9 below.



**Figure 2.8:** Satellite Image of 14 September 2013 including Nicaraguan camp and the location of the disappeared sandbar coordinates, *Certain Activities* case, New Request for Provisional Measures, Costa Rica’s Judges’ Folder, 16 October 2013, tab 5; Merits, Oral Hearings, Costa Rica’s Judges’ Folder, 28 April 2015, Tab 22

<sup>48</sup>

CR 2015/14, p. 31, para 21 (Kohen)





**Figure 2.9:** *San Juan del Norte map*, Instituto Nicaragüense de Estudios Territoriales, Nicaragua, 2011, Detailed Area, *Maritime Delimitation case*, Costa Rica’s Memorial, Sketch map 4.7

2.37. Given these different presentations of the geographical situation in the area by the Parties, the Court included the following paragraph in its 2015 Judgment:

70. The 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. In their oral arguments the Parties expressed different views on this issue. However, they 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.<sup>49</sup>

2.38. It is important to determine the exact scope of the Court's statement. Costa Rica understands that there were issues discussed in *Certain Activities* that fell outside the jurisdiction of the Court in that case. First, whether there is additional territory *seaward* of the disputed territory, i.e., seaward of the beach of Isla Portillos; second, whether there is any land territory between Harbor Head Lagoon and the sea that requires delimitation. These issues would be of relevance for the *Maritime Delimitation* case, as it emerges from the Order of the Court of 31 May 2016 appointing its own experts and defining their task.<sup>50</sup>

2.39. In its first sentence, paragraph 70 refers to the different views relating to the configuration of the "stretch of coast abutting the Caribbean Sea which lies between the Harbor Head Lagoon and the mouth of the San Juan River". It mentions that the definition of the "disputed territory" of the prior paragraph does not explicitly refer to that stretch. This phrase simply explains that the definition of "disputed territory" does not preclude the possible existence of territory beyond the disputed territory that was concerned by the activities of Nicaragua in the *Certain Activities* case. Certainly, Nicaragua claimed the existence of other territory seaward of Isla Portillos, but this was deemed to be a matter that fell outside the jurisdiction of the Court. Paragraph 70 cannot be construed as meaning that the beach of

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<sup>49</sup> *Certain Activities* case, Judgment, 16 December 2015, para 70.

<sup>50</sup> See *Maritime Delimitation* Case, Order, 31 May 2016, para 10(2)(c) ("Is there a bank of sand or any maritime feature between the points referred to in subparagraphs (a) and (b) above? If so, what are their physical characteristics? In particular, are these features, or some of them, permanently above water, even at high tide?").

Isla Portillos, which was concerned by the activities of Nicaragua, were not included in the definition of the “disputed territory”. To the contrary, the beach of Isla Portillos was expressly included within the disputed territory. What this sentence implies is that if there was any other land capable of appropriation under international law, beyond the beach of Isla Portillos -beach which the Court had just declared to be Costa Rican territory-, such land was not subject to its 2015 Judgment. However, not making a judgment over a “coastal feature” that may or may not exist is not, as Nicaragua seems to fancy, to leave open the question of the beach of Isla Portillos, which, clearly, the Court did not leave open. If there were other territory, it would be necessary to define the exact location of the boundary in the area. However, that there is no such other territory, nor even low-tide elevation maritime features seaward of the beach of Isla Portillos.

2.40. Equally, after mentioning that the parties consider Los Portillos/Harbor Head Lagoon to be Nicaraguan, the Court refrained from defining any boundary for this part of the coast. Indeed, a sandbar currently exists separating Los Portillos/Harbor Head Lagoon from the Caribbean Sea, which, if capable of appropriation as territory and if Nicaraguan, would require a determination of the boundary separating each end of that sandbar from the beach of Isla Portillos. This is precisely one of the tasks of the Court, following the institution of these proceedings by Costa Rica.

2.41. The Court also referred in paragraph 70 to the fact that the Parties did not address the question of the precise location of the mouth of the San Juan River. The experts appointed by the Court will

address this issue.<sup>51</sup> It must be noted that, for the purposes of the delimitation of the land boundary between the two countries, it is not necessary to proceed to any precise demarcation of that mouth. Alexander himself was content to provide the general indication that the boundary will follow from that mouth the right bank of the river.<sup>52</sup>

- 2.42. As a result of the above, it follows that the correct interpretation of paragraph 70 and the current physical configuration of the area, lead the Court to consider that its task in the determination of the exact location of the boundary in the northern part of Isla Portillos is limited to the establishment of the boundary in both ends of the sandbar separating the Los Portillos Lagoon from the Caribbean Sea. Today, no Nicaraguan territory exists in the area of Isla Portillos other than the Los Portillos/Harbor Head Lagoon and the strip of sand presently in existence that separates it from the Caribbean Sea, insofar as it remains above water at all times and thus this enclave is capable of appropriation by a State.

**D. THE LEGAL MATERIALS RELEVANT TO SOVEREIGNTY ISSUES AND THE DELIMITATION OF THE BOUNDARY**

- 2.43. The above conclusions with respect to the extent of the “disputed territory” are confirmed by reference to the 1858 Treaty of Limits,<sup>53</sup> the 1888 Cleveland Award,<sup>54</sup> and the First and Second Awards of General Alexander dated respectively 30 September

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<sup>51</sup> *Ibid.*, para 10(2)(a) (“What are the geographical coordinates of the point at which the right bank of the San Juan River meets the sea at the low-water line?”).

<sup>52</sup> Second Alexander Award, **Annex 49**, p. 224.

<sup>53</sup> 1858 Treaty of Limits, *Maritime Delimitation* case, **CRM Annex 1**.

<sup>54</sup> Award of the Arbitrator, President Cleveland of the United States, upon the validity of the Treaty of Limits of 1858 between Nicaragua and Costa Rica, **Annex 46**.

1897<sup>55</sup> and 20 December 1897.<sup>56</sup> These constitute the legal materials pursuant to which the Court made its Judgment of 16 December 2015 with respect to Costa Rica's territorial sovereignty over the 'disputed territory' and, so far as is relevant to the current case, a definitive interpretation has already been provided by the Court.

2.44. As to the 1858 Treaty, in its Judgment, the Court explained:

59. ... The 1858 Treaty fixed the course of the boundary between Costa Rica and Nicaragua from the Pacific Ocean and the Caribbean Sea. ... According to Article II of the Treaty ... part of the boundary between the two States runs along the right (Costa Rican) bank of the San Juan River from a point three English miles below Castillo Viejo, a small town in Nicaragua, to 'the end of Punta Castilla, at the mouth of the San Juan' on the Caribbean coast. ...

60. ... The Cleveland Award of 1888 confirmed, in its paragraph 1, the validity of the 1858 Treaty and found, in its paragraph 3 (1), 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'. The Cleveland Award also settled the other points of doubtful interpretation submitted by Nicaragua, ....<sup>57</sup>

2.45. As to the First Alexander Award, the Court recorded as follows:

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<sup>55</sup> First Alexander Award, **Annex 48**.

<sup>56</sup> Second Alexander Award, **Annex 49**.

<sup>57</sup> *Certain Activities* case, Judgment, 16 December 2015, paras 59 and 60.



In [General Alexander's] first Award he stated that the boundary line:

‘must follow the ... branch ... called the Lower San Juan, through its harbor and into the sea.

The natural terminus of that line is the right-hand headland of the harbor mouth.’ (RIAA, Vol. XXVIII, p. 217.)

He observed that:

‘throughout the treaty the river is treated and regarded as an outlet of commerce. This implies that it is to be considered as in average condition of water, in which condition alone it is navigable.’ (Ibid., pp. 218-219.)

He then defined the initial part of the boundary starting from the Caribbean Sea in the following terms:

‘The exact spot which was the extremity of the headland of Punta de Castillo [on] April 15, 1858, has long been swept over by the Caribbean Sea, and there is too little concurrence in the shore outline of the old maps to permit any certainty of statement of distance or exact direction to it from the present headland. It was somewhere to the northeastward, and probably between 600 and 1,600 feet distant, but it can not now be certainly located. Under these circumstances it best fulfills the demands of the treaty and of President Cleveland's award to adopt what it practically the headland of to-day, or the northwestern extremity of what seems to be the solid land, on the east side of Harbor Head Lagoon.

I have accordingly made personal inspection of this ground, and declare that initial line of the boundary to run as follows, to wit:

Its direction shall be due northeast and southwest, across the bank of sand, from the Caribbean Sea into the waters of Harbor Head Lagoon. It shall pass, at its nearest point, 300 feet on the northwest side from the small hut standing in that vicinity. On reaching the waters of Harbor Head Lagoon the boundary line shall turn to the left, or southeastward, and shall follow the water's edge around the harbor until it reaches the river proper by the first channel met. Up this channel, and up the river proper, the line shall continue to ascend as directed in the treaty.' (Ibid., p. 220.) ....<sup>58</sup>

- 2.46. The sketch map illustrating this initial part of the boundary attached to the First Alexander Award was reproduced by the Court as Sketch-map No. 3 in the Judgment and is also to be found opposite paragraph 2.5 above (Figure 2.2).
- 2.47. As to the Second Alexander Award, the Court recorded how this envisaged the possibility that the banks of the San Juan River would not gradually expand or contract but that there would be wholesale changes in its channels. The Court also recorded the Arbitrator's observation that:

'Today's boundary line must necessarily be affected in future by all these gradual or sudden changes. But the impact in each case can only be determined by the circumstances of the case itself, on a case-by-case basis in accordance with such principles of international law as may be applicable.

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<sup>58</sup>

*Ibid.*, citing First Alexander Award, **Annex 48**.

The proposed measurement and demarcation of the boundary line will not have any effect on the application of those principles.’ (RIAA, Vol. XXVIII, p. 224).<sup>59</sup>

2.48. Against this backdrop, the Court held as follows:

The Court considers that the 1858 Treaty and the awards by President Cleveland and General Alexander lead to the conclusion that Article II of the 1858 Treaty, which places the boundary on the ‘right bank of the . . . river’, must be interpreted in the context of Article VI (...), which provides that ‘the Republic of Costa Rica shall . . . have a perpetual right of free navigation on the . . . waters [of the river] between [its] mouth . . . and a point located three English miles below Castillo Viejo’. As General Alexander observed in demarcating the boundary, the 1858 Treaty regards the river, ‘in average condition of water’, as an ‘outlet of commerce’ (see paragraph 73 above). In the view of the Court, Articles II and VI, taken together, provide that the right bank of a channel of the river forms the boundary on the assumption that this channel is a navigable ‘outlet of commerce’. Thus, Costa Rica’s rights of navigation are linked with sovereignty over the right bank, which has clearly been attributed to Costa Rica as far as the mouth of the river.<sup>60</sup>

2.49. In its Judgment, the Court then proceeded to consider and reject Nicaragua’s argument that the ‘first channel met’ as referred to in the First Alexander Award was the *caño* that Nicaragua had excavated in 2010. It found that Costa Rica had sovereignty over and extending to the right bank of the Lower San Juan River all the way to the river mouth – as was consistent with any plain

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<sup>59</sup> *Certain Activities* case, Judgment, 16 December 2015, para 74, citing Second Alexander Award, **Annex 49**, p. 224.

<sup>60</sup> *Certain Activities* case, Judgment, 16 December 2015, para 74.

reading of the 1858 Treaty and the Awards before the Court. It stated:

The Court therefore concludes that the right bank of the *caño* which Nicaragua dredged in 2010 is not part of the boundary between Costa Rica and Nicaragua, and 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. Sovereignty over the disputed territory thus belongs to Costa Rica.<sup>61</sup>

2.50. As outlined in Section C above, the “disputed territory” included the beach of Isla Portillos east of the right bank of the mouth of the Lower San Juan River, as is consistent with the local geography. More generally, international law does not recognise a ‘beach’ as a feature separate from the territory of which it forms part, and there could be no basis for suggesting that the transition onto a beach area operates as some form of an interruption of territorial sovereignty.

2.51. There is also no basis in the Judgment, or in the 1858 Treaty and Awards as relied on by the Court, for Nicaragua's recent claim of sovereignty over “*the entire stretch of coast abutting the Caribbean Sea between Harbor Head and the river's mouth*”.<sup>62</sup> It appears that this position is based on the alleged existence of a bank of sand or other feature immediately in front of the beach of Isla Portillos. In this respect, it is noted that, in its Counter-Memorial in the *Maritime Delimitation* case, Nicaragua has said that:

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<sup>61</sup> *Ibid.*, para 92.

<sup>62</sup> Letter from Nicaragua to Costa Rica, Reference MRE/DMC/250/11/16, 17 November 2016, **Annex 57**.

As of today there have indeed been important changes in the coastal configuration in the region. But the ‘bank of sand’ separating the Caribbean Sea from Harbor Head Lagoon – which the Parties agree to be Nicaraguan – still exists as is apparent from recent satellite images – including those reproduced by Costa Rica at page 60 of its Memorial – and is still located where Alexander located it. Whatever the accuracy of Alexander’s sketch map annexed to his first Award, there is no doubt that the point of departure of the land boundary that he identified can still be established in today’s situation, ... Costa Rica’s appetite for territory is seeking to achieve what marine erosion and deposition has not been able to do.<sup>63</sup>

- 2.52. The reference to important changes in the coastal configuration is apt, but Nicaragua’s position is otherwise untenable. It is useful to trace through what has happened to Los Portillos/Harbor Head Lagoon and the sandy features in the area since 1897, including the ‘bank of sand’ to which General Alexander referred in his First Award.<sup>64</sup> The correct position, as is illustrated by Figure 2.10 in which the data from Proceedings X of the Alexander Minutes are plotted on a series of more recent images,<sup>65</sup> is as follows:

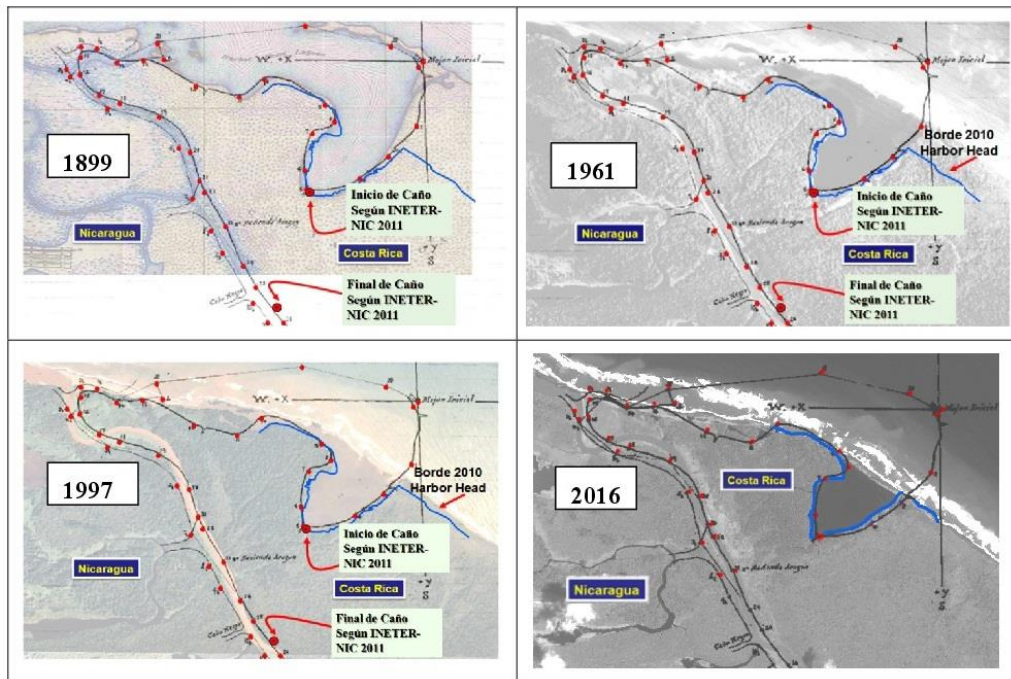
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<sup>63</sup> *Maritime Delimitation* case, NCM, para 3.49 (footnotes and reference to Nicaraguan Figure Iib-3 omitted).

<sup>64</sup> See the passages from the First Alexander Award, **Annex 48**, cited in *Certain Activities* case, Judgment, 16 December 2015, para 73.

<sup>65</sup> This Figure has been produced for illustrative purposes only and there is an element of approximation in the overlay.

- (a) The course of the Lower San Juan River, the “river proper”<sup>66</sup>, has changed relatively little. The river mouth is shown in Figure 2.11 in the location labelled “A”.
- (b) There is no longer any bank of sand “still located where Alexander located it”, as Nicaragua has contended above. Such is not to be seen on recent satellite images as Nicaragua contends.



**Figure 2.10: Coastal evolution of the mouth of the San Juan and Laguna Los Portillos / Harbor Head Lagoon.** Overlay of Sketch Map from Alexander Minutes X to 1899 map and Satellite images of 1961, 1997 and 2016 (this overlay is used for illustrative purposes only).

2.53. It follows from the above that Nicaragua could have no conceivable basis to claim territory (including the coast) in the

<sup>66</sup>

See the First Alexander Award, **Annex 48**, p. 220.

area running from the west of Los Portillos/Harbor Head Lagoon up to the mouth of the Lower San Juan River. Indeed:

- (a) The beach that runs from the west of Los Portillos/Harbor Head Lagoon (labelled 'B' on Figure 2.11) up to the mouth of the Lower San Juan River (labelled 'A' on Figure 2.11) is what was at the time of the Alexander Awards the southern or right bank of Los Portillos/Harbor Head Lagoon and “the first channel met”. This is clear from the Alexander sketch map (Figure 2.2) and Figure 2.10. That southern or right bank was held by General Alexander to be Costa Rican territory, and it is now coastal territory abutting onto the Caribbean Sea with no feature, ‘bank of sand’ or otherwise, seaward of it.
  
- (b) All that has happened is that the northern/left bank of the lagoon/channel has been eroded and has disappeared, and the southern/right bank now abuts the Caribbean Sea.



*For illustrative purposes only*

**Figure 2.11:** Sketch map based on satellite Image of 3 October 2016 (See also Figure 2.4)

2.54. It is extraordinary that Nicaragua should, whilst referring to “Costa Rica’s appetite for territory”,<sup>67</sup> seek to lay claim to land that was held by General Alexander to appertain to Costa Rica and that, of itself, has changed relatively little in the past 120 years. Today, the only Nicaraguan territory in the area of Isla Portillos is – for so long as it is territory capable of appertaining to a State – an enclave comprising the Los Portillos/Harbor Head Lagoon and the sandbar separating Los Portillos/Harbor Head Lagoon from the Caribbean Sea.

2.55. Finally, insofar as Nicaragua’s claim with respect to the “*entire stretch of coast*”<sup>68</sup> is based on an assertion of sovereignty by

<sup>67</sup> *Maritime Delimitation* case, NCM, para 3.49.

<sup>68</sup> Letter from Nicaragua to Costa Rica, Reference MRE/DMC/250/11/16, 17 November 2016, **Annex 57**.



reference to the so-called Punta Castilla,<sup>69</sup> such would be directly counter to:

- (a) the legal reasoning and conclusion of the First Alexander Award, which was not to seek to re-discover a lost marker point, but rather to identify the boundary by reference to “the demands of the treaty and of President Cleveland’s award”;
- (b) the legal reasoning and the approach in the Second Alexander Award, which recognised that the boundary line he drew would necessarily be impacted by future erosion and accretion; and
- (c) the Judgment of 16 December 2015, including the passages referred to at paragraphs 2.44-2.49 above. Directly contrary to what Nicaragua has argued in its Counter-Memorial in the *Maritime Delimitation* case, and consistent with the 1858 Treaty and the Cleveland and Alexander Awards, the location of the mouth of the Lower San Juan River has been held by the Court to be the “determining factor” so far as concerns the land boundary, not ‘Punta Castilla’.<sup>70</sup>

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<sup>69</sup> Cf. *Maritime Delimitation* case, NCM, para 3.45.

<sup>70</sup> *Certain Activities* case, Judgment, 16 December 2015, para 92. Cf. *Maritime Delimitation* case, NCM, para 3.45, where Nicaragua argued: “If the location of the mouth of the river had been the determining factor, he [General Alexander] would have simply decided where the mouth was located at that moment, without the need for establishing a fixed marker. But Alexander was not looking for the mouth of the river, only for Punta de Castilla.” That is not a correct characterisation. General Alexander considered that the boundary line “must follow ... the Lower San Juan, through its harbor and into the sea.” He continued: “The natural terminus of that line is the right-hand headland of the harbor mouth.” He was looking for the mouth of the San Juan River, which at that time flowed through its harbor, Harbor Head Lagoon, and he found it at “the northwestern extremity of what seems to be the solid land on the east side of Harbor Head Lagoon”. See First Alexander Award, **Annex 48**, as cited in *Certain Activities* case, Judgment, 16 December 2015, para 73.

- 2.56. The issue then is how the precise location of the land boundary separating both ends of the Los Portillos/Harbor Head Lagoon sandbar from Isla Portillos – at locations “B” and “C” on Figure 2.11 – should best be defined. Alexander, applying the relevant legal instruments to the geography of his day, described a continuous boundary running from the Lower San Juan River, through the “first channel met” and around the harbor to the right headland of the harbor mouth. Today, however, the changed geographic configuration and the historical treatment of the waters of Los Portillos/Harbor Head Lagoon result in a detached U-shaped boundary around the Lagoon creating a Nicaraguan enclave east of the main land boundary that, as confirmed by the Court’s Judgment, runs alongside the right bank of the Lower San Juan River all the way to its mouth in the Caribbean Sea (location A on Figure 2.11). It is this land boundary that Costa Rica has asked the Court to delimit: the boundary separating the beach of Isla Portillos from both ends of the Los Portillos/Harbor Head Lagoon sandbar (locations B and C on Figure 2.11).
- 2.57. Given the fluid nature of the local topography, and consistent with the underlying approach of General Alexander, Costa Rica does not seek any demarcation of the remnant of the Los Portillos/Harbor Head Lagoon and the sandbar separating Los Portillos/Harbor Head Lagoon from the Caribbean Sea. The local pattern of erosion appears clear from Figure 2.10, and Nicaragua’s sovereignty over this enclave can only persist for so long as the sandbar remains above water at all times and thus is capable of constituting territory appertaining to a State.
- 2.58. By reference to the above, Costa Rica’s position is that the land boundary separating both ends of the Los Portillos/Harbor Head Lagoon sandbar from Isla Portillos, insofar as this sandbar

remains above water at all times and thus is capable of constituting territory appertaining to a State, should run today from the northeastern corner of the Lagoon by the shortest line to the Caribbean Sea (location C) and from the northwestern corner of the Lagoon by the shortest line to the Caribbean Sea (location B). Considering that the coastal geography in this area is likely to continue to undergo change, describing these boundary segments with specific coordinates is not appropriate. A verbal description would be sufficiently precise, and would allow the line to change with the geography, as envisioned in the Second Alexander Award.



## **CHAPTER 3 NICARAGUA'S NEW BREACH OF COSTA RICA'S TERRITORIAL SOVEREIGNTY**

### **A. INTRODUCTION**

- 3.1. The present proceedings were initiated in response to the establishment by Nicaragua of a military camp on the Costa Rican territory of the beach of Isla Portillos, and by its claim of sovereignty over Costa Rican territory as defined by the Court in its Judgment of 16 December 2015 in the *Certain Activities* case. As this Chapter will show, Nicaragua has maintained a military camp on the sandbar directly in front of Los Portillos/Harbor Head Lagoon, which separates the Lagoon from the Caribbean Sea. However, in or about September 2016 Nicaragua moved its military camp north-westwards, from the sandbar in front of the Lagoon, to the beach of the northern part of Isla Portillos, which is indisputably Costa Rican territory, in violation of Costa Rica's sovereignty over that territory.

### **B. THE INSTALLATION OF A MILITARY CAMP BY NICARAGUA ON THE BEACH OF ISLA PORTILLOS**

- 3.2. The first documented presence of a Nicaraguan military camp on the sandbar in front of Los Portillos/Harbor Head Lagoon by Costa Rica corresponds to a satellite image of 19 November 2010 (see Figure 3.1). As the image shows, the military camp was established on the sandbar that separates Los Portillos/Harbor Head Lagoon from the Caribbean Sea in two locations. The establishment of this military camp took place seemingly in the context of Nicaragua's military occupation of the northern sector of Isla Portillos a few weeks earlier, and works Nicaragua carried out on Costa Rican territory to connect the San Juan River to the Lagoon.



**Figure 3.1:** Satellite Image of 19 November 2010 showing the location of Nicaragua’s military camp on the Nicaraguan sandbar

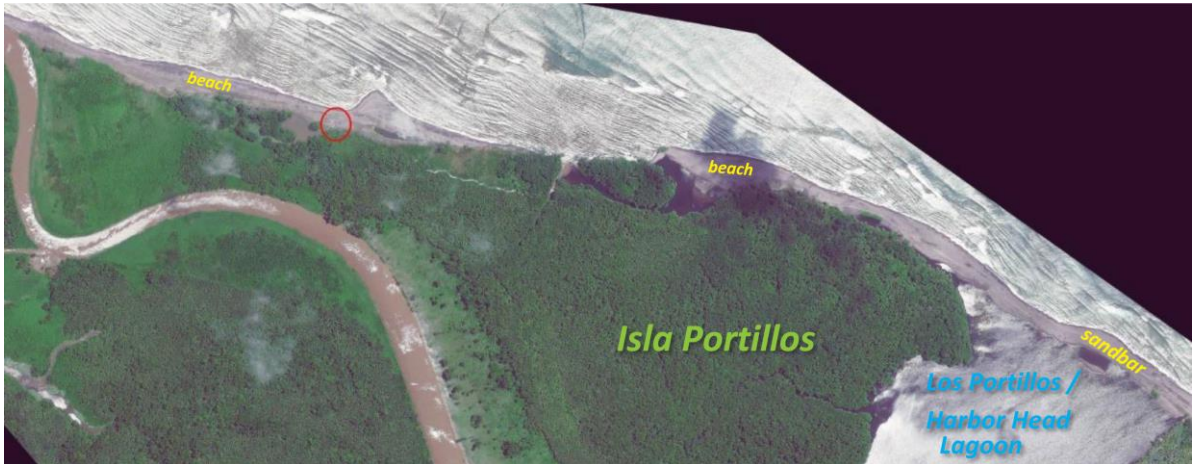
- 3.3. As the Court may recall, in the month of February 2013 Costa Rica discovered that Nicaragua had moved its military camp to the beach of Isla Portillos, closer to the mouth of the San Juan River, near the site where Nicaragua subsequently unlawfully excavated two new artificial *caños*. Costa Rica protested this situation to Nicaragua,<sup>71</sup> and brought it to the attention of the Court on 15 March 2013.<sup>72</sup> The location of this camp is shown in the satellite image of 30 June 2013 (Figure 3.2). The installation of this military camp constituted a breach of the Court’s Order on Provisional Measures of 8 March 2011. Following the Court’s new Order on Provisional Measures of 22 November 2013, Nicaragua reported to the Court that its “Army

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<sup>71</sup> Letter from Costa Rica to Nicaragua, Reference DM-AM-107-13, 27 February 2013, **Annex 53**.

<sup>72</sup> Letter from Costa Rica to the International Court of Justice, Reference ECRPB-016-13, 15 March 2013, **Annex 54**.

proceeded with the dismantling of the military camp identified by the Court in paragraph 46 of the Order.”<sup>73</sup>



**Figure 3.2:** Satellite Image of 30 June 2013 showing the location of Nicaragua’s military camp on the Costa Rican beach of Isla Portillos

- 3.4. Thereafter, it appears that Nicaragua reinstalled and maintained its military camp on the sandbar directly in front of Los Portillos/Harbor Head Lagoon. An aerial photograph of 8 March 2016 (Figure 3.3) and a satellite image of 5 July 2016 (Figure 3.4) show the camp located on the sandbar.

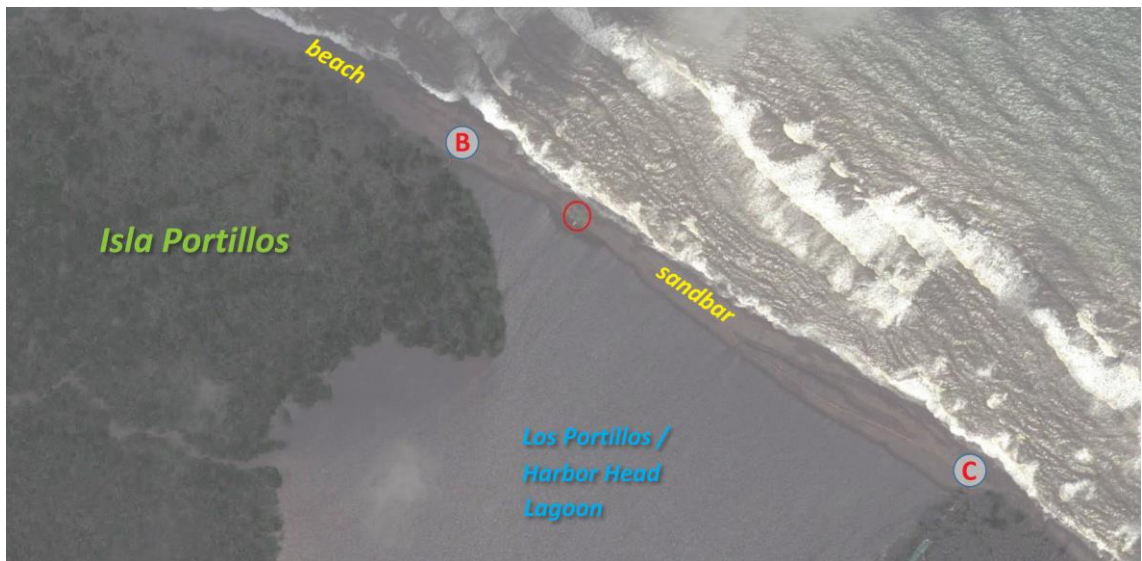
<sup>73</sup>

Letter from Nicaragua to the International Court of Justice, Reference HOL-EMB-252, 9 December 2013, **Annex 55**, p 2.





**Figure 3.3:** Aerial photograph of 8 March 2016, with Nicaragua's military camp visible on the Nicaraguan sandbar



**Figure 3.4:** Satellite Image of 5 July 2016 showing the location of Nicaragua's military camp on the Nicaraguan sandbar



- 3.5. However, as documented by an aerial photograph of 7 November 2016 (Figure 3.5) and a 14 September 2016 satellite image (Figure 3.6) the military camp appears to have been moved to a different location, to the northwest of the Lagoon's sandbar and installed on the beach of the northern part of Isla Portillos, on what was held to be Costa Rican territory by the Court in its 16 December 2015 Judgment in the *Certain Activities* case.
- 3.6. On 14 November 2016 Costa Rica wrote to Nicaragua to protest the presence of the military camp on Costa Rican territory.<sup>74</sup> Nicaragua not only refused to remove its camp, but responded by laying claim to the entirety of the beach of Isla Portillos.<sup>75</sup>

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<sup>74</sup> Letter from Costa Rica to Nicaragua, Reference DM-AM-584-16, 14 November 2016, **Annex 56**.

<sup>75</sup> Letter from Nicaragua to Costa Rica, Reference MRE/DMC/250/11/16, 17 November 2016, **Annex 57**.



**Figure 3.5:** Aerial photograph of 7 November 2016 showing the location of Nicaragua’s military camp on the Costa Rican beach of Isla Portillos



**Figure 3.6:** Satellite Image of 14 September 2016 showing the location of Nicaragua’s military camp on the Costa Rican beach of Isla Portillos

- 3.7. By way of an overflight on 14 February 2017, Costa Rica obtained photographic evidence (Figure 3.7) that Nicaragua's military camp continues to be placed on Costa Rican territory.



**Figure 3.7:** Aerial photograph of 14 February 2017, with Nicaragua's military camp visible on the Costa Rican beach of Isla Portillos

**C. NICARAGUA'S ACTIONS CONSTITUTE BREACHES OF COSTA RICA'S SOVEREIGNTY AND TERRITORIAL INTEGRITY, AND OF THE COURT'S JUDGMENT OF 16 DECEMBER 2015**

- 3.8. It is uncontested between the Parties that Nicaragua moved its military camp to the location shown in the 14 September 2016 satellite image, above (Figure 3.6). This new location is situated on beach which forms part of the northern part of Isla Portillos,

which the Court adjudged in the *Certain Activities* case to fall under Costa Rican sovereignty,<sup>76</sup> as explained in Chapter 2 above. These Nicaraguan actions breached Costa Rica's sovereignty and territorial integrity, and Costa Rica once again finds itself having to seek redress before the Court. The question of Nicaragua's alleged sovereignty over the sandbar directly in front of Harbor Head Lagoon is separate and distinct from Costa Rica's indisputable sovereignty over the northern part of Isla Portillos, including the beach in front of that territory.

#### D. CONCLUSION

3.9. As noted in paragraph 1.6 above, Nicaragua's recent position appears to form part of a persistent course of conduct, from its invasion and occupation of (and subsequent claim to) Costa Rican territory in late 2010, to its breach of the Court's 2011 Order in the *Certain Activities* case (requiring Costa Rica to obtain a further Order in 2013), and now to its placement of yet another military camp on Costa Rica's territory, in breach of the Court's Judgment of 2015, and its subsequent claim to that territory. It is in these circumstances that Costa Rica has been compelled to institute the current proceedings. For the reasons explained in Chapter 2 and this Chapter 3 above, it follows that by installing and maintaining a military camp on this territory, Nicaragua has breached:

(a) the Court's Judgment of 16 December 2015;

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<sup>76</sup> *Certain Activities* case, Judgment of 16 December 2015, paras 69 and 229(1).

- (b) Costa Rica's sovereignty, as agreed and delimited by the 1858 Treaty of Limits, the Cleveland Award and the First and Second Alexander Awards; and
  
- (c) the fundamental principles of territorial integrity and the prohibition of use of force under the Charter of the United Nations and the Charter of the Organization of American States.



## SUBMISSIONS

Costa Rica respectfully requests the Court:

- (a) To determine the precise location of the land boundary separating both ends of the Los Portillos/Harbor Head Lagoon sandbar from Isla Portillos, and in doing so to determine that the only Nicaraguan territory existing today in the area of Isla Portillos is limited to the enclave consisting of Los Portillos/Harbor Head Lagoon and the sandbar separating the Lagoon from the Caribbean Sea, insofar as this sandbar remains above water at all times and thus this enclave is capable of constituting territory appertaining to a State. Consequently, that the land boundary runs today from the northeastern corner of the Lagoon by the shortest line to the Caribbean Sea and from the northwestern corner of the Lagoon by the shortest line to the Caribbean Sea.
- (b) to adjudge and declare 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. Consequently, Costa Rica further requests the Court to declare that Nicaragua must withdraw its military camp situated in Costa Rican territory and fully comply with the Court's 2015 Judgment. Costa Rica reserves its rights to seek any further remedies with respect to any damage that Nicaragua has or may cause to its territory.





## **CERTIFICATION**

I have the honour to certify that the documents annexed to this Memorial are true copies and conform to the original documents and that the translations into English made by Costa Rica are accurate translations.

Ambassador Sergio Ugalde  
Co-Agent of Costa Rica  
The Hague, 2 March 2017

