

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

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)

JUDGMENT OF 2 FEBRUARY 2018

2018

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

DÉLIMITATION MARITIME DANS LA MER
DES CARAÏBES ET L'OCÉAN PACIFIQUE

(COSTA RICA *c.* NICARAGUA)

ET

FRONTIÈRE TERRESTRE DANS LA PARTIE
SEPTENTRIONALE D'ISLA PORTILLOS

(COSTA RICA *c.* NICARAGUA)

ARRÊT DU 2 FÉVRIER 2018

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and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary
in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua),
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ARRÊT

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INTERNATIONAL COURT OF JUSTICE

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LAND BOUNDARY IN THE NORTHERN PART
OF ISLA PORTILLOS

(COSTA RICA v. NICARAGUA)

Jurisdiction of the Court.

* *

General background.

Geography — Land boundary between Parties spanning Central American isthmus — Isla Portillos, San Juan River and Harbor Head Lagoon — Features off the Caribbean coast — Description of Pacific coast.

Historical context — 1858 Treaty of Limits — Cleveland Award — Alexander Awards — Starting segment of land boundary in first Alexander Award — Geomorphological changes — Court's finding on sovereignty in 2015 Judgment — Negotiations between the Parties concerning maritime delimitations.

Maritime delimitations in the Caribbean Sea and Pacific Ocean — 1980 delimitation treaty between Costa Rica and Panama — 1977 delimitation treaty between Costa Rica and Colombia, not ratified by Costa Rica — Court's 2007 Judgment concerning Nicaraguan maritime boundary with Honduras — Court's 2012 Judgment concerning Nicaraguan maritime boundary with Colombia — 1976 delimitation treaty between Colombia and Panama.

* *

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Issues concerning territorial sovereignty.

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2015 Judgment finding territory under Costa Rican sovereignty extends to right bank of San Juan River at its mouth — Uncertainties about configuration of coast of Isla Portillos in 2015 — Assessment of Court-appointed experts — No longer any water channel connecting San Juan River and Harbor Head Lagoon — Costa Rica has sovereignty over whole of Isla Portillos except enclave of Harbor Head Lagoon and sandbar separating it from sea, over which Nicaragua has sovereignty — Starting-point of land boundary currently at end of sandspit at mouth of San Juan River — Extent of sandbar as measured by experts — Course of land boundary for enclave of Harbor Head Lagoon.

*

Alleged violations of Costa Rica's sovereignty — Military camp not on sandbar appertaining to Nicaragua — Installation of military camp violated Costa Rica's sovereignty — Camp must be removed from Costa Rican territory — No breach of 2015 Judgment — Declaration of breach of sovereignty and order to remove camp constitute appropriate reparation.

* *

Maritime delimitation in the Caribbean Sea.

Starting-point — Divergent views of the Parties — Instability of the coastline near mouth of River — Impossibility to identify on sandspit a fixed starting-point for maritime delimitation — Use of fixed point at sea — Mobile line connecting fixed point to coast — Coastal recession as prevailing phenomenon — Two nautical miles appropriate distance from coast for fixed point.

*

Delimitation of the territorial sea — Two-stage procedure — First stage, construction of provisional median line — Only base points on natural coast and solid land used — Second stage, consideration whether special circumstances justify adjustment of median line — Concavity/convexity of coast near starting-point not a special circumstance — Instability and narrowness of sandspit at mouth of river is a special circumstance — Appropriateness of mobile line between fixed point at sea and point on solid land on Costa Rican coast closest to mouth of river — Present location of mobile line — Instability of sandbar separating Harbor Head Lagoon from sea is a special circumstance — Delimitation of territorial sea will

not take into account any entitlement which might result from enclave of Harbor Head Lagoon — Course of delimitation line in territorial sea.

*

Delimitation of the exclusive economic zone and continental shelf.

Relevant coasts — Entire mainland coast of Costa Rica relevant — Mainland coast of Nicaragua up to Punta Gorda (north) relevant — Coasts of Corn Islands that do not face north also relevant — Coasts of Cayos de Perlas not relevant — Coastal lengths measured according to natural configuration.

Relevant area — Limits of relevant area in the north — Claims of third States in the south.

Relevance of bilateral treaties and judgments involving third States — 1976 Treaty between Panama and Colombia not relevant between the Parties — With regard to 1977 Treaty between Costa Rica and Colombia, any possible renunciation of maritime entitlements by Costa Rica not shown to be renunciation in favour of other States.

Methodology of delimitation of the exclusive economic zone and continental shelf in three stages — First stage, construction of provisional equidistance line — Second stage, determination whether relevant circumstances justify adjustment of equidistance line — Third stage, verification of absence of marked disproportionality.

Provisional equidistance line — Determination of base points — Natural coast and solid land used for base points — Base points on Corn Islands — Base points on Paxaro Bovo and Palmenta Cays — Line without prejudice to any claims of third States — Course of provisional equidistance line.

Adjustment to provisional equidistance line — Corn Islands given half effect — Concavity/convexity of coast near Punta de Castilla not a relevant circumstance — Overall concavity of Costa Rica's coast not a relevant circumstance — No significant cut-off of Costa Rica's projections once half effect given to Corn Islands — Course of adjusted equidistance line — Line without prejudice to any claims of third States — Adoption of simplified line on the basis of most significant turning points — Course of simplified line.

Disproportionality test — No need to achieve strict proportionality — Impossible to calculate relevant area precisely due to potential claims of third States — Approximate calculation sufficient to test for gross disproportion — Calculation based on notional extension of Costa Rica-Panama boundary — No disproportionality such as to create an inequitable result.

* *

Maritime delimitation in the Pacific Ocean.

Starting-point — Parties agreement to use midpoint of closing line of Salinas Bay — Precise co-ordinates of that point.

*

Delimitation of the territorial sea — Parties agree on base points for construction of provisional median line — Court adopts base points selected by Parties — Santa Elena Peninsula not a special circumstance justifying adjustment of median line — Course of delimitation line in territorial sea.

*

Delimitation of the exclusive economic zone and continental shelf.

Relevant coasts — Relevant coasts of both Parties identified using straight lines — Entire Nicaraguan coast relevant — Costa Rican coast running along straight lines connecting Punta Zacate, Punta Santa Elena, Cabo Velas, Punta Guiones and Cabo Blanco relevant — Costa Rican coast running along straight lines connecting Punta Herradura, Osa Peninsula, Punta Llorona and Punta Salsipuedes also relevant — Coasts of Nicoya Gulf not relevant — Coastal lengths measured along straight lines.

Relevant area — Limits of relevant area in north — Limits of relevant area in west and south.

Provisional equidistance line — Parties agree on base points — Court adopts base points selected by Parties — Course of provisional equidistance line.

Adjustment to provisional equidistance line — Santa Elena Peninsula given half effect — Nicoya Peninsula not a relevant circumstance justifying adjustment — Course of adjusted equidistance line — Adoption of simplified line on the basis of most significant turning points — Course of simplified line.

Disproportionality test — No disproportionality such as to create an inequitable result.

JUDGMENT

Present: President ABRAHAM; Vice-President YUSUF; Judges OWADA, TOMKA, BENNOUNA, CANÇADO TRINDADE, GREENWOOD, XUE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, GEVORGIAN; Judges ad hoc SIMMA, AL-KHASAWNEH; Registrar COUVREUR.

In the case concerning maritime delimitation in the Caribbean Sea and the Pacific Ocean, and in the joined case (see paragraph 29 below) concerning the land boundary in the northern part of Isla Portillos,

between

the Republic of Costa Rica,

represented by

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

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

H.E. Mr. Sergio Ugalde, Ambassador of Costa Rica to the Kingdom of the Netherlands, Member of the Permanent Court of Arbitration,
as Co-Agent, Counsel and Advocate;

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

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

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

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

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

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

as Counsel and Advocates;

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

as Counsel;

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

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

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

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

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

as Assistant Counsel;

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

as Assistant,

and

the Republic of Nicaragua,

represented by

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

as Agent and Counsel;

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

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

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

Mr. Paul Reichler, Attorney at Law, Foley Hoag LLP, member of the Bars of the United States Supreme Court and the District of Columbia,
Mr. Antonio Remiro Brotóns, Professor of International Law, Universidad Autónoma de Madrid, member of the Institut de droit international,
Mr. Benjamin Samson, Ph.D. candidate, Centre de droit international de Nanterre (CEDIN), University Paris Nanterre, Visiting Scholar, George Washington University Law School,

as Counsel and Advocates;

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

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

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

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

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

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

Mr. Yuri Parkhomenko, Attorney at Law, Foley Hoag LLP,

as Counsel;

Ms Gimena González, Researcher in public international law,

Ms Ilona Tan, Legal Intern, Foley Hoag LLP,

as Legal Assistants;

Mr. Robin Cleverly, M.A., D.Phil, C.Geol, FGS, Law of the Sea Consultant, Marbdy Consulting Ltd,

Ms Victoria Leader, Geographical and Technical Consultant,

as Scientific and Technical Advisers;

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

as Administrator,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. By an Application filed in the Registry of the Court 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*”).

2. In its Application, Costa Rica seeks to found the jurisdiction of the Court on the declaration it made on 20 February 1973 under Article 36, paragraph 2, of the Statute of the Court, as well as on the declaration which Nicaragua made on 24 September 1929 (and amended on 23 October 2001) under Article 36 of the Statute of the Permanent Court of International Justice and which is deemed, pursuant to Article 36, paragraph 5, of the Statute of the present Court, for the period which it still has to run, to be acceptance of the compulsory jurisdiction of this Court. Costa Rica further invokes as a basis for the Court's jurisdiction Article XXXI of the American Treaty on Pacific Settlement adopted at Bogotá on 30 April 1948 (hereinafter the "Pact of Bogotá").

3. In accordance with Article 40, paragraph 2, of the Statute, the Registrar communicated a signed copy of the Application forthwith to the Government of Nicaragua; and, under paragraph 3 of that Article, all States entitled to appear before the Court were notified of the filing of the Application.

4. Pursuant to the instructions of the Court under Article 43 of its Rules, the Registrar addressed to States parties to the United Nations Convention on the Law of the Sea of 10 December 1982 (hereinafter "UNCLOS") the notifications provided for in Article 63, paragraph 1, of the Statute. The Registrar also addressed the notification provided for in Article 43, paragraph 2, of the Rules of Court to the European Union, which is also party to the said Convention, asking whether it intended to submit any observations under that provision.

5. Since the Court included upon the Bench no judge of the nationality of either Party, each of them availed itself of its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* in the case. Costa Rica chose Mr. Bruno Simma and Nicaragua chose Mr. Awn Shawkat Al-Khasawneh.

6. By an Order dated 1 April 2014, the Court fixed 3 February 2015 and 8 December 2015 as the respective time-limits for the filing of a Memorial by Costa Rica and a Counter-Memorial by Nicaragua. The Memorial and the Counter-Memorial were filed within the time-limits thus fixed.

7. By letter dated 3 February 2015 and received in the Registry on 5 February 2015, the Government of the Republic of Colombia, referring to Article 53, paragraph 1, of the Rules of Court, made a request to be furnished with copies of the pleadings and documents annexed in the case. After consulting the Parties in accordance with that same provision, the President of the Court decided to grant that request. By letters dated 30 March 2015, the Registrar duly communicated that decision to the Government of Colombia and to the Parties.

By letter dated 5 August 2015, received in the Registry on 7 August 2015, the Government of the Republic of Panama, referring to Article 53, paragraph 1, of the Rules of Court, in turn made a request to be furnished with copies of the pleadings and documents annexed in the case. After consulting the Parties in accordance with that same provision, the President of the Court decided to grant that request. By letters dated 26 August 2015, the Registrar duly communicated that decision to the Government of Panama and to the Parties.

8. At a meeting held by the President with the representatives of the Parties on 28 January 2016, the Parties agreed that it was not necessary to file a Reply and a Rejoinder.

9. By letters dated 26 February 2016, the Registrar informed the Parties that the Court, in accordance with Article 54, paragraph 1, of the Rules of Court, had fixed 5 December 2016 as the date for the opening of the oral proceedings in the case.

10. By letters dated 13 April 2016, the Registrar informed the Parties, pursuant to Article 67, paragraph 1, of the Rules of Court, that the Court was considering arranging for an expert opinion entrusted to one or several experts. The experts would be asked to collect, by conducting a site visit, all the factual elements capable of allowing for the determination of the starting-point of the maritime boundary between the Parties in the Caribbean Sea, in particular elements relating to the state of the coast between the point located on the right bank of the San Juan River at its mouth and the land point closest to Punta de Castilla, as those two points could be identified at the time of that visit. The Parties were further informed that the Court had fixed 3 May 2016 as the time-limit within which they might present their positions with respect to any such appointment, in particular their views on the subject of the expert opinion, the number and mode of appointment of the experts, and the procedure to be followed. They were also advised that any comments that either Party might wish to make on the reply of the other Party should be furnished by 13 May 2016 at the latest.

11. By letter dated 3 May 2016, Costa Rica welcomed the exercise by the Court of its power to arrange for an expert opinion. It suggested that the Court consider appointing a committee of three experts, composed of geographers who were independent of both Parties, and that the Parties should have the opportunity to make observations on the choice of these experts. Costa Rica proposed that a number of matters be covered in the terms of reference for the experts. It also expressed the wish that the Parties should have the opportunity to provide comments on the experts' report in writing before the beginning of the oral proceedings, and that any comments that either Party might wish to make on the comments of the other Party should also be provided in writing in advance of the oral proceedings. Finally, Costa Rica made certain proposals regarding logistical matters.

12. By letter of the same date, Nicaragua, for its part, stated that it considered that there was no need to carry out a site visit, asserting that, since the location of the starting-point of the land boundary on the Caribbean coast had been established by various instruments, the determination of the starting-point of the maritime boundary between the Parties was a technical and legal task that did not require a site visit. Nicaragua nonetheless added that if, having taken into account its position, the Court were to consider that a site visit was necessary, Nicaragua would be ready to express in due time its position with respect to the terms of reference for the expert(s) and their appointment, and to assist them to the fullest possible extent.

13. By letters of 13 May 2016, each of the Parties reiterated its position.

14. By Order dated 31 May 2016, the Court decided that an expert opinion would be arranged, in accordance with Articles 48 and 50 of its Statute, to inform the Court 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. The Order stated, *inter alia*, that the expert opinion would be entrusted to two independent experts appointed by Order of the President of the Court after hearing the Parties, and that these experts would make the following declaration:

“I solemnly declare, upon my honour and conscience, that I will perform my duties as expert honourably and faithfully, impartially and conscientiously, and will refrain from divulging or using, outside the Court, any documents or information of a confidential character which may come to my knowledge in the course of the performance of my task.”

15. By letters dated 2 June 2016, the Registrar informed the Parties of the Court's decision. He also indicated that the Court had identified two potential experts to prepare the expert opinion it had decided to obtain, namely Mr. Eric Fouache and Mr. Francisco Gutiérrez, whose curricula vitae were enclosed with the said letters. The Parties were invited to communicate to the Court any observations they might have on the two experts by 10 June 2016, at the latest.

16. By letter dated 10 June 2016, Costa Rica stated that it had no objection to the experts selected by the Court and that it stood ready to provide any necessary assistance to the expert mission; by letter of the same date, Nicaragua, without submitting any specific observations on the two experts, expressed its full readiness to assist the Court with the organization of the mission.

17. By an Order dated 16 June 2016, the President of the Court appointed the following two experts: Mr. Eric Fouache, of French nationality, Professor of Geography, Vice-Chancellor of Paris-Sorbonne University Abu Dhabi (United Arab Emirates), senior member of the Institut universitaire de France and President of the International Association of Geomorphologists; and Mr. Francisco Gutiérrez, of Spanish nationality, Professor of Geology and Geomorphology at the University of Zaragoza (Spain), former member of the Executive Committee of the International Association of Geomorphologists. The experts subsequently made the solemn declaration provided for in the Order of 31 May 2016 (see paragraph 14 above).

18. The experts informed the Court that, in their view, it would be necessary to conduct two site visits, one in early December (rainy period with high discharge of the San Juan River) and the other in March or early April (drier period with low discharge of the San Juan River). Consequently, the Court decided to postpone the opening of the oral proceedings until 12 June 2017. The Parties were informed of this decision by letters from the Registrar dated 1 July 2016.

19. Between July and November 2016, several exchanges of correspondence took place between the experts, the Registrar and the Parties concerning the organization of the site visits. In addition, on 1 September 2016, the Registrar met with the representatives of the Parties to discuss the practical aspects of the visits. By letters dated 20 October 2016, the Parties communicated to the Court several documents requested by the experts (photographs, satellite images, maps, etc.); these documents were transmitted to them forthwith.

20. By letter dated 28 November 2016, Costa Rica requested the postponement of the experts' first site visit, which had been scheduled to take place from 4 to 9 December 2016, in light of the damage caused by Hurricane Otto, which shortly beforehand had hit the region to be inspected. By letter dated 29 November 2016, Nicaragua indicated its preference for the mission to proceed as planned. By letter dated 30 November 2016, Costa Rica reiterated its request, while setting out the arrangements that could be provided if the Court were to decide to maintain the dates of the visit scheduled for early December. The experts were consulted and they expressed their reluctance to postpone the mission, explaining in particular that visiting at that time would allow them to have a better grasp of the impact of high-magnitude hydrological events on the configuration of the coast and the San Juan River. The President of the Court having considered the matter, it was decided to maintain the dates of the site visit as planned.

21. The experts' first site visit accordingly took place from 4 to 9 December 2016. The experts were accompanied by two staff members of the Registry who

constituted the secretariat of the mission, and by a delegation from each Party. During the visit, the Parties exchanged documents, photographs and video recordings and provided them to the experts. They subsequently indicated that they considered that such new materials exchanged during the visits should be included in the case file, unless otherwise stated.

22. 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*”).

Costa Rica seeks to found the jurisdiction of the Court on the aforementioned declarations (see paragraph 2 above) and on Article XXXI of the Pact of Bogotá.

23. In its Application, Costa Rica requested that the Court join the new proceedings with the proceedings in the case concerning *Maritime Delimitation*, pursuant to Article 47 of the Rules of Court.

24. In accordance with Article 40, paragraph 2, of the Statute, the Registrar communicated a signed copy of the said Application forthwith to the Government of Nicaragua; under paragraph 3 of that Article, all States entitled to appear before the Court were notified of the filing of the Application.

25. Since the Court included upon the Bench no judge of the nationality of either Party, each of them availed itself of its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* in the case concerning the *Northern Part of Isla Portillos*. Costa Rica chose Mr. Bruno Simma and Nicaragua chose Mr. Awn Shawkat Al-Khasawneh.

26. On 25 January 2017, the Registrar held a meeting with the representatives of Costa Rica and Nicaragua in connection with the case concerning *Maritime Delimitation* to discuss arrangements for the second site visit. During that meeting, it was decided that the said visit would take place from 12 to 17 March 2017.

27. On 26 January 2017, the President held a meeting with the representatives of Costa Rica and Nicaragua, who were invited to convey the views of their Governments on the question of the time-limits for the filing of pleadings in the case concerning the *Northern Part of Isla Portillos* and on whether it would be appropriate to join the proceedings in that case with those in the case concerning *Maritime Delimitation*.

28. By Order dated 2 February 2017, the Court fixed 2 March 2017 and 18 April 2017 as the respective time-limits for the filing of a Memorial by Costa Rica and a Counter-Memorial by Nicaragua in the case concerning the *Northern Part of Isla Portillos*. The Memorial and the Counter-Memorial were filed within the time-limits thus prescribed.

29. By its Order dated 2 February 2017, the Court also decided to join the proceedings in the case concerning *Maritime Delimitation* and the case concerning the *Northern Part of Isla Portillos*.

30. By letters dated 3 February 2017, the Registrar informed the Parties that the Court had decided that the hearings in the joined cases would open on 3 July 2017.

31. The experts’ second site visit took place from 12 to 17 March 2017. The experts were once again accompanied by two staff members of the Registry and a delegation from each Party. During the visit, the Parties exchanged documents, photographs and video recordings and provided them to the experts.

32. By letter dated 1 May 2017, the Registrar communicated to the Parties copies of the report filed by the experts appointed in the case concerning *Maritime Delimitation*. Each of the Parties was given until 1 June 2017 to submit any written observations that they might wish to make on the said report.

33. On 16 May 2017, the President held a meeting with the representatives of the Parties to discuss the organization of the oral proceedings in the joined cases; the Parties agreed that they did not consider it necessary to put any questions to the experts at the hearings. By letters dated 29 May 2017, the Registrar informed the Parties of the schedule for the oral proceedings, as adopted by the Court.

34. Under cover of a letter dated 1 June 2017, Costa Rica communicated to the Court the written observations of its Government on the experts' report. By letter of the same date, Nicaragua indicated that it had no written observations to make at that stage. Costa Rica's observations were communicated to the experts, who responded in writing on 8 June 2017; that response was transmitted to the Parties forthwith.

35. By letters dated 12 June 2017, the Registrar communicated to the experts the text of a question from a Member of the Court, and notified the Parties of that question. The experts replied on 15 June 2017; their reply was transmitted to the Parties.

36. By letters dated 28 June 2017, the Registrar communicated to the Parties the text of a question from the Court addressed to them both. The Parties were invited to present their responses during the first round of oral argument.

*

37. In accordance with Article 53, paragraph 2, of its Rules, the Court decided, after consulting the Parties, that copies of the pleadings and documents annexed, as well as the experts' report and certain related documents, would be made accessible to the public on the opening of the oral proceedings.

38. Public hearings were held from Monday 3 July to Thursday 13 July 2017 in the joined proceedings. The Court heard the oral arguments and replies of:

For Costa Rica: H.E. Mr. Edgar Ugalde Alvarez,
H.E. Mr. Sergio Ugalde,
Ms Kate Parlett,
Mr. Samuel Wordsworth,
Mr. Marcelo Kohén,
Ms Katherine Del Mar,
Mr. Arnoldo Brenes,
Mr. Coalter Lathrop.

For Nicaragua: H.E. Mr. Carlos José Argüello Gómez,
Mr. Alex Oude Elferink,
Mr. Antonio Remiro Brotóns,
Mr. Vaughan Lowe,
Mr. Paul Reichler,
Mr. Benjamin Samson,
Mr. Lawrence H. Martin.

* *

39. In its Application in the case concerning *Maritime Delimitation*, Costa Rica made the following requests:

“Accordingly, the Court is asked to determine the complete course of a single maritime boundary between all the maritime areas appertaining, respectively, to Costa Rica and to Nicaragua in the Caribbean Sea and in the Pacific Ocean, on the basis of international law.

Costa Rica further requests the Court to determine the precise geographical co-ordinates of the single maritime boundaries in the Caribbean Sea and in the Pacific Ocean.”

40. In the course of the written proceedings in the case concerning *Maritime Delimitation*, the following submissions were presented by the Parties:

On behalf of the Government of Costa Rica,
in the Memorial:

“Costa Rica respectfully requests the Court to determine the complete course of single maritime boundaries between all the maritime areas appertaining, respectively, to Costa Rica and to Nicaragua in the Pacific Ocean and in the Caribbean Sea, on the basis of international law.

Costa Rica further requests the Court to determine the precise geographical co-ordinates of the single maritime boundaries in the Pacific Ocean and in the Caribbean Sea, as follows:

1. to delimit the maritime areas of Costa Rica and Nicaragua in the Pacific Ocean by a boundary connecting with geodetic lines the points with the following co-ordinates:

<i>Point number</i>	<i>Latitude north (DMS) (WGS 84)</i>	<i>Longitude west (DMS) (WGS 84)</i>
SP-P (Starting-Point — Pacific)	11° 04' 00.0"	85° 44' 28.0"
1	11° 03' 57.6"	85° 45' 30.3"
2	11° 03' 57.7"	85° 45' 35.9"
3	11° 03' 47.2"	85° 46' 31.7"
4	11° 03' 53.8"	85° 47' 13.4"
5	11° 03' 24.2"	85° 49' 43.5"
6	11° 03' 17.9"	85° 50' 05.1"
7	11° 02' 45.0"	85° 51' 25.2"
8	11° 03' 11.6"	85° 52' 42.8"
9	11° 04' 26.8"	85° 55' 28.3"
10	11° 05' 13.7"	85° 57' 21.2"
11	11° 05' 51.6"	86° 00' 48.1"
12	11° 05' 54.2"	86° 04' 31.5"
13	11° 06' 22.0"	86° 07' 00.4"
14	11° 05' 45.4"	86° 13' 10.2"
15	11° 05' 43.7"	86° 13' 28.7"
16	11° 05' 30.9"	86° 15' 09.8"
17	11° 04' 22.2"	86° 21' 43.8"
18	11° 03' 32.6"	86° 25' 21.2"
19	10° 56' 56.3"	86° 44' 27.0"
20	10° 54' 22.7"	86° 49' 39.5"

<i>Point number</i>	<i>Latitude north (DMS) (WGS 84)</i>	<i>Longitude west (DMS) (WGS 84)</i>
21	10° 36' 50.6"	87° 22' 47.6"
22	10° 21' 23.2"	87° 47' 15.3"
23	09° 43' 05.7"	89° 11' 23.5"

(intersection with 200-M limit)

2. to delimit the maritime areas of Costa Rica and Nicaragua in the Caribbean Sea by a boundary connecting with geodetic lines the points with the following co-ordinates:

<i>Point number</i>	<i>Latitude north (DMS) (WGS 84)</i>	<i>Longitude west (DMS) (WGS 84)</i>
SP-C (Starting-Point — Caribbean)	10° 56' 26.0"	83° 41' 53.0"
1	10° 56' 54.0"	83° 42' 03.7"
2	10° 57' 16.6"	83° 41' 58.4"
3	11° 02' 12.6"	83° 40' 27.1"
4	11° 02' 54.7"	83° 40' 01.0"
5	11° 03' 04.8"	83° 39' 54.1"
6	11° 03' 46.1"	83° 39' 29.6"
7	11° 03' 47.4"	83° 39' 28.7"
8	11° 05' 35.2"	83° 38' 14.0"
9	11° 07' 47.2"	83° 36' 33.2"
10	11° 10' 16.0"	83° 34' 13.2"
11	11° 10' 39.2"	83° 33' 47.3"
12	11° 13' 42.6"	83° 30' 33.9"
13	11° 15' 02.0"	83° 28' 53.6"
14	12° 19' 15.9"	80° 33' 59.2"

(intersection with Costa Rica
200-M limit)

On behalf of the Government of Nicaragua,

in the Counter-Memorial:

“For the reasons given in the present Counter-Memorial, the Republic of Nicaragua requests the Court to adjudge and declare that:

1. In the Pacific Ocean, the maritime boundary between the Republic of Nicaragua and the Republic of Costa Rica starts at a point with co-ordinates 11° 03' 56.3" N, 85° 44' 28.3" W and follows geodetic lines connecting the points with co-ordinates:

<i>Points</i>	<i>Latitude</i>	<i>Longitude</i>
P-1	11° 03' 57.6" N	85° 45' 27.0" W
P-2	11° 03' 57.8" N	85° 45' 36.8" W
P-3	11° 03' 47.6" N	85° 46' 34.0" W
P-4	11° 03' 54.0" N	85° 47' 13.2" W
P-5	11° 03' 25.0" N	85° 49' 42.4" W
P-6	11° 03' 17.7" N	85° 50' 06.3" W

<i>Points</i>	<i>Latitude</i>	<i>Longitude</i>
P-7	11° 02' 44.8" N	85° 51' 25.2" W
P-8	10° 54' 51.7" N	86° 10' 14.6" W
(12 NM)		
P-9	10° 50' 59.1" N	86° 21' 37.6" W
P-10	10° 41' 24.4" N	86° 38' 00.8" W
P-11	10° 19' 28.3" N	87° 11' 00.7" W
P-12	9° 53' 09.0" N	87° 47' 48.8" W
P-13	9° 16' 27.5" N	88° 46' 10.9" W
(200 NM)		

2. In the Caribbean Sea, the maritime boundary between the Republic of Nicaragua and the Republic of Costa Rica starts at a point with co-ordinates 10° 55' 49.7" N and 83° 40' 0.6" W and follow[s] geodetic lines connecting the points with co-ordinates:

<i>Points</i>	<i>Latitude</i>	<i>Longitude</i>
C-1	10° 59' 21.3" N	83° 31' 06.9" W
C-1a	11° 00' 18.9" N	83° 27' 38.0" W
(12 NM)		
C-2	11° 01' 09.9" N	83° 24' 26.9" W
C-3	11° 05' 33.7" N	83° 03' 59.2" W
C-4	11° 11' 08.4" N	82° 34' 41.8" W
C-5	11° 05' 00.7" N	82° 18' 52.3" W
C-6	11° 05' 05.2" N	82° 14' 00.0" W
C-7	10° 49' 00.0" N	82° 14' 00.0" W
C-8	10° 49' 00.0" N	81° 26' 08.2" W

(All co-ordinates are referred to WGS 84 datum.)”

41. At the oral proceedings in the joined cases, the following submissions were presented by the Parties with respect to the case concerning *Maritime Delimitation*:

On behalf of the Government of Costa Rica,
at the hearing of 10 July 2017:

“Costa Rica respectfully requests the Court, rejecting all submissions made by Nicaragua:

1. To determine, on the basis of international law, the complete course of single maritime boundaries between all the maritime areas appertaining, respectively, to Costa Rica and to Nicaragua in the Pacific Ocean and in the Caribbean Sea.
2. To determine the precise geographical co-ordinates of the single maritime boundaries in the Pacific Ocean and in the Caribbean Sea, and in particular:
 - (a) to delimit the maritime areas of Costa Rica and Nicaragua in the Pacific Ocean by a boundary connecting with geodetic lines the points with the following co-ordinates:

<i>Point number</i>	<i>Latitude (DMS) (WGS 84)</i>	<i>Longitude (DMS) (WGS 84)</i>
SP-P (Starting-Point — Pacific)	11° 04' 00.0" N	85° 44' 28.0" W
1	11° 03' 57.6" N	85° 45' 30.3" W
2	11° 03' 57.7" N	85° 45' 35.9" W
3	11° 03' 47.2" N	85° 46' 31.7" W
4	11° 03' 53.8" N	85° 47' 13.4" W
5	11° 03' 24.2" N	85° 49' 43.5" W
6	11° 03' 17.9" N	85° 50' 05.1" W
7	11° 02' 45.0" N	85° 51' 25.2" W
8	11° 03' 11.6" N	85° 52' 42.8" W
9	11° 04' 26.8" N	85° 55' 28.3" W
10	11° 05' 13.7" N	85° 57' 21.2" W
11	11° 05' 51.6" N	86° 00' 48.1" W
12	11° 05' 54.2" N	86° 04' 31.5" W
13	11° 06' 22.0" N	86° 07' 00.4" W
14	11° 05' 45.4" N	86° 13' 10.2" W
15	11° 05' 43.7" N	86° 13' 28.7" W
16	11° 05' 30.9" N	86° 15' 09.8" W
17	11° 04' 22.2" N	86° 21' 43.8" W
18	11° 03' 32.6" N	86° 25' 21.2" W
19	10° 56' 56.3" N	86° 44' 27.0" W
20	10° 54' 22.7" N	86° 49' 39.5" W
21	10° 36' 50.6" N	87° 22' 47.6" W
22	10° 21' 23.2" N	87° 47' 15.3" W
23	09° 43' 05.7" N	89° 11' 23.5" W
(intersection with 200-M limit)		

(b) to delimit the maritime areas of Costa Rica and Nicaragua in the Caribbean Sea by a boundary connecting with geodetic lines the points with the following co-ordinates:

<i>Point number</i>	<i>Latitude (DMS) (WGS 84)</i>	<i>Longitude (DMS) (WGS 84)</i>
SP-C (Starting-Point — Caribbean)	10° 56' 22.1" N	83° 41' 51.4" W
1	10° 56' 54.0" N	83° 42' 03.7" W
2	10° 57' 16.6" N	83° 41' 58.4" W
3	11° 02' 12.6" N	83° 40' 27.1" W
4	11° 02' 54.7" N	83° 40' 01.0" W
5	11° 03' 04.8" N	83° 39' 54.1" W
6	11° 03' 46.1" N	83° 39' 29.6" W
7	11° 03' 47.4" N	83° 39' 28.7" W
8	11° 05' 35.2" N	83° 38' 14.0" W
9	11° 07' 47.2" N	83° 36' 33.2" W
10	11° 10' 16.0" N	83° 34' 13.2" W
11	11° 10' 39.2" N	83° 33' 47.3" W
12	11° 13' 42.6" N	83° 30' 33.9" W
13	11° 15' 02.0" N	83° 28' 53.6" W

<i>Point number</i>	<i>Latitude (DMS) (WGS 84)</i>	<i>Longitude (DMS) (WGS 84)</i>
14 (intersection with Costa Rica's 200-M limit)	12° 19' 15.9" N	80° 33' 59.2" W

(c) as a subsidiary submission to paragraph (b) above, to delimit the maritime areas of Costa Rica and Nicaragua in the Caribbean Sea by a boundary:

- (i) connecting, using a geodetic line, the point 3 nautical miles from the Parties' respective coasts (Point FP1, having co-ordinates 10° 59' 22.7" N, 83° 41' 19.0" W), with Point 3 in paragraph (b) above;
- (ii) thereafter, connecting, with geodetic lines Points 3 to 14 in paragraph (b) above;
- (iii) in the initial sector, connecting, using a geodetic line, Point FP1 and the point constituting the low-water mark on the right bank of the San Juan River at its mouth, as it may exist from time to time."

On behalf of the Government of Nicaragua,
at the hearing of 13 July 2017:

"Nicaragua respectfully requests from the Court to:

1. Dismiss and reject the requests and submissions of the Republic of Costa Rica.
2. Determine, on the basis of international law, the complete course of the maritime boundaries between all the maritime areas appertaining, respectively, to Nicaragua and Costa Rica in the Pacific Ocean and in the Caribbean Sea:

(a) In the Pacific Ocean, the maritime boundary between the Republic of Nicaragua and the Republic of Costa Rica starts at a point with co-ordinates 11° 03' 56.3" N, 85° 44' 28.3" W and follows geodetic lines connecting the points with co-ordinates (. . .):

<i>Points</i>	<i>Latitude</i>	<i>Longitude</i>
P-1	11° 03' 57.6" N	85° 45' 27.0" W
P-2	11° 03' 57.8" N	85° 45' 36.8" W
P-3	11° 03' 47.6" N	85° 46' 34.0" W
P-4	11° 03' 54.0" N	85° 47' 13.2" W
P-5	11° 03' 25.0" N	85° 49' 42.4" W
P-6	11° 03' 17.7" N	85° 50' 06.3" W
P-7	11° 02' 44.8" N	85° 51' 25.2" W
P-8	10° 54' 51.7" N	86° 10' 14.6" W
(12 NM)		
P-9	10° 50' 59.1" N	86° 21' 37.6" W
P-10	10° 41' 24.4" N	86° 38' 0.8" W
P-11	10° 19' 28.3" N	87° 11' 0.7" W
P-12	9° 53' 9.0" N	87° 47' 48.8" W
P-13	9° 16' 27.5" N	88° 46' 10.9" W
(200 NM)		

- (b) In the Caribbean Sea, the maritime boundary between the Republic of Nicaragua and the Republic of Costa Rica starts at Point CA with co-ordinates 10° 56' 18.898" N, 83° 39' 52.536" W and follows geodetic lines connecting the points with co-ordinates (. . .):

<i>Points</i>	<i>Latitude</i>	<i>Longitude</i>
C-1	10° 59' 21.3" N	83° 31' 6.9" W
C-1a (12 NM)	11° 00' 18.9" N	83° 27' 38.0" W
C-2	11° 01' 9.9" N	83° 24' 26.9" W
C-3	11° 05' 33.7" N	83° 03' 59.2" W
C-4	11° 11' 8.4" N	82° 34' 41.8" W
C-5	11° 05' 0.7" N	82° 18' 52.3" W
C-6	11° 05' 5.2" N	82° 14' 0.0" W
C-7	10° 49' 0.0" N	82° 14' 0.0" W
C-8	10° 49' 0.0" N	81° 26' 8.2" W

The maritime boundary between Point CA and the land is a geodetic line connecting Point CA and the eastern headland of Harbor Head Lagoon (presently located at [the] Court experts' Point Ple).

(All co-ordinates are referred to WGS 84 datum.)”

*

42. In its Application filed in the case concerning the *Northern Part of Isla Portillos*, Costa Rica made the following requests:

“Accordingly, the Court is asked:

- (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 north-eastern corner of the lagoon by the shortest line to the Caribbean Sea and from the north-western 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 it[s] rights to seek any further remedies

with respect to any damage that Nicaragua has or may cause to its territory.”

43. In the course of the written proceedings in the case concerning the *Northern Part of Isla Portillos*, the following submissions were presented by the Parties:

On behalf of the Government of Costa Rica,
in the Memorial:

“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 north-eastern corner of the lagoon by the shortest line to the Caribbean Sea and from the north-western 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 it[s] rights to seek any further remedies with respect to any damage that Nicaragua has or may cause to its territory.”

On behalf of the Government of Nicaragua,
in the Counter-Memorial:

“For the reasons exposed in the present Counter-Memorial, the Republic of Nicaragua respectfully requests the Court to adjudge and declare that:

1. the stretch of coast abutting the Caribbean Sea which lies between the Harbor Head Lagoon and the mouth of the San Juan River constitutes Nicaraguan territory;
2. the military camp set up by Nicaragua is located on Nicaraguan territory and consequently;
3. the requests and submissions of the Republic of Costa Rica are rejected in their entirety.”

44. At the oral proceedings in the joined cases, the following submissions were presented by the Parties with respect to the case concerning the *Northern Part of Isla Portillos*:

On behalf of the Government of Costa Rica,
at the hearing of 10 July 2017:

“Costa Rica respectfully requests the Court:

1. (a) to adjudge and declare that Nicaragua’s submission that the stretch of coast abutting the Caribbean Sea which lies between the Harbor Head Lagoon and the mouth of the San Juan River constitutes Nicaraguan territory is inadmissible, on the basis that the issue has already been settled by the Judgment of the Court dated 16 December 2015 in the *Certain Activities* case;
 - (b) to reject all other submissions made by Nicaragua;
2. (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, in so far 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 north-eastern corner of the lagoon by the shortest line to the Caribbean Sea and from the north-western 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.”

On behalf of the Government of Nicaragua,
at the hearing of 13 July 2017:

“Nicaragua respectfully requests from the Court to:

Adjudge and declare that:

- (a) the stretch of coast abutting the Caribbean Sea which lies between the Harbor Head Lagoon and the mouth of the San Juan River constitutes Nicaraguan territory;
- (b) the military camp set up by Nicaragua is located on Nicaraguan territory and consequently;
- (c) the requests and submissions of the Republic of Costa Rica are rejected in their entirety.”

* * *

I. JURISDICTION OF THE COURT

45. In both of the cases under consideration, Costa Rica invokes, as bases of jurisdiction, the declarations by which Costa Rica and Nicara-

gua have recognized the compulsory jurisdiction of the Court under paragraphs 2 and 5, respectively, of Article 36 of the Statute, as well as Article XXXI of the Pact of Bogotá (see paragraphs 2 and 22 above). Nicaragua does not contest the Court's jurisdiction to entertain Costa Rica's claims.

46. The Court finds that it has jurisdiction over the disputes in the joined cases.

II. GENERAL BACKGROUND

A. Geography

47. Costa Rica and Nicaragua are situated in Central America, sharing a land boundary that spans the Central American isthmus from the Caribbean Sea to the Pacific Ocean. Nicaragua lies to the north of that boundary and Costa Rica to the south. Nicaragua has a border with Honduras in the north, while Costa Rica shares a border with Panama in the south.

48. 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. 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. 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. This lagoon is at present separated from the Caribbean Sea by a sandbar.

49. The Caribbean Sea lies in the western part of the Atlantic Ocean. It is partially enclosed to the north and east by the Caribbean islands, and bounded to the south and west by South and Central America, respectively. 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, and having an area, respectively, of 9.6 sq km (Great Corn Island) and 3 sq km (Little Corn Island). The Corn Islands have a population of approximately 7,400 inhabitants. Other small features lying off the Nicaraguan coast include Paxaro Bovo, the Palmenta Cays, Cayos de Perlas, Tyra Rock, Man of War Cays, Ned Thomas Cay, Miskitos Cays, Muerto Cay and Edinburgh Reef. Costa Rica has two small islands, Isla Pájaros and Isla Uvita, less than half a nautical mile off its coast near the city of Limón.

50. On the Pacific side, the coast of Nicaragua is relatively straight and generally follows a north-west to south-east direction. 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

51. As the Court noted in its Judgment of 16 December 2015 in the cases concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (*I.C.J. Reports 2015 (II)*), p. 665, hereinafter the “2015 Judgment” (in the “*Certain Activities case*”), the present disputes between the Parties are set within a historical context dating back to the 1850s. Following hostilities between the two States in 1857, the Governments of Costa Rica and Nicaragua signed, on 15 April 1858, a Treaty of Limits, which was ratified by Costa Rica on 16 April 1858 and by Nicaragua on 26 April 1858 (*Consolidated Treaty Series*, Vol. 118, p. 439, hereinafter the “1858 Treaty”). The 1858 Treaty fixed the course of the land boundary between Costa Rica and Nicaragua from the Pacific Ocean to 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 de Castilla, at the mouth of the San Juan” on the Caribbean coast.

52. Following challenges by Nicaragua on various occasions to the validity of the 1858 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 to the President of the United States of America, Grover Cleveland, for arbitration. In addition, the Parties agreed that, if the 1858 Treaty were found to be valid, President Cleveland should also decide “upon all the other points of doubtful interpretation which either of the parties may find in the treaty”. On 22 June 1887, Nicaragua communicated to Costa Rica 11 points of doubtful interpretation, which were subsequently submitted to President Cleveland for resolution. 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”.

53. Subsequent to the Cleveland Award, the Parties agreed in the “Convention on border demarcation concluded between the Republic of Costa Rica and the Republic of Nicaragua”, signed at San Salvador on 27 March 1896 (United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVIII, p. 211), to establish two national Demarcation Commissions, each composed of two members (Art. I). This Convention further provided that the Commissions would include an engineer, appointed by the President of the United States of America, who “shall have broad powers to decide whatever kind of differences may arise in the

course of any operations and [whose] ruling shall be final” (Art. II). 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 (*RIAA*, Vol. XXVIII, pp. 215 and following for the first four Awards).

54. 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. That segment was defined as starting from “the north-western extremity of what seems to be the solid land, on the east side of Harbor Head Lagoon” and then running “across the bank of sand, from the Caribbean Sea into the waters of Harbor Head Lagoon”. From there, Alexander determined that the boundary would “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.) As the Court noted in the 2015 Judgment, “what the Arbitrator considered to be the ‘first channel’ was the branch of the Lower San Juan River which was then flowing into the Harbor Head Lagoon” (*I.C.J. Reports 2015 (II)*, p. 699, para. 73). 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.

55. 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. In 2010, a dispute arose between Costa Rica and Nicaragua with regard to certain activities carried out by Nicaragua in that area. In its 2015 Judgment, the Court considered the impact of some of these changes on the issue of territorial sovereignty. The Court stated “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” (*I.C.J. Reports 2015 (II)*, p. 703, para. 92). The Court thus concluded 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” (*ibid.*, pp. 696-697, paras. 69-70, and p. 740, para. 229 (1)). 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.

56. With respect to maritime areas, a bilateral Sub-Commission on Limits and Cartography 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. In 2002, the Vice-Ministers for Foreign Affairs of both countries instructed the bilateral Sub-Commission to begin negotiations. The Sub-Commission held five meetings between 2002 and 2005. Several technical meetings were also held between the Costa Rican National Geographic Institute and the Nicaraguan Institute for Territorial Studies during the same period. Following these initial meetings, negotiations on maritime delimitations between the two States stalled.

*C. Delimitations already Effected in the Caribbean Sea
and the Pacific Ocean*

57. 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 (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007 (II), p. 659; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012 (II), p. 624). Colombia and Panama also concluded a maritime delimitation treaty establishing their boundary in the Caribbean Sea on 20 November 1976; this treaty entered into force on 30 November 1977 (United Nations, *Treaty Series (UNTS)*, Vol. 1074, p. 221).

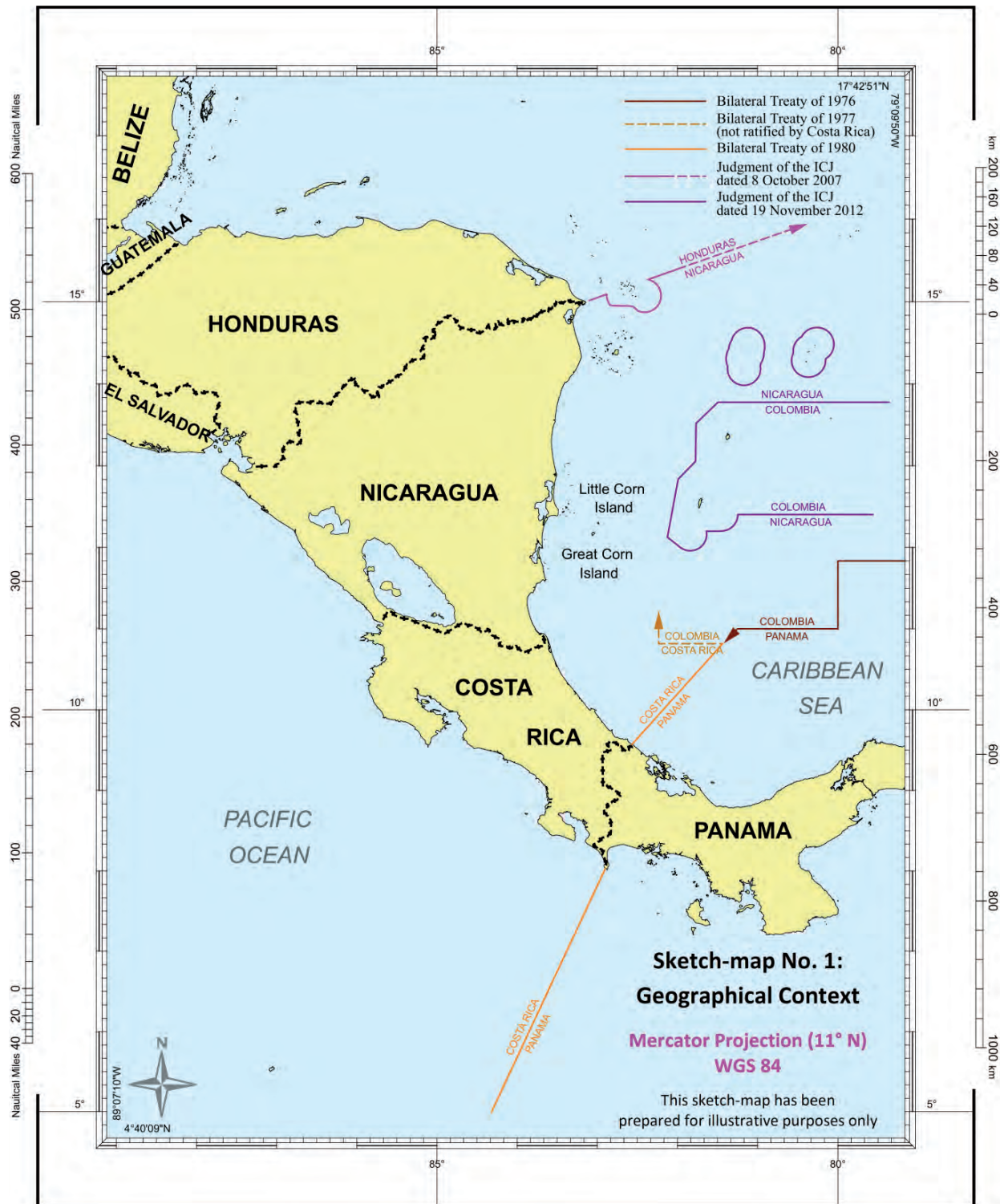
58. The above-mentioned treaty concluded by Costa Rica and Panama in 1980 also delimited their maritime boundary in the Pacific Ocean. For its part, Nicaragua has not concluded any treaty establishing a maritime boundary in the Pacific Ocean.

III. LAND BOUNDARY IN THE NORTHERN PART
OF ISLA PORTILLOS

A. Issues concerning Territorial Sovereignty

59. 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 Parties express divergent views on the interpretation of the 2015 Judgment and advance opposing claims on certain questions relating to sovereignty over the coast of the northern part of Isla Portillos.

60. In the operative part of the 2015 Judgment, the Court stated that "Costa Rica has sovereignty over the 'disputed territory', as defined by



the Court in paragraphs 69-70 of the . . . Judgment”. These paragraphs read 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).

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.” (*Judgment, I.C.J. Reports 2015 (II)*, pp. 696-697.)

61. According to Costa Rica’s reading of that Judgment, “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.” Therefore, “[o]nly the precise location of the boundary at each end of the sandbar of Harbor Head Lagoon remains open”. Costa Rica maintains that the purpose behind the first sentence of paragraph 70 of the 2015 Judgment was to leave open the question whether there was a maritime feature beyond the beach of Isla Portillos, and not to exclude that beach from the disputed territory. According to Costa Rica, “the beach of Isla Portillos was expressly included within the disputed territory” and was thus declared to be Costa Rican territory.

62. In Costa Rica's view, the mainland boundary runs, consistent with Article II of the 1858 Treaty, along the right bank of the Lower San Juan River all the way to its mouth in the Caribbean Sea and the land boundary terminus is located on the right bank of the San Juan River at its mouth. According to Costa Rica, the only Nicaraguan territory in the area of Isla Portillos is the enclave of Los Portillos/Harbor Head Lagoon and the sandbar separating the lagoon from the Caribbean Sea, "for so long as it is territory capable of appertaining to a State".

63. Nicaragua argues that, in its 2015 Judgment, "the Court did not . . . determine the precise location of the boundary at *any* point between the north-western end of Harbor Head Lagoon and the mouth of the San Juan River" (emphasis in the original). Nicaragua maintains that the Court in that Judgment refrained from defining the boundary with regard to the coast between the mouth of the San Juan River and Harbor Head Lagoon and "did not fix the limits of the 'territory in dispute'". Nicaragua contends that the *Certain Activities* case was one regarding State responsibility for wrongful acts and was not concerned with delimitation. According to Nicaragua, that case did not require the Court to take a position regarding sovereignty over the relevant stretch of coast or its precise limits. Therefore, in Nicaragua's view, sovereignty over the beach of Isla Portillos remains to be determined.

64. In this respect, Nicaragua argues that the 1858 Treaty and the subsequent Cleveland and Alexander Awards indicate that the starting-point of the boundary is located at a fixed point at Punta de Castilla, and not at the mouth of the San Juan River. It emphasizes that President Cleveland fixed the starting-point of the land boundary "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*" (emphasis added by Nicaragua). According to Nicaragua, the Cleveland Award, which is still binding on the Parties, made clear that the starting-point was a "*fixed unmovable point*" the location of which would not shift following changes in the flow of the River (emphasis of Nicaragua). Nicaragua maintains that General Alexander's first Award went "to great lengths to find where Punta de Castilla was located, because that was the fixed starting point for the border".

65. In its Counter-Memorial, Nicaragua argued that the channel of the San Juan River which flowed into Harbor Head Lagoon at the time of General Alexander's first Award, and was identified in the Award as marking the land boundary, still flows into the lagoon. According to Nicaragua, the beach of Isla Portillos and the sandbar between Harbor Head Lagoon and the Caribbean Sea consist of the remnants of the barrier that used to separate the lagoon from the Caribbean Sea so that they should be considered an independent feature separated from the mainland. In Nicaragua's view, the land boundary between the Parties runs as follows:

"the land boundary starts at the north-east corner of the sandbar separating Harbor Head Lagoon from the Caribbean Sea, cuts that

sandbar and follows the water's edge around the lagoon until it meets the channel connecting Harbor Head Lagoon to the lower San Juan. The boundary then follows the contour of Isla Portillos up to the lower San Juan".

Consequently, it submits that the stretch of coast between Harbor Head Lagoon and the mouth of the San Juan River is under Nicaraguan sovereignty. Nicaragua argued in its oral pleadings that if the Court were to accept Costa Rica's position and decide that the coast is not under Nicaraguan sovereignty, "the whole structure carefully created by the 1858 Treaty and the Awards would be dismantled and the Nicaragua/Costa Rica border would have to be repeatedly under review".

66. Nicaragua acknowledged at the hearings that the channel linking Harbor Head Lagoon to the San Juan River had "partially disappeared" in recent years. It maintained that the "rules governing the effects of accretion and erosion" do not apply to the present situation and that accordingly "the boundary should continue to be defined by the approximate location of the former channel, such that the boundary that now separates the beach from the wetland behind it corresponds to the line of vegetation".

67. In its final submissions, Costa Rica specifically requests the Court

"to adjudge and declare that Nicaragua's submission that the stretch of coast abutting the Caribbean Sea which lies between Harbor Head Lagoon and the mouth of the San Juan River constitutes Nicaraguan territory is inadmissible, on the basis that the issue has already been settled by the Judgment of the Court dated 16 December 2015 in the *Certain Activities* case".

*

68. The Court has previously had the occasion to emphasize that "the principle of *res judicata*, as reflected in Articles 59 and 60 of its Statute, is a general principle of law which protects, at the same time, the judicial function of a court or tribunal and the parties to a case which has led to a judgment that is final and without appeal" (*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, I.C.J. Reports 2016 (I)*, p. 125, para. 58 and authorities cited therein). However, for *res judicata* to apply in a given case, the Court "must determine whether and to what extent the first claim has already been definitively settled" (*ibid.*, p. 126, para. 59), for "[i]f a matter has not in fact been determined, expressly or by necessary implication, then no force of *res judicata* attaches to it" (*ibid.*, para. 60, quoting *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 (I)*, p. 95, para. 126).

69. 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 (*I.C.J. Reports 2015 (II)*), p. 740, para. 229). 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” (*ibid.*, p. 697, para. 69).

The Court noted, 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” (*ibid.*, para. 70).

The Court further noted 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.” (*Ibid.*)

These passages indicate that no decision was taken by the Court 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 cannot declare inadmissible Nicaragua’s claim concerning sovereignty over that stretch of coast of Isla Portillos.

70. In its 2015 Judgment, the Court 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” (*ibid.*, p. 703, para. 92). However, 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.

71. 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. 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. It follows from the 2015 Judgment and from the foregoing 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. That point is currently located at the end of the sandspit constituting the right bank of the San Juan River at its mouth.

72. However, as stated in the 2015 Judgment, the Parties agree that Nicaragua has sovereignty over Harbor Head Lagoon (*I.C.J. Reports 2015 (II)*, p. 697, para. 70). Costa Rica requests the Court 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”.

73. 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”. 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 (see above, p. 169, sketch-map No. 2).

B. Alleged Violations of Costa Rica's Sovereignty

74. 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 was referring to a military camp that was placed in August 2016 "to the north-west of the lagoon's sandbar and installed on the beach of the northern part of Isla Portillos". Costa Rica requests the Court to declare that "Nicaragua must withdraw its military camp" and reserves its position with regard to further remedies.

75. Nicaragua initially asserted that the camp was situated on the "sandbar that separates Harbor Head Lagoon from the Caribbean Sea". Later in its pleadings, Nicaragua did not contest that the camp was placed on the beach outside the limits of the sandbar separating the lagoon from the Caribbean Sea, but argued that "the whole coast belongs to Nicaragua". In any case, Nicaragua contends that the Court has not yet issued any decision with the effect of *res judicata* concerning the beach where the camp was located.

76. As an alternative argument, Nicaragua maintains that, even if the Court were to find that the entirety of the coast is under Costa Rican sovereignty, the camp was still positioned on a portion of the beach that belongs to Nicaragua, because of the presence of a channel of water running behind the camp and connecting to Harbor Head Lagoon.

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77. 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 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, as has been observed above (see paragraph 69), the boundary with regard to the coast had not been defined in that Judgment.

78. 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

79. The Court has been requested to delimit the maritime boundaries between the Parties in the Caribbean Sea and the Pacific Ocean. The Parties' respective claims relating to the Caribbean Sea are illustrated on sketch-map No. 3 below (p. 172).

A. Starting-point of the Maritime Delimitation

80. The divergent views of the Parties concerning the starting-point of the land boundary are reflected in their different approaches to defining the starting-point of the maritime delimitation in the Caribbean Sea. According to Costa Rica, the maritime delimitation "must start at the mouth of the San Juan River". However, given the instability of the coast and in particular of the features near the point where the San Juan River flows into the Caribbean Sea, Costa Rica suggests that the starting-point of the maritime delimitation should be placed not at the western end of the sandspit at the mouth of the river, but on "the solid ground at the base of the spit of Isla Portillos". According to Costa Rica, this point coincides with the point that the Court-appointed experts called point Pv (see paragraph 104 below).

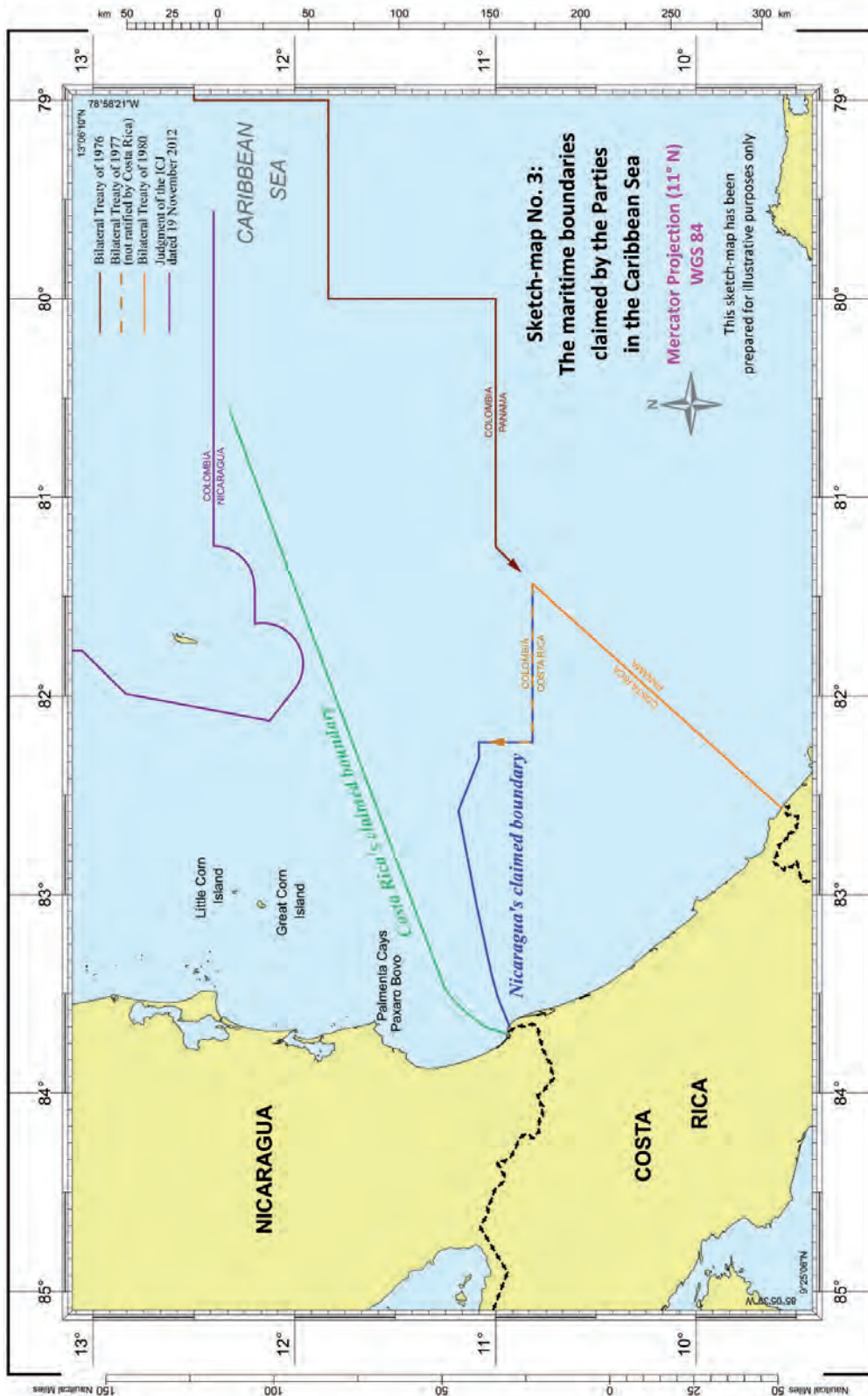
81. Nicaragua maintains that, according to the 1858 Treaty and the Cleveland Award, the land boundary line "begins at the extremity of Punta de Castilla at the mouth of the San Juan de Nicaragua River, as they both existed on the 15th day of April 1858" and that this point should be used also for the maritime delimitation. Since General Alexander stated in his first Award that the point in question could "not now be certainly located" and that

"it best fulfil[led] the demands of the treaty and of President Cleveland's award to adopt what is practically the headland of to-day, or the north-western extremity of what seems to be the solid land, on the east side of Harbor Head Lagoon" (*RIAA*, Vol. XXVIII, p. 220),

Nicaragua argues that the point identified by General Alexander should be adopted as the starting-point for the maritime delimitation even if it has been submerged by the sea.

82. In a communication to the Parties, the Court invited them to indicate in their oral pleadings their positions concerning the possibility of "starting the maritime boundary from a fixed point in the Caribbean Sea some distance from the coast".

83. Costa Rica's primary position remains that the Court should select a starting-point on land. Costa Rica suggests as an alternative that the Court "connect any fixed point at sea [on the equidistance line] to the mouth of the San Juan River with a mobile line segment". This fixed point would act as a "hinge point". Costa Rica indicates that such a point, if adopted by the Court, should be placed at a distance of 3 nauti-



cal miles from the coast, a distance sufficient to anticipate possible physical changes.

84. While arguing for a different location of the starting-point, Nicaragua agrees that “the ‘hinge’ solution is practicable. The line connecting the fixed point at sea with the actual land territory could be mobile, moving with natural changes in the coastline”. In its view, the fixed point should be placed at the point that General Alexander identified as the starting-point of the land boundary and should be joined to the north-eastern end of Harbor Head Lagoon by a mobile line.

85. The positions taken by the Parties with regard to the starting-point of the maritime boundary are illustrated on sketch-map No. 4 below (p. 174).

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86. 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 (see paragraph 71 above), 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 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.

* *

87. With regard to the enclave under Nicaragua’s sovereignty, Costa Rica argues that no starting-point for the maritime delimitation can be placed on the sandbar separating Harbor Head Lagoon from the Caribbean Sea because of the general characteristics of the sandbar and in particular its instability.

88. Nicaragua addresses the issue of the starting-points of maritime delimitation relating to the enclave only as an alternative, in the event that the Court does not accept Nicaragua’s main contention that the starting-point of the maritime delimitation is the same point identified by General Alexander as the starting-point for the land boundary. Nicaragua notes that, should its contention not be accepted by the Court, “there would be three land boundary termini on the Caribbean Sea defining different stretches of coasts belonging to one Party or the other, generating overlapping projections into the sea”.

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89. 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 question of the starting-points of the maritime delimitation is bound up with the effects, if any, of this feature on the maritime delimitation. This latter issue will be addressed below, taking into account the characteristics of the feature in question.

B. Delimitation of the Territorial Sea

90. With regard to the delimitation of the territorial sea, Article 15 of UNCLOS, which is applicable between the Parties, both of them being party to the Convention, reads as follows:

“Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.”

The Court will use the term “median line” as in the above provision but will refer to “equidistance line” when it summarizes pleadings of the Parties where the latter term is used.

*

91. Costa Rica argues that the Court should delimit the Parties’ boundary in the territorial sea first, and thereafter in the exclusive economic zone and on the continental shelf, by means of two different methods. According to Costa Rica, the Court has consistently differentiated between the delimitation of the territorial sea under Article 15 of UNCLOS, and the delimitation of the exclusive economic zone and of the continental shelf under Articles 74 and 83 of UNCLOS, according to which it “shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution”.

92. Nicaragua argues that Article 15 of UNCLOS does not stipulate how the delimitation is to be effected, but only how States must act failing an agreement on delimitation. According to Nicaragua, a flexible application of the equidistance/special circumstances rule is necessary in order to “take into account local characteristics of the configuration of the coastline”. Nicaragua further argues that there is no practical difference between the régime of delimitation of the territorial sea according to

Article 15 of UNCLOS and the régime applicable to the delimitation of the exclusive economic zone and the continental shelf, respectively outlined in Articles 74 and 83 of UNCLOS. In its view, “the approaches to delimitation of the different maritime zones are convergent” and all relevant provisions of UNCLOS must be read together and in context.

93. Costa Rica maintains that in the delimitation of the territorial sea Nicaragua has taken into account legal concepts and geographic features that could only be relevant to the delimitation of its exclusive economic zone and continental shelf. Costa Rica indicates that, while the provisions of UNCLOS may not be taken in isolation, Article 15 “does not refer to or incorporate Articles 74 and 83, and vice versa”: Article 15 uses different terms, concerns a different subject-matter and consists of an autonomous provision. Costa Rica recalls that, in earlier cases concerning the delimitation of the territorial sea, the Court recognized the primacy of equidistance and decided that it would depart from an equidistance line only if special circumstances justified such a departure. While Costa Rica agrees that there is an element of flexibility in the adjustment of the line based on the existence of special circumstances, it maintains that this flexibility could not override the plain meaning of the text of UNCLOS which distinguishes between delimitation methods in different maritime zones.

94. However, the Parties agree that, for the delimitation of the territorial sea, it is first necessary to establish the equidistance line. The Parties proceeded to discuss the delimitation of the territorial sea on the basis of the same method. They began by drawing a provisional equidistance line, and subsequently argued whether special circumstances existed that would justify the adjustment of the line.

95. Costa Rica recalls that base points must be selected on coastal features that represent the “physical reality at the time of the delimitation” (referring to *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *Judgment*, *I.C.J. Reports 2009*, p. 106, para. 131). Consequently, base points should not be placed on “ephemeral, sandy, unstable features”. According to Costa Rica, those features include Barra Morris Creek, a sandbar on the left bank of the mouth of the San Juan River, and the sandspit north-west of Isla Portillos.

96. Nicaragua identifies base points on dry land “and not . . . any points that lie upon straight baselines but not upon land”. Nicaragua criticizes the fact that, in the construction of the equidistance line in the territorial sea, Costa Rica did not place base points on Paxaro Bovo and Palmenta Cays. According to Nicaragua, these features are entitled to a territorial sea and cannot be disregarded in the drawing of the equidistance line in the territorial sea.

97. Objecting to Nicaragua’s view that base points should be placed on Paxaro Bovo and Palmenta Cays for the construction of the equidistance line in the territorial sea, Costa Rica argues that, in light of their location,

those features can have no impact on the course of the delimitation line in the territorial sea.

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98. In accordance with its established jurisprudence, the Court will proceed in two stages: first, the Court will draw a provisional median line; second, it will consider whether any special circumstances exist which justify adjusting such a line (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 94, para. 176; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 740, para. 268).

99. The Court notes that Nicaragua has adopted a system of straight baselines in the Caribbean Sea by Decree No. 33-2013 of 19 August 2013, which Costa Rica has challenged. However, Nicaragua does not rely on those baselines for determining the equidistance lines concerning the territorial sea, the exclusive economic zone and the continental shelf.

100. The Court will construct the provisional median line for delimiting the territorial sea 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 placement of these base points is illustrated on sketch-map No. 5 below (p. 180). The Court observes that Paxaro Bovo and Palmenta Cays do not affect the construction of the median line in the territorial sea.

* *

101. Nicaragua contends that the equidistance line in the territorial sea should be adjusted in view of a “special circumstance” consisting in “the exaggerated cut-off resulting from the change from a convex to a concave coastline in the immediate vicinity of the Punta de Castilla starting-point”. Nicaragua maintains that this portion of the coast does not reflect its general direction and notes that the resulting deviation “persists for a significant part of the length of the equidistance line”. It argues that the convex-concave combination has to be regarded as a special circumstance requiring an adjustment of the strict equidistance line in the territorial sea. According to Nicaragua, it is “common ground that cut-offs resulting from coastal configurations” may lead to necessary adjustments of the provisional equidistance line.

102. Costa Rica argues that there are no “special circumstances which require a delimitation of the territorial sea other than on the basis of equidistance”. In response to Nicaragua’s argument, Costa Rica contends that recourse to the equidistance line would not create any inequitable

cut-off within the territorial sea. It maintains that Nicaragua's argument is based on an "artificially expanded geographic scope for the territorial sea delimitation" and inaccurate depictions of the coastal projections that it alleges would be cut off. According to Costa Rica, the boundary in the territorial sea should therefore follow an unadjusted equidistance line.

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103. 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.

104. 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 sizeable territory appertaining to Nicaragua (see paragraph 86 above). 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, referred to in paragraph 86 above, 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. Under the present circumstances, this point has been identified by the Court-appointed experts as point Pv, with co-ordinates 10° 56' 22.56" N, 83° 41' 51.81" W (WGS 84 datum), but there may be geomorphological changes over time. For the present, the delimitation line in the territorial sea thus 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.

105. 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.

106. The delimitation line in the territorial sea is obtained by joining landwards the fixed point at sea defined below with the point on solid land on Costa Rica's coast that is closest to the mouth of the river (see paragraph 104 above) and by joining seawards with geodetic lines the points with the following co-ordinates in WGS 84 datum:

<i>Turning point</i>	<i>Latitude north</i>	<i>Longitude west</i>
Fixed point at 2 NM (FP)	10° 58' 22.9"	83° 41' 39.8"
A	11° 01' 38.6"	83° 40' 50.4"
B	11° 02' 32.0"	83° 40' 12.9"
C	11° 02' 42.7"	83° 40' 05.6"
D	11° 02' 45.7"	83° 40' 03.7"
E	11° 03' 14.3"	83° 39' 45.6"
F	11° 04' 10.9"	83° 39' 07.7"
G	11° 04' 54.2"	83° 38' 35.3"
H	11° 05' 02.7"	83° 38' 28.7"
I	11° 06' 04.1"	83° 37' 42.6"
J	11° 06' 24.8"	83° 37' 26.3"
K	11° 06' 46.7"	83° 37' 08.0"
L	11° 07' 24.0"	83° 36' 34.7"

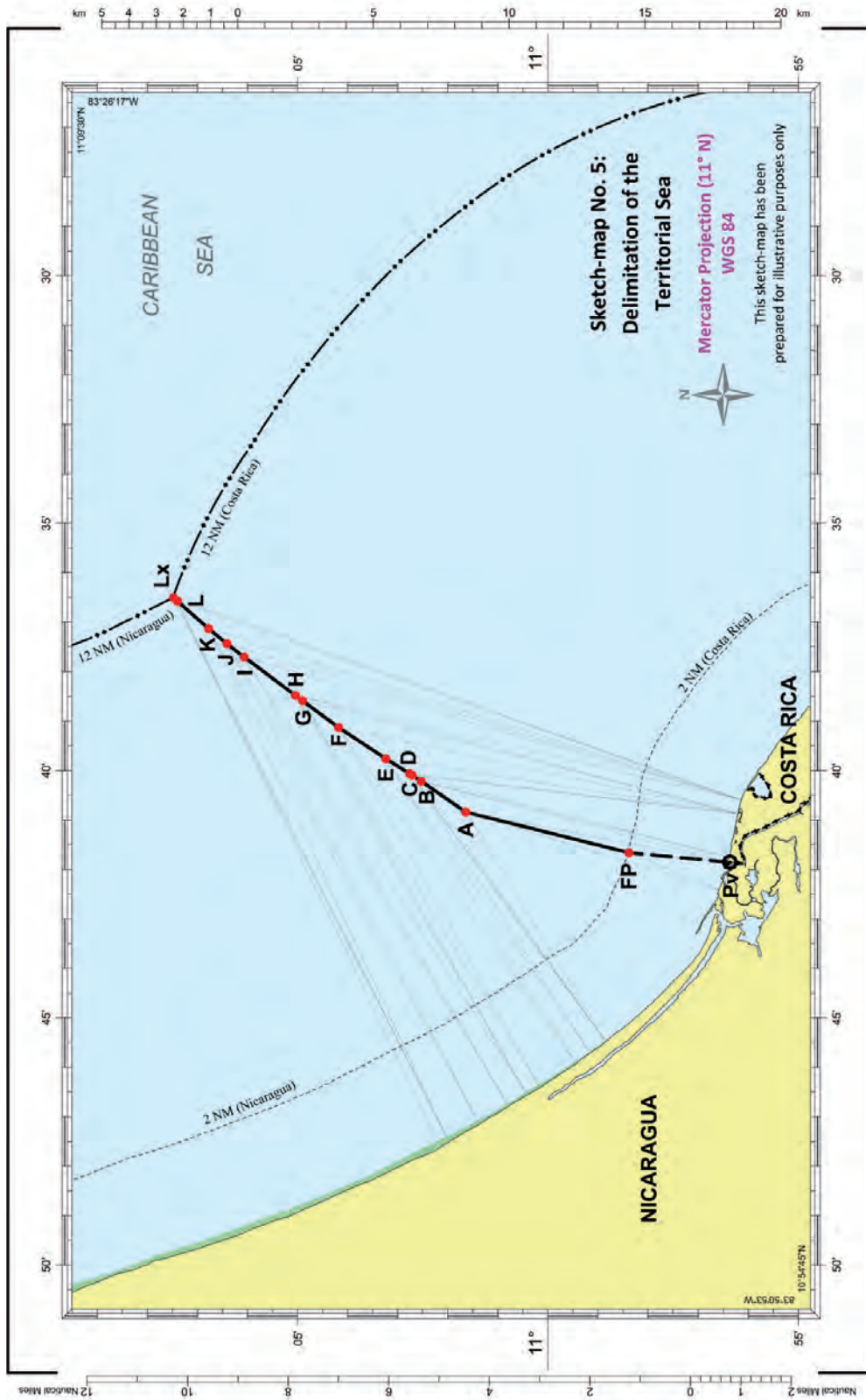
The boundary in the territorial sea shall terminate at point Lx (with current co-ordinates 11° 07' 28.8" N and 83° 36' 30.4" W), at the intersection of the 12-nautical-mile line with the geodetic line connecting point L with the first turning point on the provisional equidistance line in the exclusive economic zone, identified as point 1 and having the co-ordinates indicated at paragraph 145 below. The delimitation line is illustrated on sketch-map No. 5 below (p. 180).

*C. Delimitation of the Exclusive Economic Zone
and the Continental Shelf*

107. The Court will now proceed 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. The relevant provisions of UNCLOS read as follows:

Article 74

“The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.”



Article 83

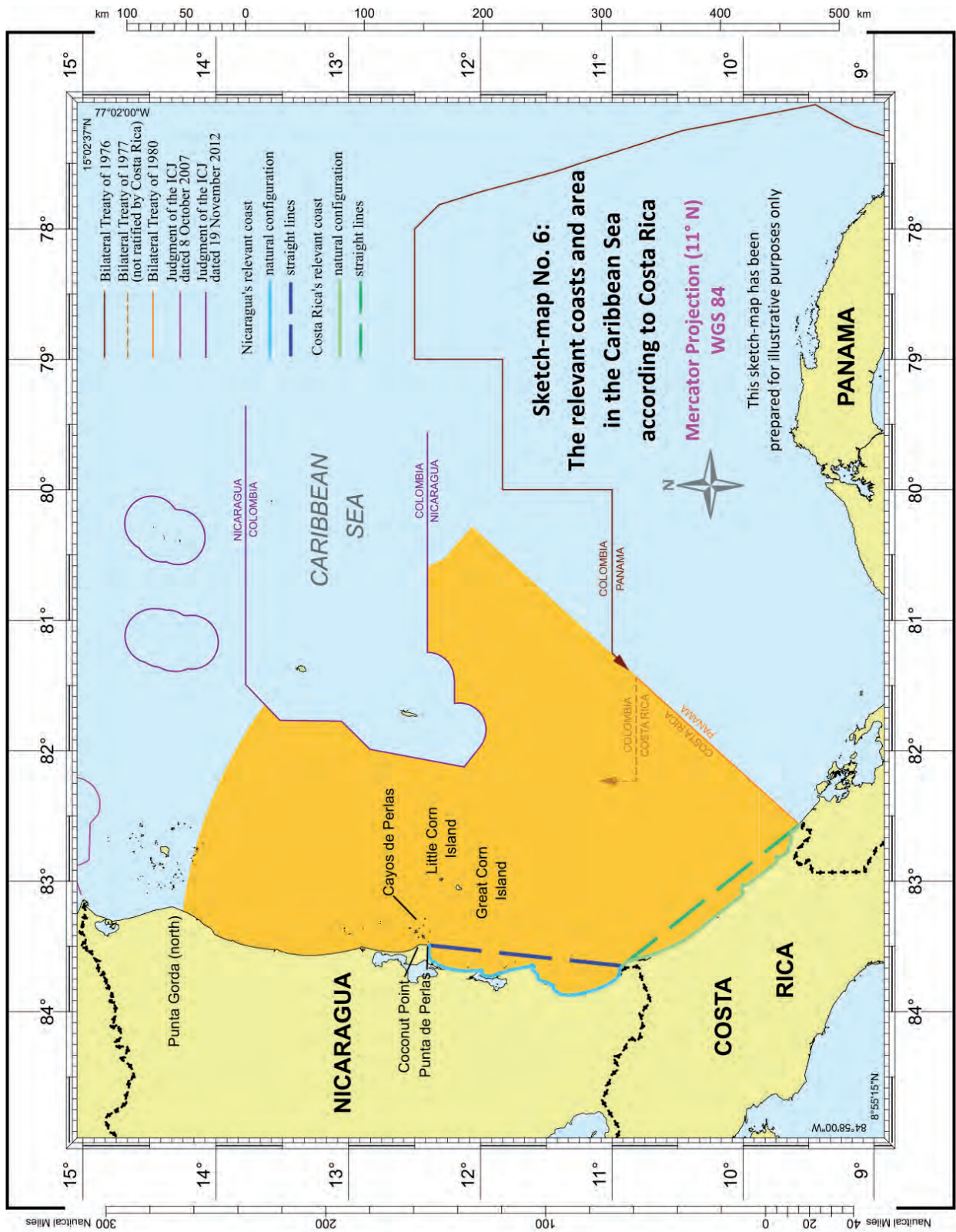
“The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.”

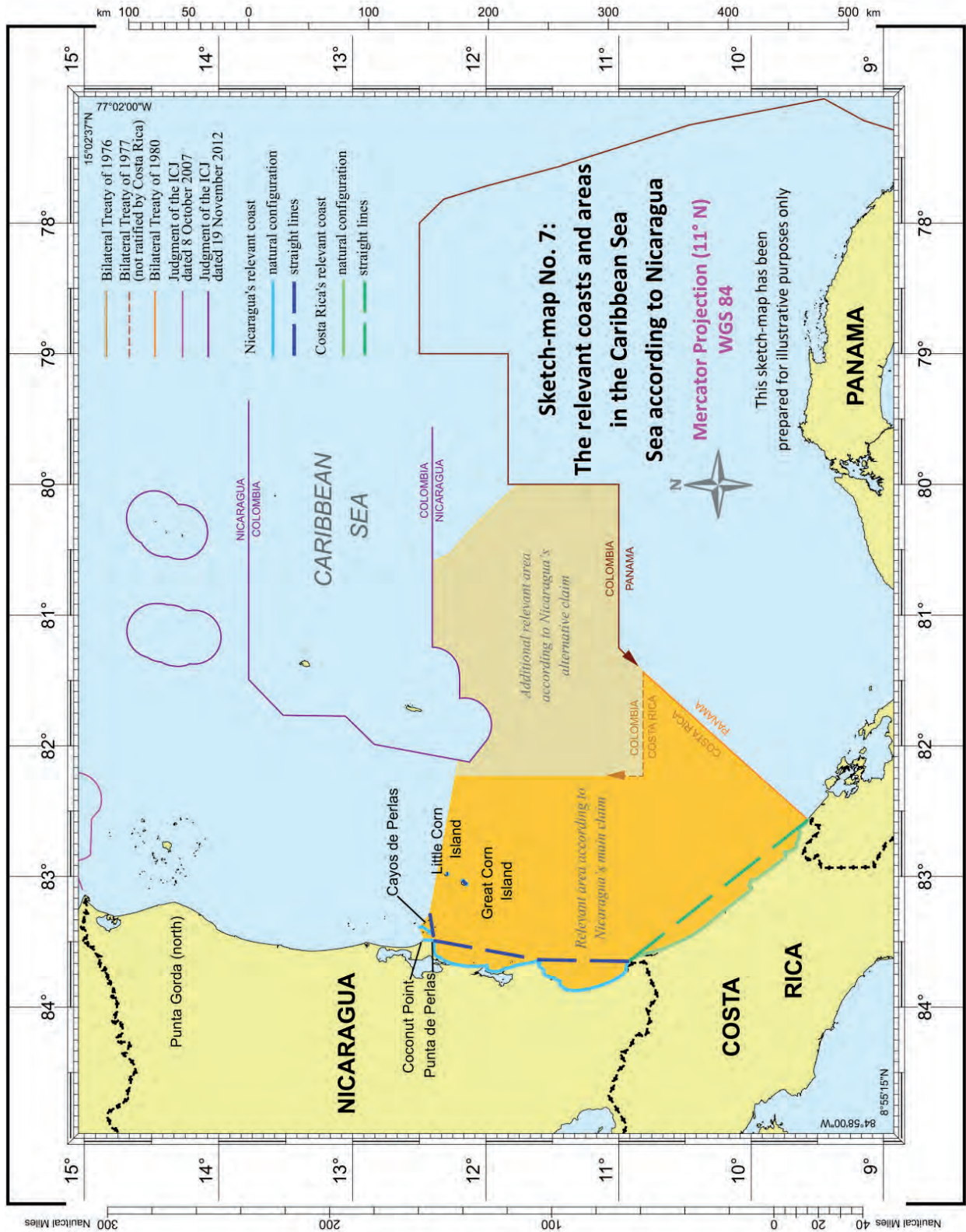
(a) *Relevant coasts and relevant area*(i) *Relevant coasts*

108. An essential step in maritime delimitation is identifying the relevant coasts: those that “generate projections which overlap with projections from the coast of the other Party” (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *Judgment*, *I.C.J. Reports 2009*, p. 97, para. 99). For defining the criteria applicable to determining when relevant overlapping projections exist, both Parties refer to the Court’s jurisprudence and to a passage in the arbitral award in *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, in which the arbitral tribunal noted that “there is a margin of appreciation in determining the projections generated by a segment of coastline and a point at which a line drawn at an acute angle to the general direction of the coast can no longer be fairly said to represent the seaward projection of that coast” (Tribunal established under Annex VII of UNCLOS, *Award of 7 July 2014*, *International Law Reports*, Vol. 167, p. 86, para. 302).

109. However, Nicaragua and Costa Rica take different approaches to the determination of the relevant coasts in the present proceedings. Nicaragua argues that a segment of coast may be considered relevant only if its frontal projection “overlaps with the seaward projection of the coast of [the] other Party”, the term “seaward” having “the connotation of ‘in the direction of the sea’”. Costa Rica contends that, with some exceptions concerning particular situations — such as the case of a coast that “faces entirely away from the area of overlapping potential entitlements” — the relevant coasts are determined by establishing which coasts generate overlapping entitlements by employing radial projections, using an envelope of arcs.

110. Notwithstanding this divergence of methods, the Parties reach nearly identical solutions with regard to the relevant coasts on the Caribbean Sea. According to Nicaragua, “its relevant coast includes the coast up to Coconut Point”, while the entire coast of Costa Rica is relevant (see below, p. 183, sketch-map No. 7). Costa Rica takes the same position with regard to its own coast but considers that “only the coast of Nicaragua ending at or near Punta de Perlas is relevant on the Nicaraguan coast” (see below, p. 182, sketch-map No. 6).





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111. 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. All these coasts generate projections that overlap with projections from the other Party's coast.

112. One divergence between the Parties regarding the relevant coasts concerns Nicaragua's contention that a few kilometres should be added to the overall length of its relevant coast because some parts of the coasts of the Corn Islands and of the Cayos de Perlas should also be included. The Court observes that the Corn Islands, but not the Cayos de Perlas, were already considered in the Judgment in the case between Nicaragua and Colombia as parts of the relevant coast, contributing "base points for the construction of the provisional median line" with regard to the continental shelf and the exclusive economic zone (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012 (II), pp. 698-699, para. 201). According to that Judgment, the coasts of the Corn Islands did not "add to the length of the relevant coast", but this was for a reason that does not apply in the present case, namely that in relation to Colombia's islands the Corn Islands were "parallel to the mainland" (*ibid.*, p. 678, para. 145).

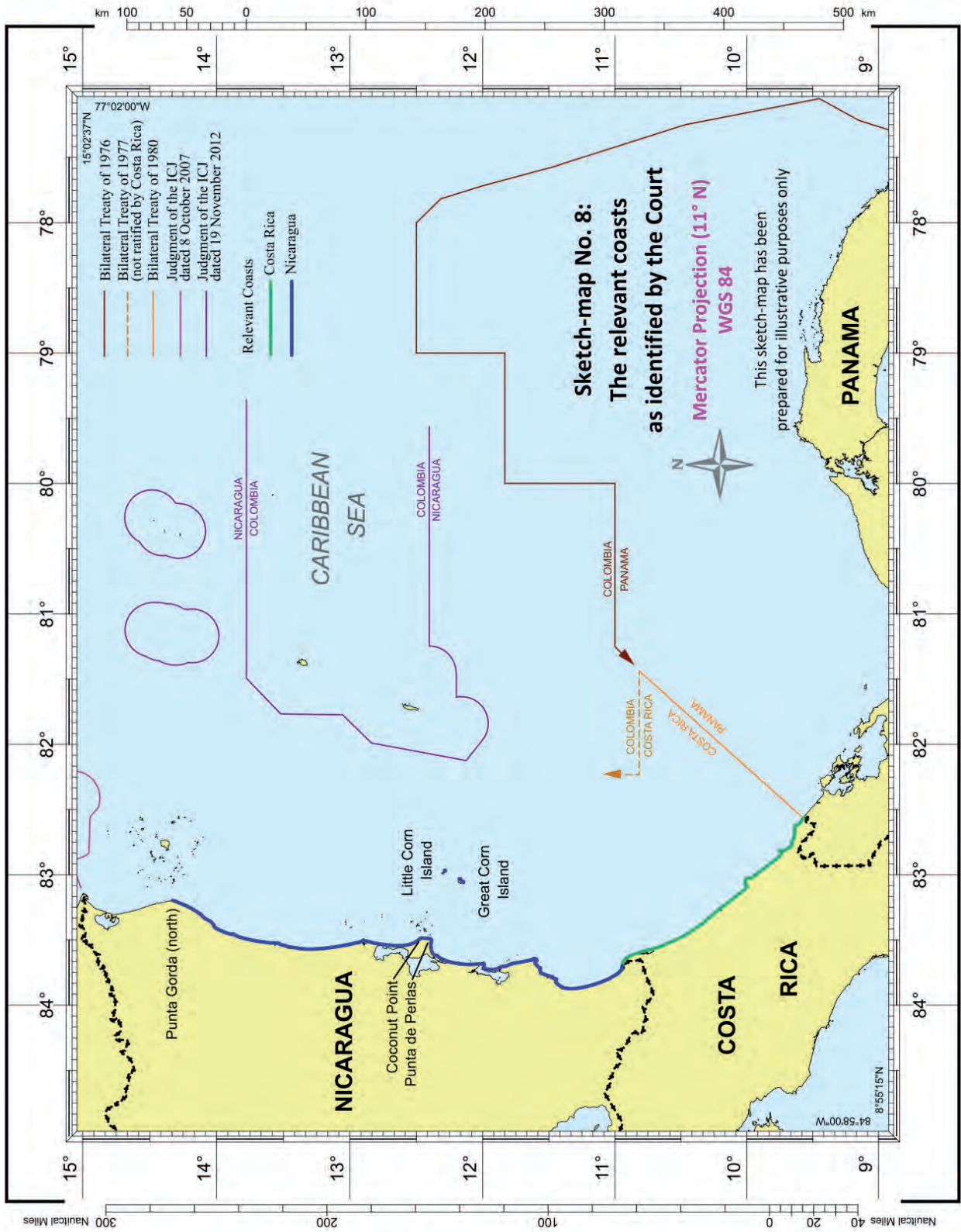
113. The coasts of the Corn Islands that do not face north also have to be included when determining the length of the relevant coasts. On the other hand, no evidence concerning the capacity of the Cayos de Perlas to "sustain human habitation or economic life of their own" as required by Article 121 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.

114. 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 (see below, p. 185, sketch-map No. 8).

(ii) *Relevant area*

115. As the Court indicated in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, "[t]he relevant area comprises that part of the maritime space in which the potential entitlements of the parties overlap" (*Judgment, I.C.J. Reports 2012 (II)*, p. 683, para. 159).

116. The Court also recalls its observation that "the legal concept of the 'relevant area' has to be taken into account as part of the methodology of maritime delimitation" (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 99, para. 110).



Moreover, “[d]epending on the configuration of the relevant coasts in the general geographical context, the relevant area may include certain maritime spaces and exclude others which are not germane to the case in hand” (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Judgment*, *I.C.J. Reports 2012 (II)*, p. 682, para. 157).

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117. The Parties agree that the relevant area should not include the spaces attributed to Colombia on the basis of the 2012 Judgment and those attributed to Panama by the 1980 bilateral treaty concluded with Costa Rica. This conforms with what the Court stated in *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (*Judgment*, *I.C.J. Reports 2012 (II)*, p. 685, para. 163):

“The Court recalls that the relevant area cannot extend beyond the area in which the entitlements of both Parties overlap. Accordingly, if either Party has no entitlement in a particular area, whether because of an agreement it has concluded with a third State or because that area lies beyond a judicially determined boundary between that Party and a third State, that area cannot be treated as part of the relevant area for present purposes.”

118. In the north, in order to determine the relevant area, Nicaragua submits that a perpendicular line to the general direction of the coast should be drawn starting from Coconut Point until it reaches the boundary with Colombia (see above, p. 183, sketch-map No. 7). Costa Rica contends that the relevant area should also comprise waters falling “within the radial projection of other parts of coast that are relevant”. This would increase the part of the relevant area attributed to Nicaragua (see above, p. 182, sketch-map No. 6).

119. To define the relevant area in the south, Costa Rica adopts a notional line continuing along the direction of its maritime boundary with Panama as set out in their bilateral treaty of 1980. Nicaragua’s position on the relevant area is that it should be bounded to the south by the lines drawn in the 1980 treaty between Costa Rica and Panama and in the 1977 treaty between Costa Rica and Colombia (see orange area on sketch-map No. 7 above). However, Nicaragua contends that, if the Court were to adopt Costa Rica’s position on the 1977 Treaty and extend the relevant area beyond the limits set out therein, that area should be bounded by the line drawn in the 1976 Treaty between Panama and Colombia (see light brown area on sketch-map No. 7). Nicaragua rejects Costa Rica’s approach of using the notional extension of the line set out in the 1980 Treaty to define the relevant area as it would exclude an area to the south of that line where only Costa Rica or Nicaragua may have claims.

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120. 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.

121. In the south, the situation is more complicated because of the presence of claims of third States on which the Court cannot pronounce itself (see subsection (b) below). 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. In the *Maritime Delimitation in the Black Sea case (Romania v. Ukraine)* (*Judgment, I.C.J. Reports 2009*, p. 100, para. 114), the Court observed that:

“where areas are included solely for the purpose of approximate identification of overlapping entitlements of the Parties to the case, which may be deemed to constitute the relevant area (and which in due course will play a part in the final stage testing for disproportionality), third party entitlements cannot be affected.”

122. The Court will further analyse the issue of the relevant area in subsection (e) below.

(b) *Relevance of bilateral treaties and judgments involving third States*

123. An issue is raised by the fact that, in the area of the Caribbean Sea in which the Court is requested to delimit the maritime boundary between the Parties, third States may also have claims. As was stated in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, the Court's Judgment may only address the maritime boundary between the Parties, “without prejudice to any claim of a third State or any claim which either Party may have against a third State” (*Judgment, I.C.J. Reports 2012 (II)*, p. 707, para. 228). The Judgment can refer to those claims, but cannot determine whether they are well founded. Conversely, a judgment rendered by the Court between one of the Parties and a third State or between two third States cannot per se affect the maritime boundary between the Parties. The same applies to treaties concluded between one of the Parties and a third State or between third States.

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124. Nicaragua acknowledges that treaties cannot be relied on by States that are not party to them, but nevertheless presents arguments concerning maritime delimitation on the basis of three treaties to which it is not a party, one between Costa Rica and Colombia, another between Costa Rica and Panama and the last between Colombia and Panama.

With regard to the 1977 Treaty on Delimitation of Marine and Submarine Areas and Maritime Co-operation between Costa Rica and Colombia, Nicaragua argues that this treaty “fixed and limited Costa Rica’s interests in the maritime spaces of the Caribbean Sea” and that it consolidated Costa Rica’s potential claims in the area.

125. Moreover, Nicaragua states that although the treaty between Costa Rica and Colombia has not been ratified, it “was in fact enforced according to its provisions”. According to Nicaragua, compliance by Costa Rica with the terms of the treaty for approximately 40 years generated binding obligations for Costa Rica. In Nicaragua’s view, statements made by Costa Rica “constituted an irrevocable commitment to ratify [the treaty], once all the parliamentary requirements had been satisfied”.

126. Nicaragua claims that the boundary established by the 1977 Treaty between Costa Rica and Colombia must be taken into account in the delimitation between the Parties in the present case in the exclusive economic zone and continental shelf. That boundary, in Nicaragua’s view, “defines — and limits — the extent of Costa Rica’s maritime areas in the Caribbean Sea” and prevents Costa Rica from claiming any area to the north and east of that line.

127. According to Nicaragua,

“there can have been no vacuum in the areas of the South-Western Caribbean attributed to Colombia in its 1977 Treaty with Costa Rica. If the areas were not claimed by Costa Rica in 1977, they appertained to Colombia: and following the Court’s Judgment of 2012, some of those areas now belong to Nicaragua.”

128. With regard to the 1980 Treaty between Costa Rica and Panama, Nicaragua acknowledges that this treaty is also *res inter alios acta* in relation to Nicaragua, but nevertheless it argues that the treaty creates “a legal régime and scenario which the Court cannot ignore”. According to Nicaragua, Article 1 of the treaty establishes a tripoint at the intersection of the boundaries concerning Costa Rica, Colombia and Panama. This provision, in Nicaragua’s view, also gives effect to the 1977 Treaty between Costa Rica and Colombia.

129. Concerning the 1976 Treaty between Colombia and Panama, Nicaragua argues that Panama can no longer have any claim in the area north of the boundary line, because it would be incompatible with that treaty. In Nicaragua’s view, also Colombia cannot have any claim in that area, as this would be incompatible with the boundary drawn by the Court in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*. Therefore, only Nicaragua or Costa Rica may have claims in that area.

130. In its Counter-Memorial, Nicaragua observes that the 2012 Judgment of the Court is not binding on Costa Rica, but that “a departure from its findings would be warranted only if new and compelling elements would justify such a departure”.

131. With regard to the 1977 Treaty between Costa Rica and Colombia, Costa Rica argues that this treaty has not been ratified and that thus, according to its terms, it has never entered into force and cannot have the same effects as if it were ratified. Despite Costa Rica's practice of compliance with regard to the boundary fixed by the treaty, the latter is *res inter alios acta* in relation to Nicaragua and should not be taken into account in the present case. Costa Rica further asserts that the treaty could not produce any *erga omnes* effects. Moreover, following the Court's 2012 Judgment in the case concerning *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Costa Rica indicated in a note to Colombia that it considered the treaty to be "impracticable" and "ineffective". It maintains that the two countries no longer share an area of overlapping maritime entitlements. Referring to the 1980 Treaty between Costa Rica and Panama, Costa Rica argues that the fact that this treaty is undisputedly in force and that the boundary it establishes may connect at a tripoint with the line fixed by the 1977 Treaty does not imply that the 1977 Treaty is in force.

132. In response to Nicaragua's argument concerning Costa Rica's practice with regard to the 1977 Treaty, Costa Rica contends that its conduct cannot amount to any renunciation of its rights in the maritime areas now at stake. Costa Rica maintains that the "provisional application of a treaty that has not entered into force simply involves compliance with the provisions of the law of treaties" and refers to the obligation, under Article 18 of the Vienna Convention on the Law of Treaties, for a State which has signed a treaty to refrain from "acts which would defeat the object and purpose" of the treaty before its ratification. Costa Rica stresses that on no occasion did it renounce its right to assert its entitlement to maritime areas in the region with respect to Nicaragua.

133. With regard to the 1976 Treaty between Colombia and Panama, Costa Rica maintains that this treaty cannot affect the rights of the Parties in the present case. Costa Rica argues that the Court and international tribunals have consistently refused to consider treaties concluded with third States or between third States when drawing the course of a maritime boundary. According to Costa Rica, while these treaties may be used to set the limits of the relevant area and may influence the endpoint of the maritime boundary, their bilateral character should be preserved and the Court should not take them into account when drawing a maritime boundary between the Parties.

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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*

135. In order to define the single maritime boundary concerning the exclusive economic zone and the continental shelf, the Court has to “achieve an equitable solution” according to Articles 74 and 83 of UNCLOS. The Court will delimit the exclusive economic zone and the continental shelf pursuant to its established methodology in three stages. First, it will provisionally draw an equidistance line using the most appropriate base points on the relevant coasts of the Parties. Second, it will consider whether there exist relevant circumstances which are capable of justifying an adjustment of the equidistance line provisionally drawn. Third, it will assess 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 (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, pp. 101-103, paras. 115-122; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012 (II)*, pp. 695-696, paras. 190-193; *Maritime Dispute (Peru v. Chile)*, Judgment, *I.C.J. Reports 2014*, p. 65, para. 180). The Court notes that the methodology in three stages set out in its Judgment in *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* has also been adopted by other international tribunals requested to delimit maritime boundaries (see e.g. *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, *ITLOS Reports 2012*, pp. 64-68, paras. 225-240; *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award of 7 July 2014, *International Law Reports*, Vol. 167, pp. 111-114, paras. 336-346).

136. With regard to the first stage of the delimitation, the Court, in *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, stated that:

“First, the Court will establish a provisional delimitation line, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place. So far as delimitation between adjacent coasts is concerned, an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case” (*Judgment, I.C.J. Reports 2009*, p. 101, para. 116).

As the Court observed in that Judgment, “[t]he line thus adopted is heavily dependent on the physical geography and the most seaward points of the two coasts” (*ibid.*, para. 117). However, the Court also noted that, “[w]hen placing base points on very small maritime features would distort the relevant geography, it is appropriate to disregard them in the construction of a provisional median line” (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012 (II)*, p. 699, para. 202).

137. The seaward endpoint of the delimitation of the territorial sea, as determined above (see paragraph 106), constitutes the starting-point of the provisional equidistance line.

138. The Court has already observed when considering the median line relating to the territorial sea that the Parties construct their respective equidistance lines by using base points that are placed on natural coasts. The same applies with regard to the equidistance lines proposed by the Parties concerning the exclusive economic zone and the continental shelf.

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139. 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. Costa Rica contests this placement. Costa Rica acknowledges that, in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, “[t]hese same Nicaraguan features were given full effect in the delimitation with Colombia”, but argues that in that case the delimitation was different, because it concerned “the opposite coasts of opposing islands” and not adjacent coasts. Nicaragua contends that, considering the Corn Islands’ vicinity to the mainland, “to ignore [them] as base points would . . . effectively erase an integral component of Nicaragua’s coast from the map”. Nicaragua points out that the Corn Islands are capable of generating an exclusive economic zone and a continental shelf.

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140. The Court concludes that base points should be placed on the Corn Islands for the purpose of constructing a provisional equidistance line. 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. The effect that has to be attributed to the Corn Islands in the adjusted delimitation is a different question, that should not affect the construction of the provisional equidistance line.

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141. The other issue relating to the base points concerns some minor maritime features, Paxaro Bovo and Palmenta Cays, which are situated at a short distance from Nicaragua’s mainland coast near Punta del Mono. Costa Rica argues that base points should not be placed on small insular features located along the coast and stresses that islets, cays and rocks do not generate entitlements to an exclusive economic zone or a continental

shelf. In Costa Rica's view, placing base points on those features would create an "excessive and disproportionate distortion" of the provisional equidistance line. Nicaragua does not argue that these small islands are capable of generating a claim to an exclusive economic zone or to a continental shelf. According to Nicaragua, however, these maritime features can provide base points for the construction of the provisional equidistance line because they are "fringing islands" that "form an integral part of Nicaragua's coast". The assimilation of these islands to the coast is contested by Costa Rica.

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142. The Court notes that the Palmenta Cays are islets lying at a distance of about one nautical mile from the coast. When considering base points for the construction of an equidistance line, the Court referred to "a cluster of fringe islands" in *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (*Judgment, I.C.J. Reports 2009*, p. 109, para. 149) and to "islands fringing the Nicaraguan coast" in *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (*Judgment, I.C.J. Reports 2012 (II)*, p. 678, para. 145; see also *ibid.*, p. 699, para. 201). Such formations may be assimilated to the coast. Palmenta Cays fit this description. The same conclusion may apply with regard to Paxaro Bovo, which is a rock situated 3 nautical miles off the coast south of Punta del Mono. The Court considers it appropriate to place base points on both features for the construction of the provisional equidistance line.

143. In the construction of the provisional equidistance line relating to the exclusive economic zone and to the continental shelf, the Court will again select base points located on the natural coast and on solid land (see paragraph 100 above).

144. As already stated, the construction of this line is without prejudice to any claims that a third State may have on part of the area crossed by the line.

145. The provisional equidistance line shall follow a series of geodetic lines connecting the points having the following co-ordinates in WGS 84 datum:

<i>Turning point</i>	<i>Latitude north</i>	<i>Longitude west</i>
Lx (endpoint of the delimitation of the territorial sea)	11° 07' 28.8"	83° 36' 30.4"
1	11° 08' 08.3"	83° 35' 54.5"
2	11° 09' 01.3"	83° 35' 05.3"
3	11° 09' 11.5"	83° 34' 55.5"
4	11° 10' 20.9"	83° 33' 47.9"
5	11° 10' 49.9"	83° 33' 17.2"
6	11° 11' 08.1"	83° 32' 57.1"
7	11° 11' 13.8"	83° 32' 50.5"

<i>Turning point</i>	<i>Latitude north</i>	<i>Longitude west</i>
8	11° 12' 39.0"	83° 31' 22.7"
9	11° 12' 56.2"	83° 31' 04.2"
10	11° 13' 06.0"	83° 30' 53.5"
11	11° 13' 07.3"	83° 30' 52.0"
12	11° 14' 03.7"	83° 29' 46.5"
13	11° 14' 56.5"	83° 20' 54.2"
14	11° 14' 56.4"	83° 17' 24.1"
15	11° 15' 02.4"	83° 07' 50.0"
16	11° 15' 06.1"	83° 03' 44.9"
17	11° 15' 39.2"	82° 47' 03.3"
18	11° 15' 42.5"	82° 45' 38.1"
19	11° 13' 29.7"	82° 40' 33.2"
20	11° 12' 03.5"	82° 37' 09.5"
21	11° 11' 52.0"	82° 36' 41.4"
22	11° 07' 19.5"	82° 25' 08.1"
23	11° 05' 11.7"	82° 19' 33.4"
24	11° 05' 01.1"	82° 18' 16.5"
25	11° 04' 55.4"	82° 17' 28.1"
26	11° 05' 06.1"	81° 58' 08.3"
27	11° 05' 03.4"	81° 38' 38.8"
28	11° 09' 58.0"	81° 06' 27.0"
29	11° 12' 24.8"	80° 46' 04.4"

From point 29, the provisional equidistance line continues along the geodetic line starting at an azimuth of 82° 08' 29". The line is illustrated on sketch-map No. 9 below (p. 194).

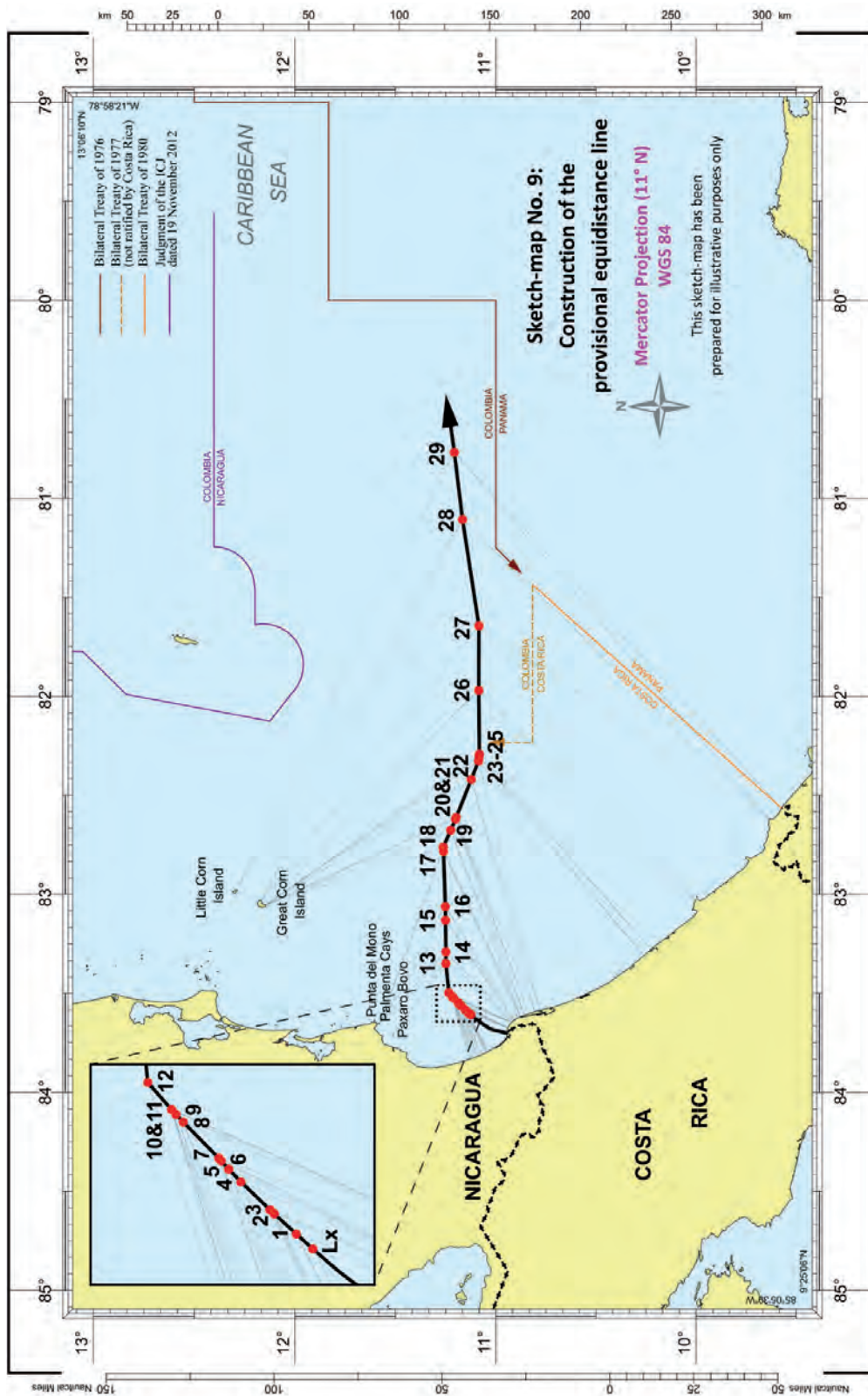
(d) *Adjustment to the provisional equidistance line*

146. After constructing the provisional equidistance line, "the Court will at the next, second stage consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result" (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *Judgment*, *I.C.J. Reports 2009*, p. 101, para. 120).

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147. Both Parties are of the view that an adjustment of the provisional equidistance line for the delimitation of the EEZ and continental shelf is necessary, but they rely on different circumstances to support their claimed adjustment.

148. Nicaragua argues that it would suffer from a cut-off effect caused by "the convex and north-facing nature of Costa Rica's coastline at Punta de Castilla immediately adjacent to Nicaragua's concave coastline" if the provisional equidistance line were adopted as the maritime boundary. That cut-off has been invoked by Nicaragua also as a special circumstance



requiring the adjustment of the equidistance line in the territorial sea. According to Nicaragua, its effects persist beyond the limits of the territorial sea, up to a distance of at least 65 nautical miles. Nicaragua argues that the combination of the convexity of Costa Rica's coast with the concavity of Nicaragua's coast forces the equidistance line to take a sharp angle in front of Nicaragua's coast, to its disadvantage. Nicaragua contends that the line must be adjusted in order to achieve an equitable result.

149. Costa Rica contests Nicaragua's argument. According to Costa Rica, the convexity and concavity invoked by Nicaragua are "microgeographical" and cannot be characterized as "marked". It maintains that "Nicaragua's cut-off is inevitable, but it is not inequitable". Costa Rica moreover contends that the combination of convexity and concavity can only be relevant when a State occupies a central position between two States along a convex or concave coast: since Nicaragua does not find itself in a three-State-concavity situation, it cannot claim to suffer such a cut-off.

150. In order to support an adjustment to the provisional equidistance line to its own advantage, Costa Rica refers to what it calls a notional delimitation, consisting of the prolongation of the equidistance line agreed in the bilateral treaty with Panama. It indicates that the fact that it finds itself in the situation of a "three-State concavity" where the "coastal concavity and the cut-off created by that concavity in conjunction with a notional delimitation with a third State" creates an inequitable delimitation. Costa Rica argues that its coast is "purely concave", and that the equidistance line produces a cut-off effect for Costa Rica's seaward projections. According to Costa Rica, this cut-off constitutes a relevant circumstance calling for the adjustment of the provisional equidistance line in order to reach an equitable solution for both Parties. Costa Rica recalls that the Court first enunciated the notion of cut-off in the *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* cases and that international tribunals have further confirmed that the provisional equidistance line should be adjusted when a cut-off is created as a result of the concavity of the coast. Costa Rica observes that its claimed adjustment would allow it to reach its full 200-nautical-mile entitlement.

151. Costa Rica further argues that if, contrary to its view, the Court were to find that the Corn Islands should be taken as base points for the provisional equidistance line, the geographic situation of these islands, and in particular their location at a distance from the mainland coast should be considered as a relevant circumstance calling for an adjustment of the line. According to Costa Rica, the Corn Islands should be given no effect.

152. Nicaragua rejects Costa Rica's argument according to which it is suffering from "the interplay between the delimitation with Nicaragua, on the one side, and the notional delimitation with Panama, on the other". In Nicaragua's view, the relationship between Costa Rica and Panama cannot

be taken into account in the present proceedings, as it has nothing to do with Nicaragua. Moreover, Nicaragua maintains that the jurisprudence does not recognize a right of States to have their exclusive economic zones reach the limit of 200 nautical miles, irrespective of the geography and the potential rights of third States. Nicaragua also dismisses Costa Rica's contention according to which the Corn Islands constitute a relevant circumstance calling for the adjustment of the equidistance line. Nicaragua considers that the Corn Islands exert an influence on the course of the equidistance line in the same way as base points placed on Costa Rica's coast: "those influences are mutual and balanced". Nicaragua argues that the Corn Islands must be given full weight.

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153. With regard to the effect to be given to the Corn Islands in the determination of the maritime boundary, the Court observes that, while they are entitled to generate an exclusive economic zone and a continental shelf, they are situated at about 26 nautical miles from the mainland coast and their impact on the provisional equidistance line is out of proportion to their limited size. As was noted by the International Tribunal for the Law of the Sea in *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* (*Judgment, ITLOS Reports 2012*, p. 86, para. 317):

"the effect to be given to an island in the delimitation of the maritime boundary in the exclusive economic zone and the continental shelf depends on the geographic realities and the circumstances of the specific case. There is no general rule in this respect. Each case is unique and requires specific treatment, the ultimate goal being to reach a solution that is equitable."

154. 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.

155. 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.

156. 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.

157. The adjusted equidistance line of the exclusive economic zone and continental shelf is obtained by joining with geodetic lines the points with the following co-ordinates in WGS 84 datum:

<i>Turning point</i>	<i>Latitude north</i>	<i>Longitude west</i>
Lx (endpoint of the delimitation of the territorial sea)	11° 07' 28.8"	83° 36' 30.4"
1	11° 08' 08.3"	83° 35' 54.5"
2	11° 09' 01.3"	83° 35' 05.3"
3	11° 09' 11.5"	83° 34' 55.5"
4	11° 10' 20.9"	83° 33' 47.9"
5	11° 10' 49.9"	83° 33' 17.2"
6	11° 11' 08.1"	83° 32' 57.1"
7	11° 11' 13.8"	83° 32' 50.5"
8	11° 12' 39.0"	83° 31' 22.7"
9	11° 12' 56.2"	83° 31' 04.2"
10	11° 13' 06.0"	83° 30' 53.5"
11	11° 13' 07.3"	83° 30' 52.0"
12	11° 14' 03.7"	83° 29' 46.5"
13	11° 14' 56.5"	83° 20' 54.2"
14	11° 14' 56.4"	83° 17' 24.1"
15	11° 15' 02.4"	83° 07' 50.0"
16	11° 15' 06.1"	83° 03' 44.9"
17	11° 15' 39.2"	82° 47' 03.3"
18	11° 15' 42.5"	82° 45' 38.1"
19'	11° 14' 39.4"	82° 40' 02.5"
20'	11° 13' 58.8"	82° 36' 20.2"
21'	11° 13' 53.6"	82° 35' 51.2"
22'	11° 13' 28.0"	82° 33' 20.0"
23'	11° 11' 56.7"	82° 24' 06.7"
24'	11° 11' 54.6"	82° 23' 53.6"
25'	11° 11' 54.0"	82° 23' 49.7"
26'	11° 11' 49.5"	82° 23' 20.7"
27'	11° 11' 01.9"	82° 18' 01.5"
28'	11° 11' 00.8"	82° 17' 29.5"
29'	11° 11' 00.3"	82° 17' 08.0"
30'	11° 11' 19.6"	82° 08' 49.8"
31'	11° 11' 39.3"	81° 59' 01.5"
32'	11° 11' 43.5"	81° 58' 01.0"
33'	11° 11' 51.9"	81° 57' 00.7"
34'	11° 14' 58.9"	81° 39' 24.5"
35'	11° 19' 31.9"	81° 21' 43.1"
36'	11° 21' 24.5"	81° 10' 12.0"

<i>Turning point</i>	<i>Latitude north</i>	<i>Longitude west</i>
37'	11° 21' 31.1"	81° 09' 34.5"
38'	11° 21' 40.2"	81° 08' 50.2"
39'	11° 21' 47.5"	81° 08' 17.4"
40'	11° 21' 52.2"	81° 07' 55.4"
41'	11° 25' 59.0"	80° 47' 51.3"

From point 41', the delimitation line continues along the geodetic line starting at an azimuth of 77° 49' 08". As already noted (see paragraph 144 above), this line is constructed without prejudice to any claims that a third State may have on part of the area crossed by the line. The line is illustrated on sketch-map No. 10 below (p. 199).

158. Given the complexity of the line described in the previous paragraph, 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 composed of the points with the following co-ordinates in WGS 84 datum:

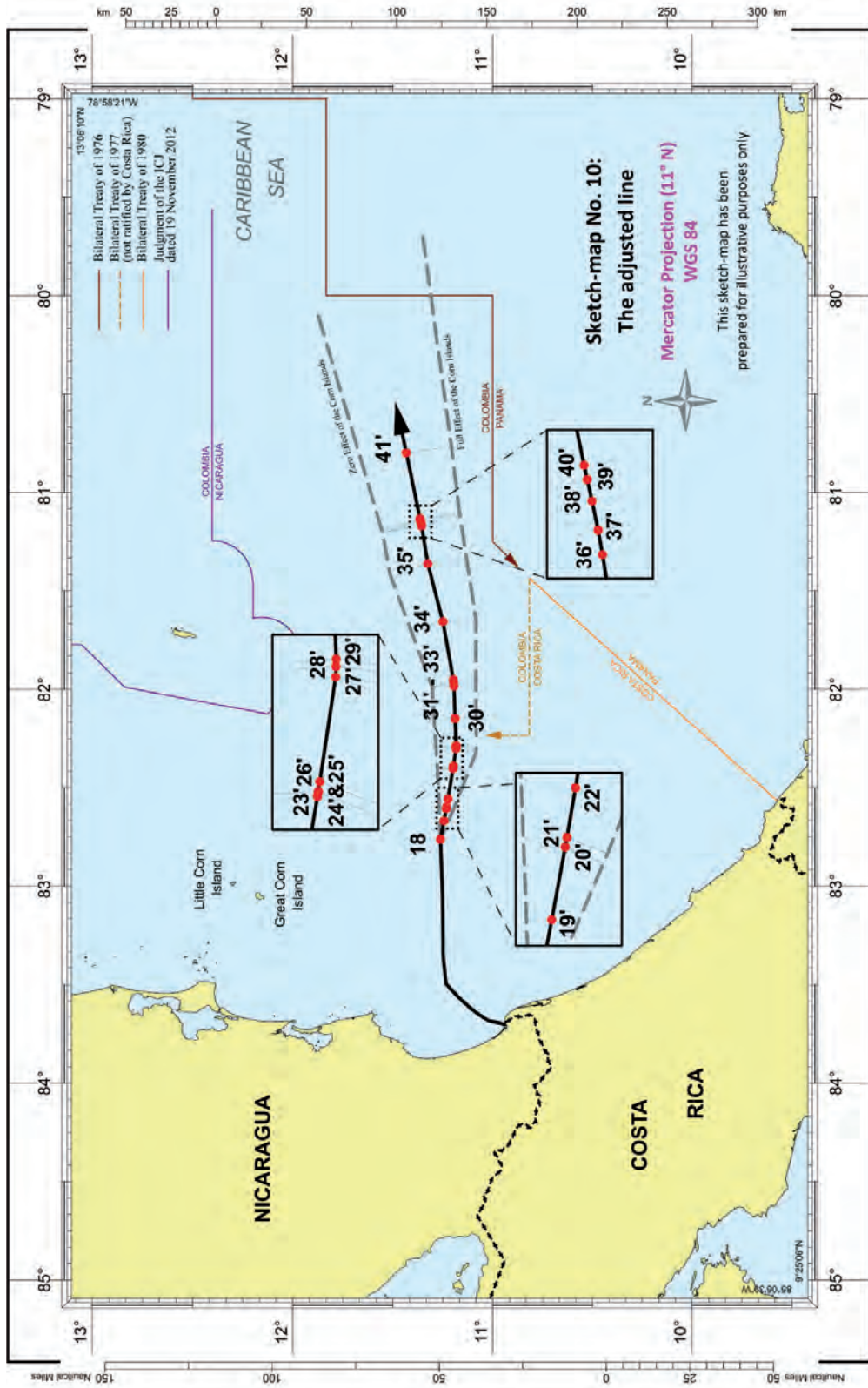
<i>Turning point</i>	<i>Latitude north</i>	<i>Longitude west</i>
Lx (endpoint of the delimitation of the territorial sea)	11° 07' 28.8"	83° 36' 30.4"
M	11° 08' 08.3"	83° 35' 54.5"
N	11° 14' 03.7"	83° 29' 46.5"
O	11° 14' 56.5"	83° 20' 54.2"
P	11° 15' 42.5"	82° 45' 38.1"
Q	11° 11' 00.8"	82° 17' 29.5"
R	11° 11' 43.5"	81° 58' 01.0"
S	11° 14' 58.9"	81° 39' 24.5"
T	11° 19' 31.9"	81° 21' 43.1"
U	11° 21' 31.1"	81° 09' 34.5"
V	11° 25' 59.0"	80° 47' 51.3"

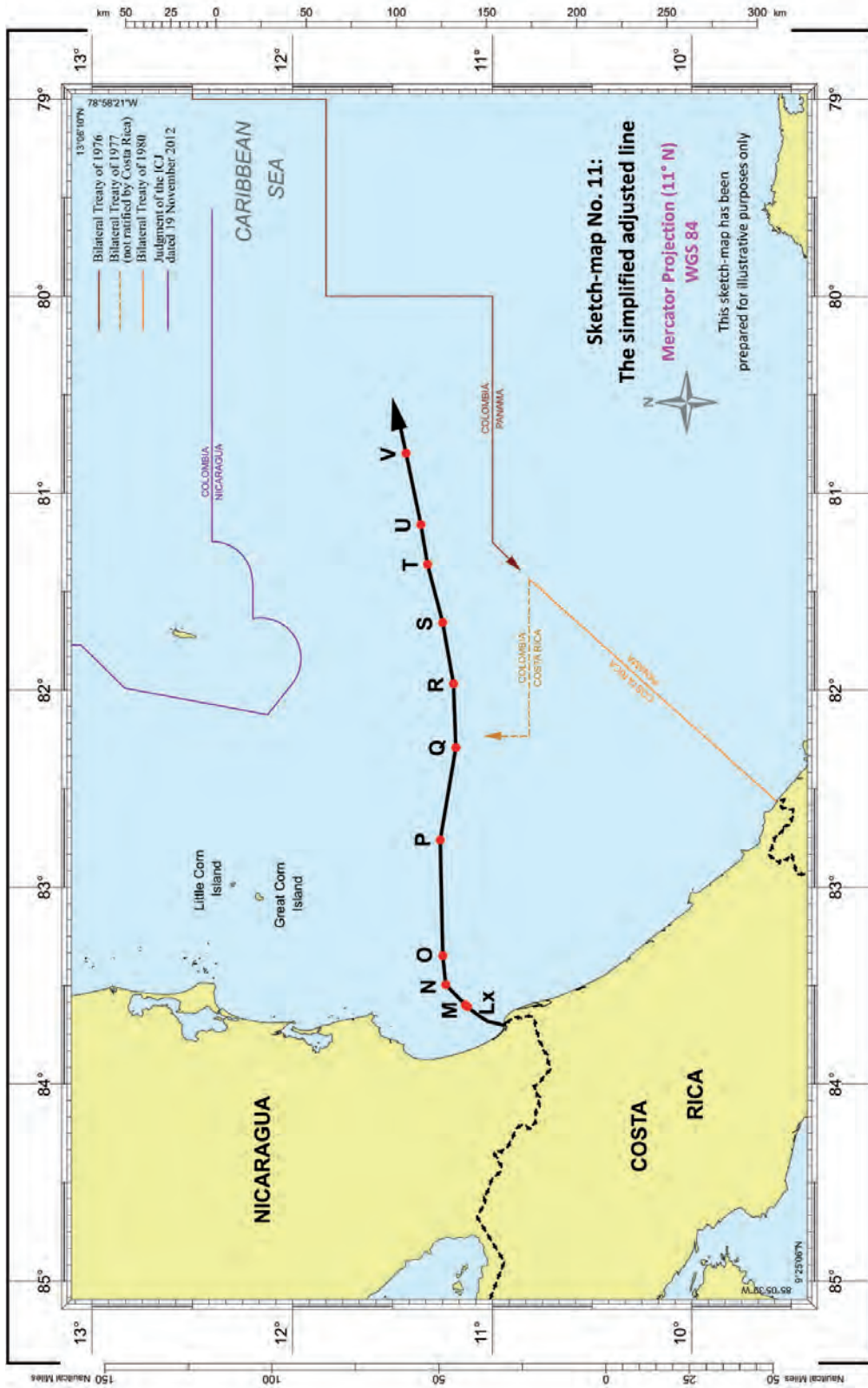
From point V, the delimitation line continues along the geodetic line starting at an azimuth of 77° 49' 08". This line is illustrated on sketch-map No. 11 below (p. 200).

(e) *Disproportionality test*

159. As the Court stated in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*:

“Finally, and at a third stage, the Court will verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and





the ratio between the relevant maritime area of each State by reference to the delimitation line” (*Judgment, I.C.J. Reports 2009*, p. 103, para. 122).

160. The Court also referred to the need for “a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths” (*ibid.*, para. 122).

161. In *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, the Court explained that:

“[i]n carrying out this third stage, the Court . . . is not applying a principle of strict proportionality. Maritime delimitation is not designed to produce a correlation between the lengths of the Parties’ relevant coasts and their respective shares of the relevant area . . . The Court’s task is to check for a significant disproportionality. What constitutes such a disproportionality will vary according to the precise situation in each case, for the third stage of the process cannot require the Court to disregard all of the considerations which were important in the earlier stages.” (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Judgment, I.C.J. Reports 2012 (II)*, p. 715, para. 240.)

Therefore, at this stage in the delimitation, the Court will endeavour to “ensure that there is not a disproportion so gross as to ‘taint’ the result and render it inequitable” (*ibid.*, p. 716, para. 242). Whether there is significant disproportionality “remains in each case a matter for the Court’s appreciation, which it will exercise by reference to the overall geography of the area” (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *Judgment, I.C.J. Reports 2009*, p. 129, para. 213).

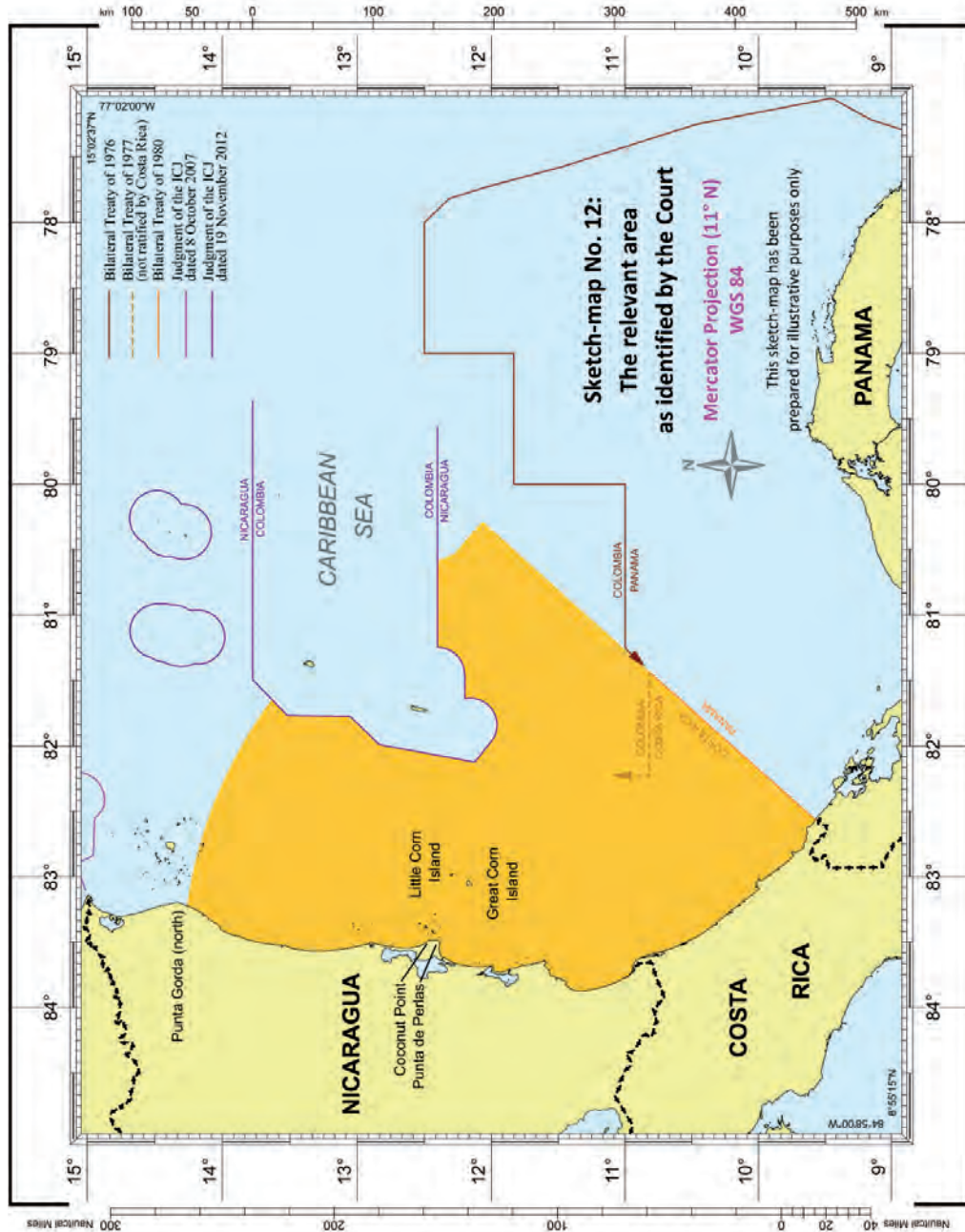
162. In *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, the Court also explained that:

“[t]he calculation of the relevant area does not purport to be precise but is only approximate and ‘[t]he object of delimitation is to achieve a delimitation that is equitable, not an equal apportionment of maritime areas’” (*Judgment, I.C.J. Reports 2012 (II)*, p. 683, para. 158, citing *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *Judgment, I.C.J. Reports 2009*, p. 100, para. 111).

163. The relevant coastal lengths and their ratio have already been identified (see paragraph 114 above). What still needs to be determined is the size of the maritime area appertaining to each Party as a result of the construction of the maritime boundary.

164. 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 (see paragraph 119 above).



165. On the foregoing basis, the relevant area (see above, p. 202, sketch-map No. 12) 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 comparison with the ratio of coastal lengths (1:2.04 also in favour of Nicaragua: see paragraph 114 above) does not show any “marked disproportion”.

166. 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.

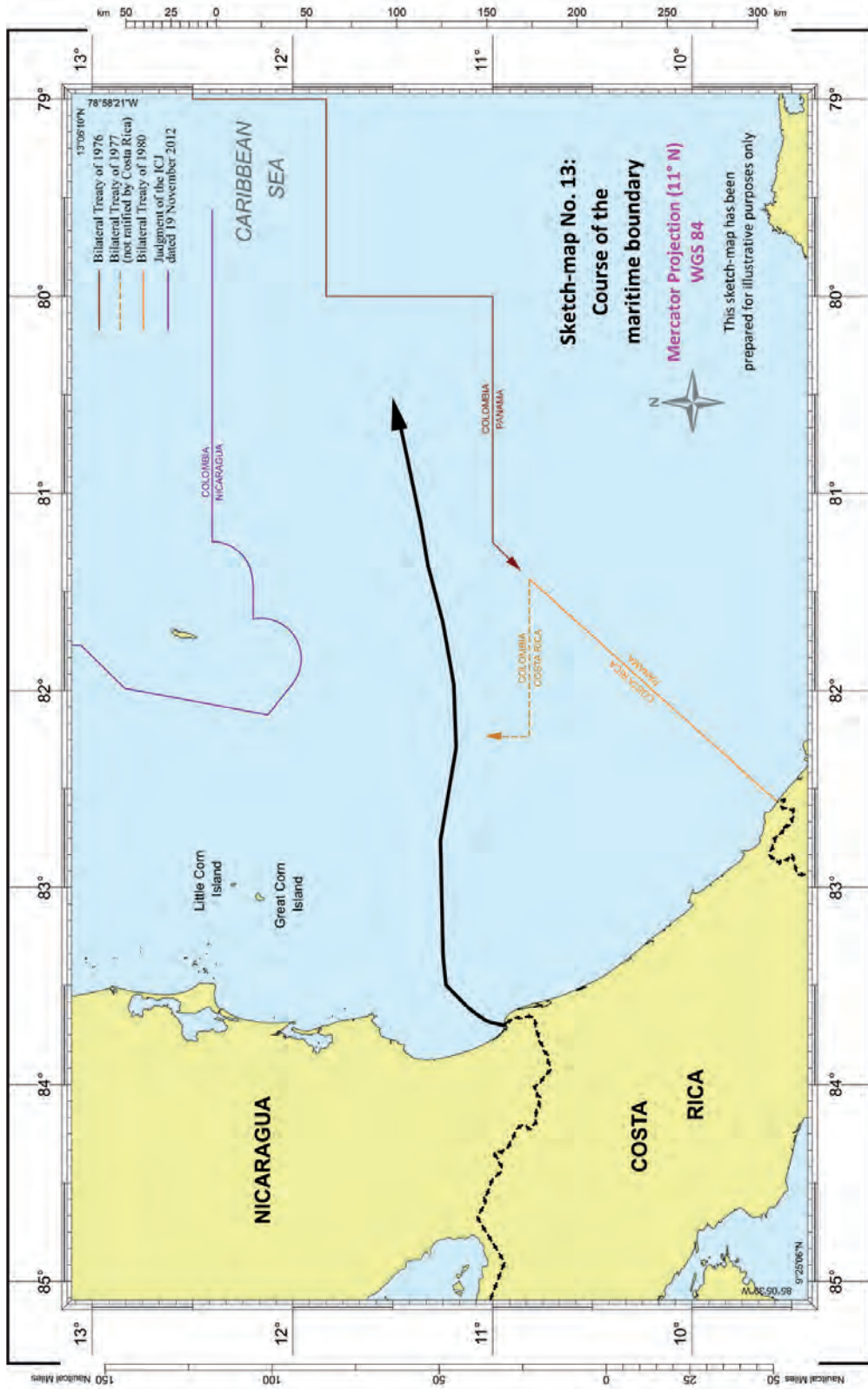
V. MARITIME DELIMITATION IN THE PACIFIC OCEAN

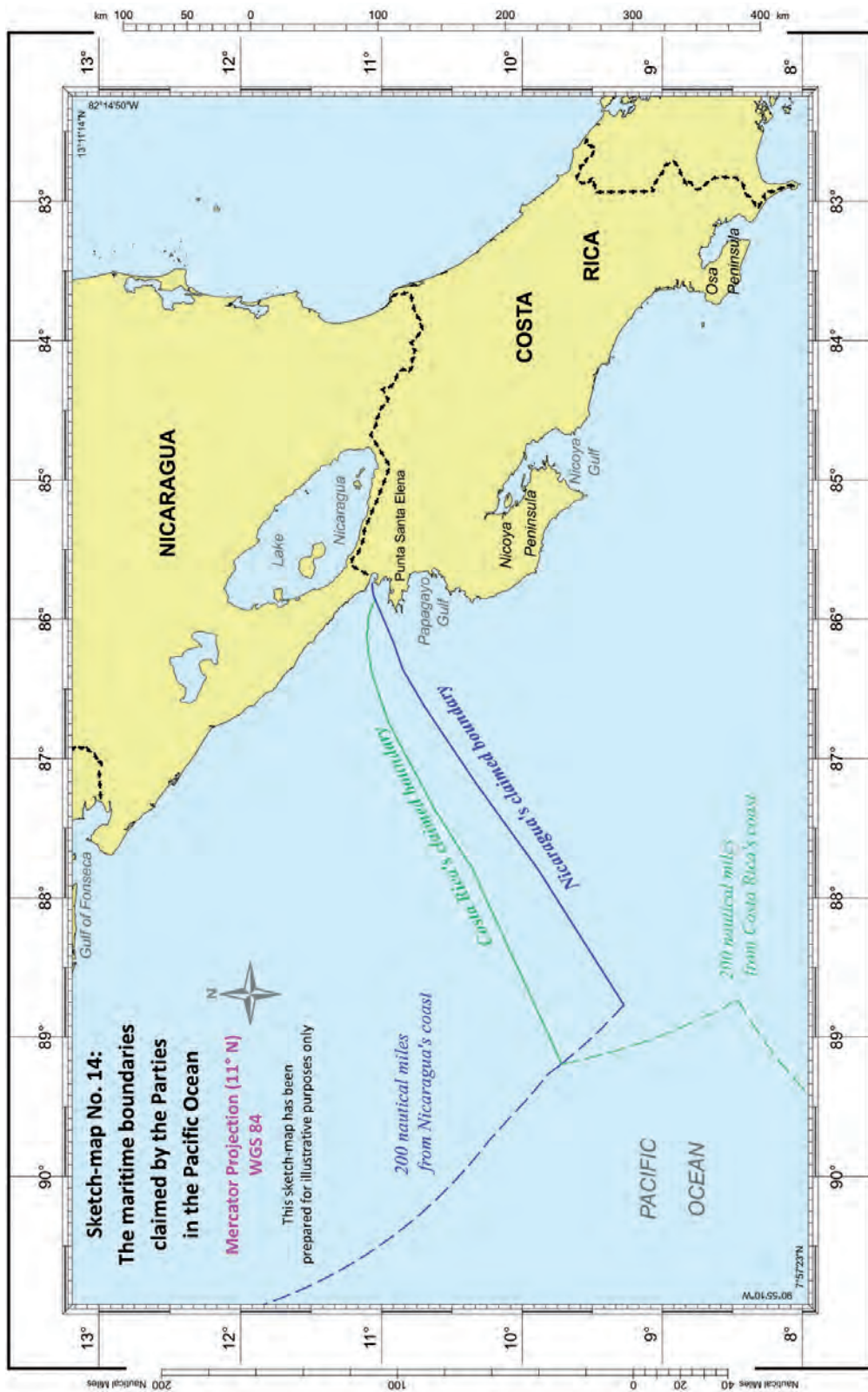
167. The Court now turns to the delimitation of the maritime boundary between the Parties in the Pacific Ocean. As with the maritime delimitation in the Caribbean Sea, the Court was requested with respect to the Pacific Ocean to delimit the boundary for the territorial sea, the exclusive economic zone and the continental shelf. The maritime boundaries claimed by each Party are depicted in sketch-map No. 14 below (p. 205).

168. Following its established jurisprudence, the Court will delimit the maritime boundary in the Pacific Ocean pursuant to the same methods used in delimiting the territorial sea, the exclusive economic zone and the continental shelf in the Caribbean Sea (see paragraphs 98 and 135 above).

A. *Starting-point of the Maritime Delimitation*

169. Costa Rica and Nicaragua agree that the starting-point of the maritime boundary in the Pacific Ocean is the midpoint of the closing line of Salinas Bay, and that such a closing line is the one drawn between Punta Zacate, on Costa Rican territory, and Punta Arranca Barba, on Nicaraguan territory. According to Costa Rica, the co-ordinates of the midpoint of the closing line of Salinas Bay are 11° 04' 00" N, 85° 44' 28" W. According to Nicaragua, the exact co-ordinates of the midpoint of the closing line of Salinas Bay are 11° 03' 56.3" N, 85° 44' 28.3" W. 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

170. In order to establish the median line in the territorial sea, Costa Rica selects a number of base points. On its own coast, Costa Rica selects base points on some islets just off Punta Zacate and Punta Descartes, as well as two points located on a seaward protrusion of the Santa Elena Peninsula called Punta Blanca. Costa Rica states that the Santa Elena Peninsula has an area of some 286 sq km and a permanent population of more than 2,400 inhabitants, which Nicaragua does not dispute. On Nicaragua's coast, Costa Rica selects as base points certain features in the vicinity of Punta Arranca Barba, Punta La Flor, Frailes Rocks and Punta Sucia. Costa Rica contends that there are no special circumstances justifying an adjustment of the provisional equidistance line drawn in the territorial sea. In particular, Costa Rica argues that the Santa Elena Peninsula could not be considered to have a distorting effect on the equidistance line in the territorial sea. Therefore, Costa Rica requests the Court to delimit the territorial sea in the Pacific Ocean in accordance with a strict equidistance line.

171. Nicaragua agrees with Costa Rica on how to draw the provisional equidistance line in the territorial sea in the Pacific Ocean, which includes the selection of base points both on Costa Rica's coast and on its own coast. However, Nicaragua argues that the configuration of the coast in the immediate vicinity of Salinas Bay is a special circumstance requiring the Court to adjust the equidistance line in the territorial sea. Specifically, Nicaragua contends that the Santa Elena Peninsula has a distorting effect on the equidistance line, since, starting at the first turning point controlled by the base points on Punta Blanca, it markedly cuts off Nicaragua's coastal projections in the territorial sea. Consequently, Nicaragua requests the Court to adjust the equidistance line by discounting the base points on the Santa Elena Peninsula which would cause the boundary to deflect towards Nicaragua's coast.

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172. In accordance with its established jurisprudence, the Court will apply Article 15 of UNCLOS, quoted in paragraph 90 above, by first drawing a provisional median line, and subsequently considering whether special circumstances exist which justify its adjustment (see paragraph 98 above). The Court notes that Costa Rica drew straight baselines in the Pacific Ocean by promulgating Decree 18581-RE of 14 October 1988. Nicaragua does not object to the drawing of straight baselines by Costa Rica in the Pacific Ocean. However, Costa Rica has not relied on such straight baselines in the present proceedings.

173. 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 (see paragraphs 170-171 above). The Court sees no reason to depart from the base points selected by both Parties. Therefore, for the purposes of drawing the provisional median line in the territorial sea, the Court will locate base points on certain features in the vicinity of Punta Zacate, Punta Descartes and Punta Blanca on Costa Rica's coast, and on certain features in the vicinity of Punta Arranca Barba, Punta La Flor, Frailes Rocks and Punta Sucia on Nicaragua's coast.

174. However, 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, "islets, rocks and minor coastal projections" can have a disproportionate effect on the median line (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, *Merits, Judgment, I.C.J. Reports 2001*, p. 114, para. 246, citing *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Judgment, I.C.J. Reports 1985*, p. 48, para. 64, itself citing *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, *Judgment, I.C.J. Reports 1969*, p. 36, para. 57). 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 Santa Elena Peninsula cannot be considered to be a minor coastal projection that has a disproportionate effect on the delimitation line. 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, 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.

175. The Court concludes that the territorial sea in the Pacific Ocean shall be delimited between the Parties by means of a median line, starting at the midpoint of the closing line of Salinas Bay, having the co-ordinates identified in paragraph 169 above. The median line shall be drawn using the base points indicated in paragraph 173 above. The maritime boundary in the territorial sea shall follow a series of geodetic lines connecting the points having the following co-ordinates in WGS 84 datum:

<i>Turning point</i>	<i>Latitude north</i>	<i>Longitude west</i>
Starting-point (SP)	11° 03' 56.3"	85° 44' 28.3"
A	11° 03' 56.9"	85° 45' 22.7"
B	11° 03' 57.4"	85° 45' 38.5"

<i>Turning point</i>	<i>Latitude north</i>	<i>Longitude west</i>
C	11° 03' 47.6"	85° 46' 34.1"
D	11° 03' 53.7"	85° 47' 11.1"
E	11° 03' 24.9"	85° 49' 40.8"
F	11° 03' 18.5"	85° 50' 02.6"
G	11° 02' 44.7"	85° 51' 24.8"
H	11° 03' 13.3"	85° 52' 47.9"
I	11° 04' 32.1"	85° 55' 41.4"
J	11° 05' 12.9"	85° 57' 19.4"
K	11° 05' 49.2"	86° 00' 39.0"

The boundary in the territorial sea shall terminate at point Kx (with current co-ordinates 11° 05' 49.5" N and 86° 01' 21.7" W), at the intersection of the 12-nautical-mile line with the geodetic line connecting point K with the first turning point on the provisional equidistance line in the exclusive economic zone, identified as point 1 and having the co-ordinates indicated at paragraph 188 below. The delimitation line is illustrated on sketch-map No. 15 below (p. 209).

*C. Delimitation of the Exclusive Economic Zone
and the Continental Shelf*

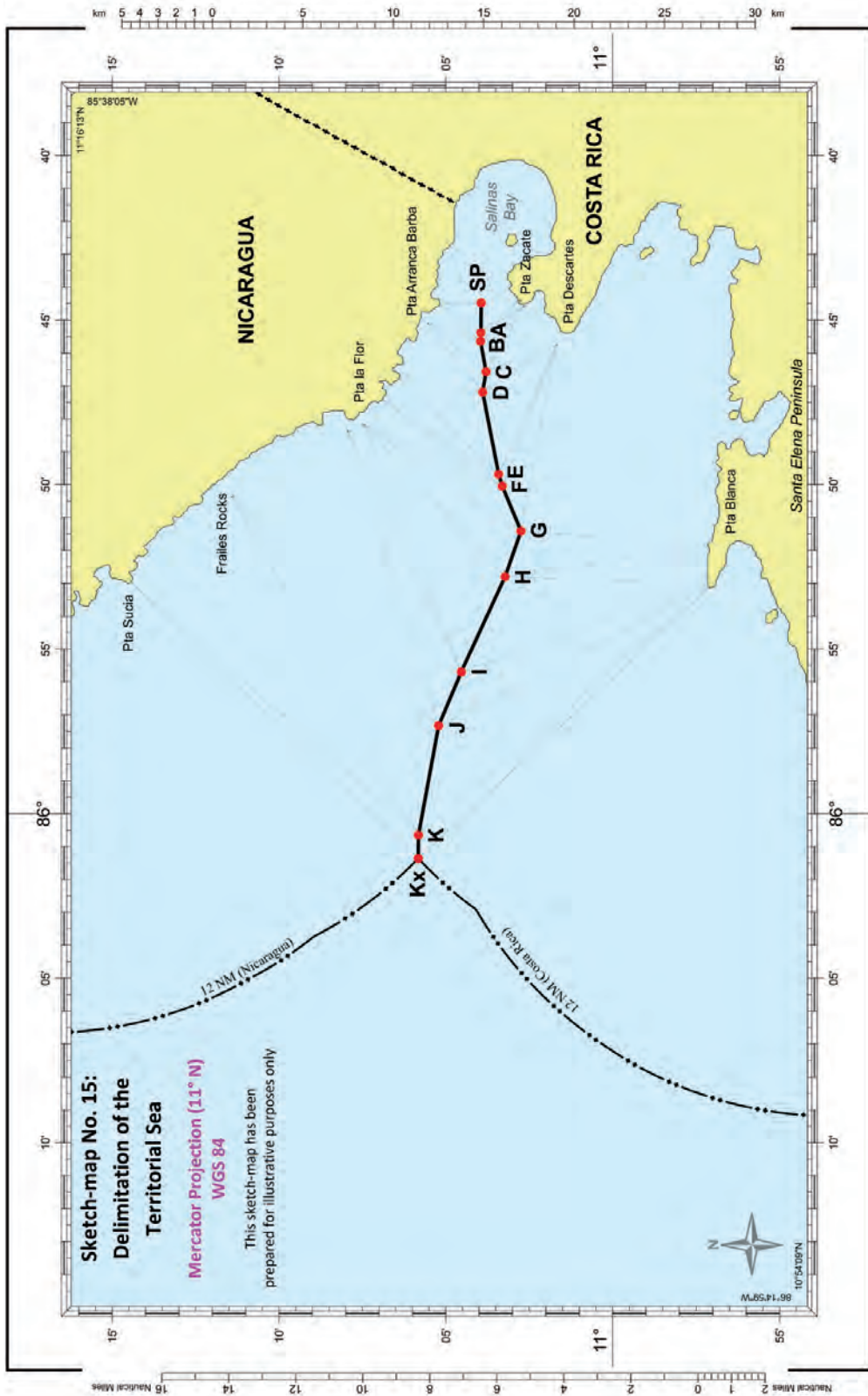
176. The Court will now delimit the maritime boundary between the Parties for the exclusive economic zone and the continental shelf in the Pacific Ocean according to its established methodology.

(a) *Relevant coasts and relevant area*

(i) *Relevant coasts*

177. Costa Rica argues that the entire Nicaraguan coast, from Punta Arranca Barba to Punta Cosigüina, is relevant for the purposes of delimitation in the Pacific Ocean. Costa Rica also argues that its own relevant coast is divided into two parts. A first part extends from Punta Zacate down to Cabo Blanco on the Nicoya Peninsula, while a second part extends from Punta Herradura down to Punta Salsipuedes. Costa Rica measures the length of the proposed relevant coast both by following the natural configuration of the coast, and by using straight-line approximations of the coast. Applying the former method, Nicaragua's relevant coast would be 345 km long, and Costa Rica's would be 670 km long. Applying the latter method, Nicaragua's relevant coast would be 300 km long, and Costa Rica's would be 415 km long (see below, p. 212, sketch-map No. 16).

178. Nicaragua argues that its relevant coast in the Pacific Ocean runs from Punta La Flor on Salinas Bay to Corinto Point. Concerning Costa Rica's relevant coast, Nicaragua contends that it only comprises the coast running from Punta Zacate on Salinas Bay to Punta Guiones on the Nicoya Peninsula. Nicaragua measures the Parties' relevant coasts



using straight-line approximations. Nicaragua argues that its relevant coast extends for 238 km, while Costa Rica's relevant coast extends for 144 km (see below, p. 213, sketch-map No. 17).

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179. The Court recalls that in order to consider a coast to be relevant for the purposes of delimitation, it must generate projections which overlap with projections from the coast of the other party (see paragraph 108 above). 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, the Court considers it appropriate to identify the relevant coast of both Parties by means of straight lines.

180. The Court notes that the Parties' positions do not differ significantly with respect to the identification of Nicaragua's relevant coast. The Court finds that the entire Nicaraguan coast, from Punta Arranca Barba to Punta Cosigüina, generates potential maritime entitlements overlapping with those of Costa Rica. In the geographical circumstances of the present case, this conclusion does not change whether potential maritime entitlements are generated by the method of radial projections or by the method of frontal projections. The length of Nicaragua's relevant coast, thus identified and measured by the Court along a straight line, is 292.7 km long.

181. 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. Neither Party argued that the stretch of Costa Rica's coast running from Cabo Blanco due north-east into Nicoya Gulf and down to Punta Herradura should be included in the relevant coast. 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 (see below, p. 215, sketch-map No. 18).

(ii) *Relevant area*

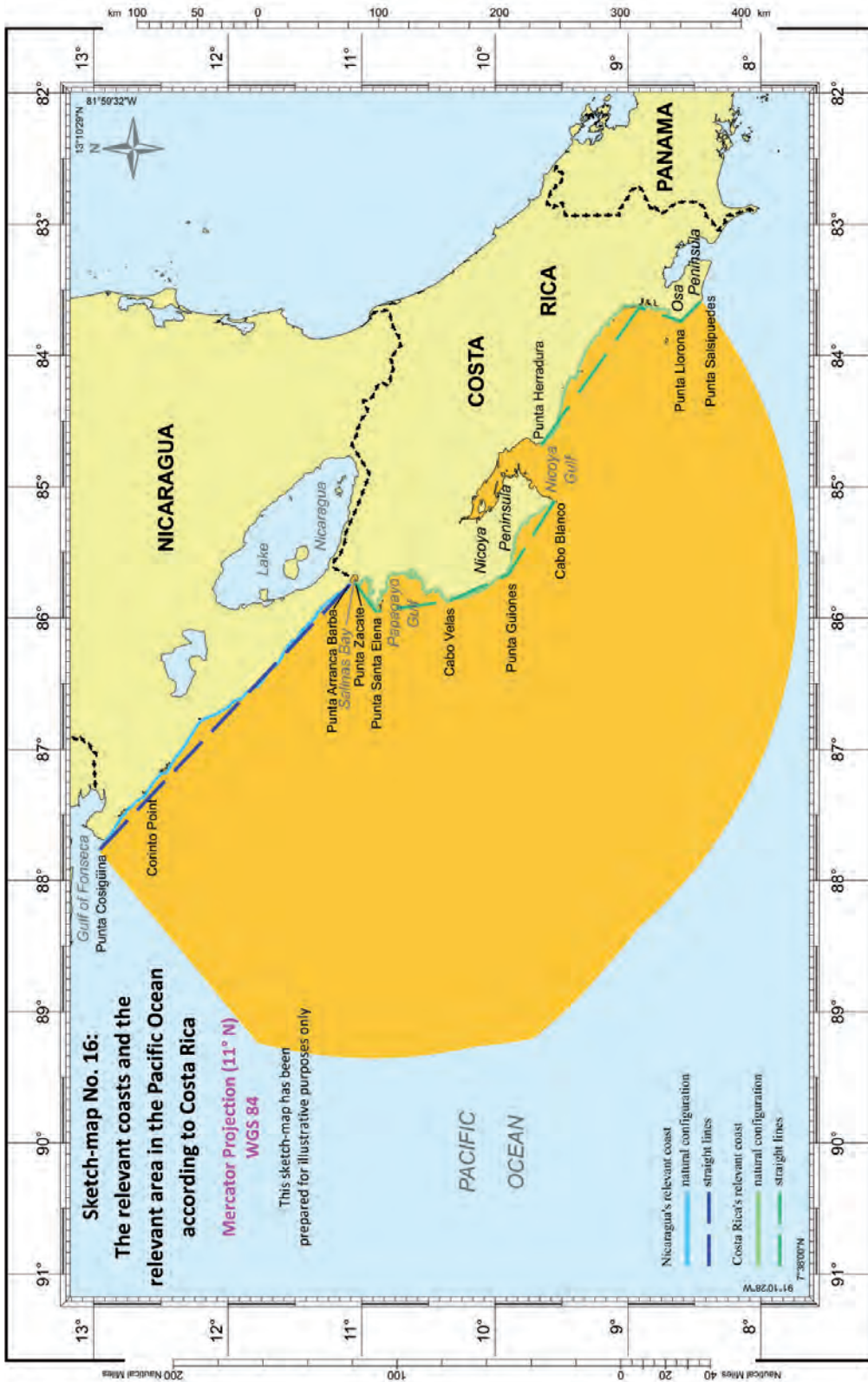
182. Costa Rica argues that maritime areas should be considered to be relevant for the purposes of delimitation only if both Parties have a potential entitlement over such areas. According to Costa Rica, the identification of the relevant area need not be precise. Costa Rica identifies the relevant area by reference to radial coastal projections. The use of radial projections produces a relevant area enclosed within the envelope of arcs having a 200-nautical-mile radius identifying the area of overlapping potential entitlements between the Parties, and bordered in the north by a straight line starting at Punta Cosigüina and perpendicular to the direction of the Nicaraguan coast (see below, p. 212, sketch-map No. 16).

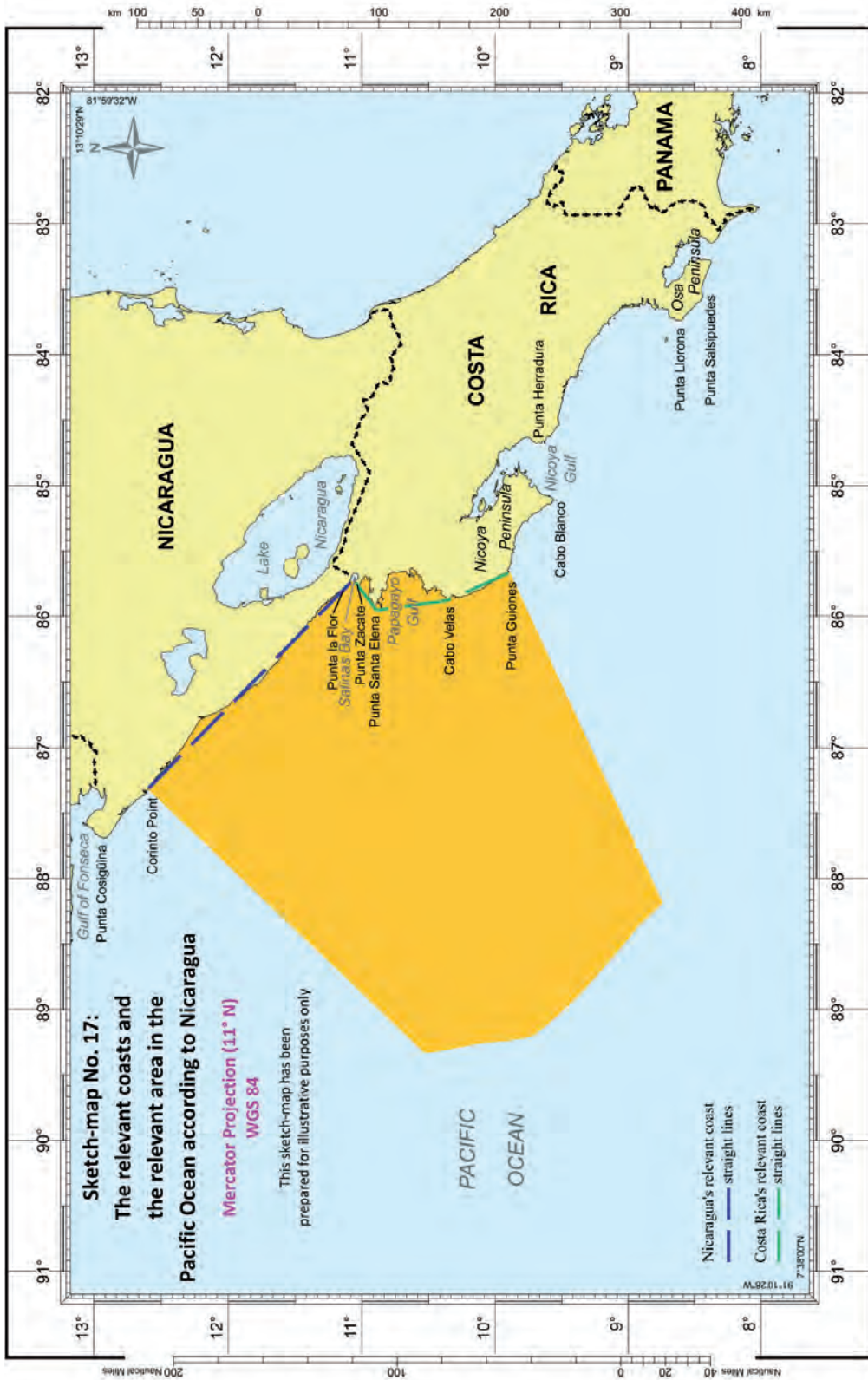
183. Nicaragua agrees with Costa Rica that the relevant area is identified by reference to the areas in which the potential maritime entitlements of the Parties overlap. However, Nicaragua argues that the relevant area should be identified by using frontal coastal projections. Accordingly, Nicaragua suggests that the relevant area should be enclosed by the 200-nautical-mile limits of the exclusive economic zones of the Parties in the west, by a line perpendicular to the general direction of Costa Rica's coast between Cabo Velas and Punta Guiones and starting at Punta Guiones in the south, and by a line perpendicular to the general direction of Nicaragua's coast starting from Corinto Point in the north (see below, p. 213, sketch-map No. 17).

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184. The Court recalls that the relevant area, the identification of which is part of the established maritime delimitation methodology, includes the maritime spaces in which the potential entitlements generated by the coasts of the Parties overlap (see paragraphs 115-116 above). In the present case, the Court is of the view that both the potential maritime entitlements generated by the northern part of Costa Rica's relevant coast, and the potential maritime entitlements generated by the southern part of Costa Rica's relevant coast (paragraph 181 above), overlap with the potential maritime entitlements generated by the relevant coast of Nicaragua. The Court is also of the view 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 (see paragraph 180 above). In the west and in the south, 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.

185. The coast extending from Cabo Blanco due north-east into Nicoya Gulf and down to Punta Herradura does not generate potential maritime entitlements overlapping with those generated by Nicaragua's coast. Therefore, the Court finds that the maritime area landward of the line joining Cabo Blanco to Punta Herradura and approximately corresponding to the waters of Nicoya Gulf is not part of the relevant area for





the purposes of the delimitation. The relevant area thus identified measures approximately 164,500 sq km (see below, p. 215, sketch-map No. 18).

(b) *Provisional equidistance line*

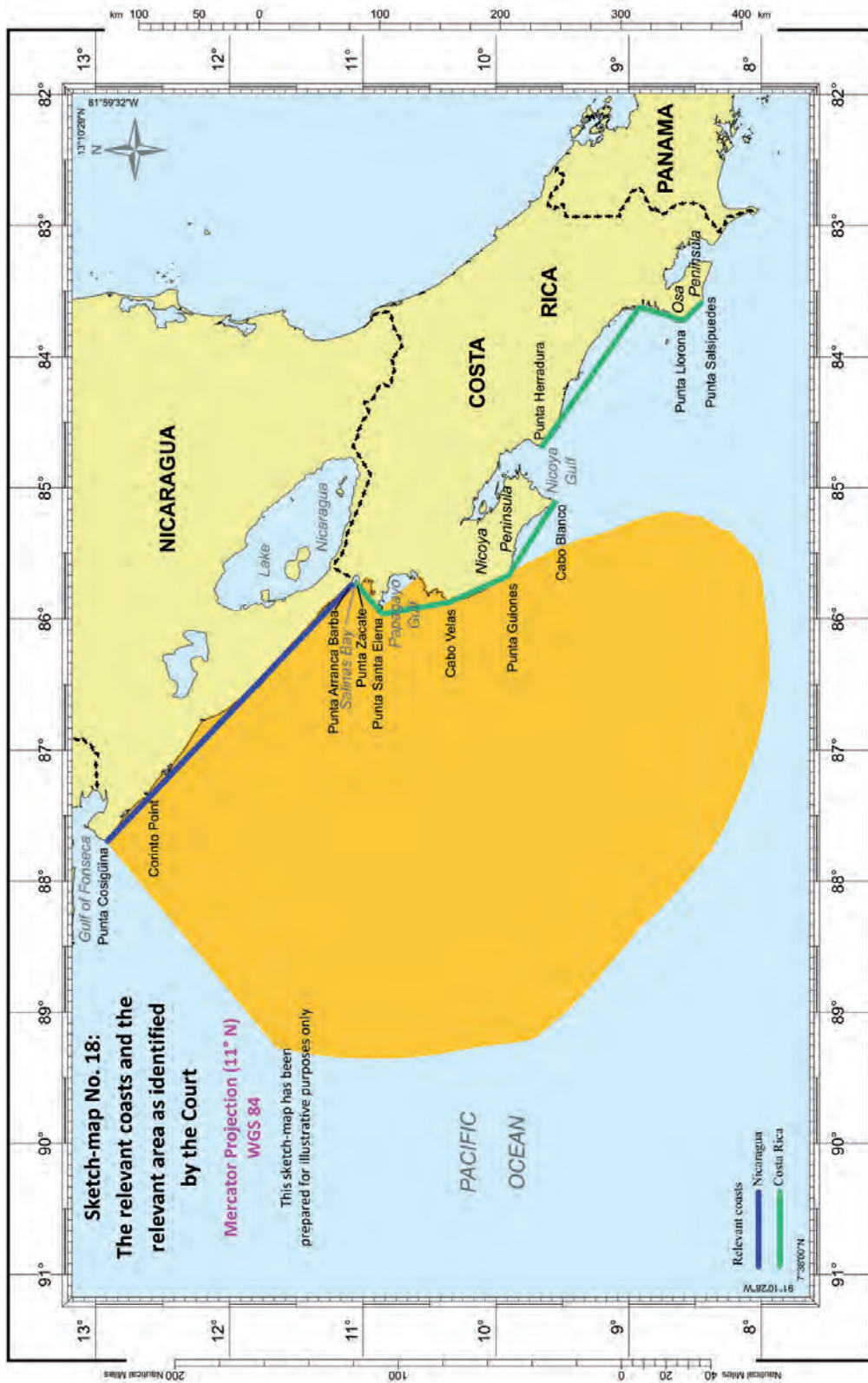
186. In order to draw the provisional equidistance line in the exclusive economic zone and on the continental shelf, Costa Rica identifies on its own coast a number of base points on the Santa Elena Peninsula, located on the features called Punta Blanca and Punta Santa Elena. In addition, Costa Rica identifies one base point on the Nicoya Peninsula, located on Cabo Velas, which controls the provisional equidistance line starting at a point situated at approximately 120 nautical miles from the coast of the Parties. On Nicaragua's coast, Costa Rica identifies a number of base points in the vicinity of Punta Sucia, Punta Pie del Gigante and Punta Masachapa. Costa Rica submits that its provisional equidistance line and the Nicaraguan provisional equidistance line are not materially different.

187. Nicaragua agrees that the base points selected by Costa Rica on the Nicaraguan coast faithfully reflect the macro-geography of the area. However, Nicaragua notes that, were it not for the existence of the Nicoya Peninsula, the provisional equidistance line would be essentially perpendicular to the general direction of the coast of the Parties. Nevertheless, Nicaragua's provisional equidistance line does not differ from that suggested by Costa Rica. Nicaragua notes that disagreements between the Parties on the maritime delimitation in the Pacific Ocean do not relate to the first stage of the delimitation process, which concerns the drawing of a provisional equidistance line.

*

188. The Court is satisfied that the base points selected by the Parties are appropriate for drawing a provisional equidistance line in the Pacific Ocean. 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 (see paragraph 175 above), and thence it shall follow a series of geodetic lines connecting the points having the following co-ordinates in WGS 84 datum:

<i>Turning point</i>	<i>Latitude north</i>	<i>Longitude west</i>
Kx (endpoint of the delimitation of the territorial sea)	11° 05' 49.5"	86° 01' 21.7"
1	11° 05' 51.0"	86° 04' 44.7"
2	11° 06' 18.2"	86° 07' 06.2"
3	11° 05' 08.3"	86° 17' 40.0"
4	11° 04' 26.2"	86° 21' 45.0"
5	11° 03' 51.5"	86° 24' 18.7"
6	10° 56' 41.7"	86° 45' 05.0"



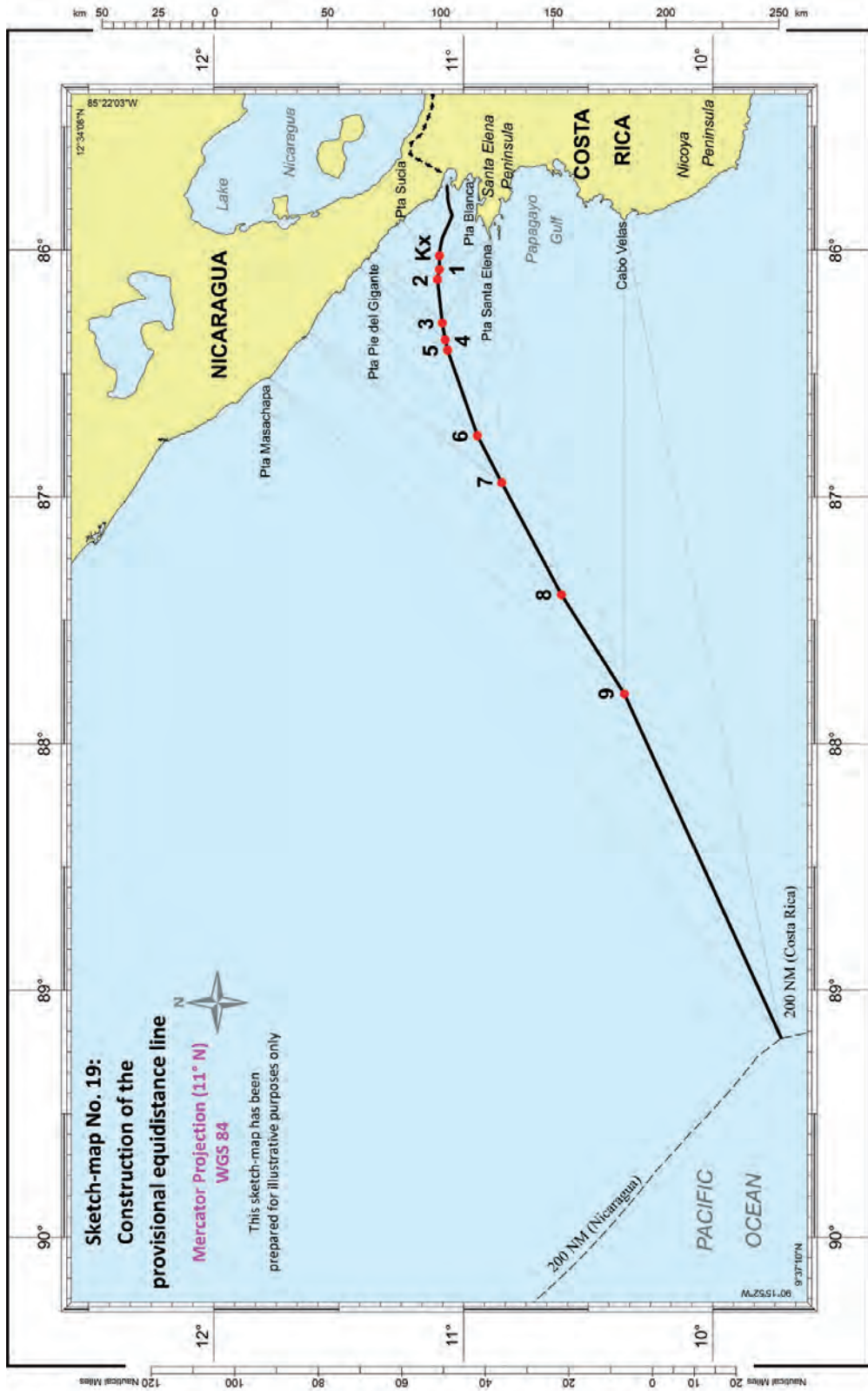
<i>Turning point</i>	<i>Latitude north</i>	<i>Longitude west</i>
7	10° 50' 50.5"	86° 56' 32.2"
8	10° 36' 27.5"	87° 23' 48.0"
9	10° 21' 17.1"	87° 47' 54.5"

189. From point 1 to point 8, the provisional equidistance line is controlled, on Costa Rica's side, by the base points located on the Santa Elena Peninsula. At point 9 the provisional equidistance line begins to be controlled by the base point located on Cabo Velas, on the Nicoya Peninsula. From point 9, the provisional equidistance line continues along the geodetic line starting at an azimuth of 245° 38' 27.4" until it reaches the 200-nautical-mile outer limit of the exclusive economic zone of the Parties (see below, p. 217, sketch-map No. 19).

(c) *Adjustment to the provisional equidistance line*

190. Costa Rica argues that the question whether it is necessary to adjust the provisional equidistance line should be assessed by reference to coastal geography. Costa Rica maintains that there is no relevant circumstance which could justify an adjustment of the provisional equidistance line in the Pacific Ocean. Costa Rica submits that the Santa Elena Peninsula and the Nicoya Peninsula are significant geographical features which are not capable of producing an inequitable effect by distorting the provisional equidistance line to the detriment of Nicaragua. Costa Rica asserts that the Nicoya Peninsula, which is an area of approximately 7,500 sq km and has approximately 264,000 inhabitants, is an example of a substantial geographical feature that cannot be refashioned by giving it less than full effect in establishing the maritime boundary between the Parties in the Pacific Ocean. Costa Rica also contends that the disparity between the length of the relevant coasts of the Parties is not sufficiently marked to require adjusting the provisional equidistance line, and that there is no coastal concavity that inequitably cuts off Nicaragua's coastal projections. Therefore, Costa Rica requests the Court to refrain from making any adjustment of the provisional equidistance line.

191. Nicaragua agrees with Costa Rica that the relevant circumstances which might justify the adjustment of the provisional equidistance line could be generally geographical in character. Nicaragua contends that the provisional equidistance line in the Pacific Ocean produces a marked and unjustified cut-off of its coastal projections. According to Nicaragua, the direction of the coasts of the Santa Elena Peninsula and of the Nicoya Peninsula does not correspond to the general direction of Costa Rica's coast. Nicaragua considers that placing base points on these features leads to a provisional equidistance line which veers to the north, thus cutting off Nicaragua's coastal projections. Nicaragua argues that placing base points on the Santa Elena Peninsula and on the Nicoya Peninsula would excessively distort the provisional equidistance line were it not adjusted. Nica-



ragua contends that an equitable solution in respect of the exclusive economic zone and the continental shelf could be achieved by giving half effect both to the Santa Elena Peninsula and to the Nicoya Peninsula.

*

192. The arguments of the Parties concerning the adjustment of the provisional equidistance line pertain to two distinct issues: first, whether the existence of the Santa Elena Peninsula results in an inequitable cut-off of Nicaragua's coastal projections; second, whether the existence of the Nicoya Peninsula similarly creates an inequitable cut-off of Nicaragua's coastal projections.

193. The Santa Elena Peninsula is a protrusion lying close to the starting-point of the maritime boundary between the Parties. The Court has already found that the effect produced by the Santa Elena Peninsula within the territorial sea does not justify an adjustment of the provisional median line within 12 nautical miles (see paragraph 174 above). However, 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. The Court also considers that, beyond the territorial sea, the effect of the Santa Elena Peninsula on the provisional equidistance line results in a significant cut-off of Nicaragua's coastal projections. In the view of the Court, this cut-off effect is inequitable.

194. Therefore, the Court finds it appropriate to adjust the provisional equidistance line for the exclusive economic zone and the continental shelf. In doing so, the Court is mindful of the requirement that delimitation in the exclusive economic zone and on the continental shelf shall "achieve an equitable solution" in accordance with Articles 74 and 83 of UNCLOS. The Court recalls that any adjustment effected to remedy an inequitable cut-off to the detriment of Nicaragua must not create an inequitable cut-off to the detriment of Costa Rica (see *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012 (II), p. 704, para. 216). In the circumstances of the present case, the Court considers that an appropriate method to abate the cut-off of Nicaragua's coastal projections created by the presence of the Santa Elena Peninsula is to give half effect to that peninsula. In the view of the Court, this decision contributes to the achievement of an equitable solution.

195. The Court recalls that the Nicoya Peninsula is a feature with a large landmass, corresponding to approximately one-seventh of Costa Rica's territory, and with a large population (see paragraph 190 above). The coast of the Nicoya 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 has drawn the provisional equidistance line using Cabo Velas, located on the Nicoya Peninsula, as a base point. Cabo Velas controls the equidistance line for approximately 80 nautical miles, from a point located at approximately 120 nautical miles from the coast of the Parties to the endpoint of the maritime boundary in the Pacific Ocean (see paragraphs 188-189 above).

196. In *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, the Chamber of the Court rejected proposals to give less than full effect to certain substantial mainland features. The Chamber stated that:

“the Parties have repeatedly charged each other with trying to refashion nature or geography in the case of this or that feature of the area. It is not possible to accept the United States claim that the south-westward protrusion of the Nova Scotian peninsula from the Chignectou isthmus is an anomaly, a geographical distortion to be treated as such, and to be considered an irregular derogation from the general south-south-west/north-north-east trend of the eastern seaboard of the North American Continent. It is likewise not possible to accept Canada's claim that the existence of so substantial a peninsula as Cap[e] Cod may be ignored because it forms a salient on the Massachusetts coast on the western side of the Gulf of Maine. The Chamber must recall that the facts of geography are not the product of human action amenable to positive or negative judgment, but the result of natural phenomena, so that they can only be taken as they are.”
(*Judgment, I.C.J. Reports 1984*, p. 271, para. 37.)

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, it cannot be given less than full effect in delimiting the boundary in the exclusive economic zone and on the continental shelf.

197. Furthermore, it is well established that, in delimiting maritime boundaries, the Court cannot disregard the geographical realities of the case before it. In *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, the Court stated that:

“[e]quity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the

same plane, and it is not such natural inequalities as these that equity could remedy.” (*Judgment, I.C.J. Reports 1969*, pp. 49-50, para. 91.)

198. The Court considers that, in order to achieve an equitable solution, the provisional equidistance line must be adjusted by giving half effect to the Santa Elena Peninsula. Since placing base points on the Nicoya Peninsula does not lead to an inequitable solution, the Court also finds that no adjustment is necessary on account of the presence of the Nicoya Peninsula. The Court is of the view that its decision ensures the achievement of an equitable solution in accordance with Articles 74 and 83 of UNCLOS.

199. In order to make this adjustment, the Court has drawn two lines, one giving full effect and one giving no effect to the Santa Elena Peninsula for the exclusive economic zone and the continental shelf (see below, p. 222, sketch-map No. 20). Both the full effect and the no effect lines start at the point at which the boundary in the territorial sea terminates (see paragraph 175 above). The line giving full effect to the Santa Elena Peninsula corresponds to the provisional equidistance line already drawn by the Court and described at paragraphs 188-189 above. The line giving no effect to the Santa Elena Peninsula is obtained by discounting the Costa Rican base points located on the Santa Elena Peninsula, while retaining the other base points on Costa Rica’s coast. The Court has then drawn a line whose course lies midway between the full effect line and the no effect line, which corresponds to the provisional equidistance line adjusted to give half effect to the Santa Elena Peninsula.

200. 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 (point Kx described in paragraph 175 above), established using the base points mentioned in paragraphs 186-188 above, and subsequently adjusted as described in paragraphs 198-199 above. The maritime boundary in the exclusive economic zone and on the continental shelf shall therefore follow a series of geodetic lines connecting the points having the following co-ordinates in WGS 84 datum:

<i>Turning point</i>	<i>Latitude north</i>	<i>Longitude west</i>
Kx (endpoint of the delimitation of the territorial sea)	11° 05' 49.5"	86° 01' 21.7"
1'	11° 04' 44.6"	86° 04' 45.2"
2'	11° 04' 42.6"	86° 04' 52.0"
3'	11° 04' 41.0"	86° 04' 58.5"
4'	11° 04' 11.6"	86° 07' 11.4"
5'	11° 00' 25.1"	86° 16' 59.0"
6'	10° 58' 53.3"	86° 20' 37.2"
7'	10° 57' 59.5"	86° 22' 36.3"
8'	10° 57' 30.0"	86° 23' 33.0"

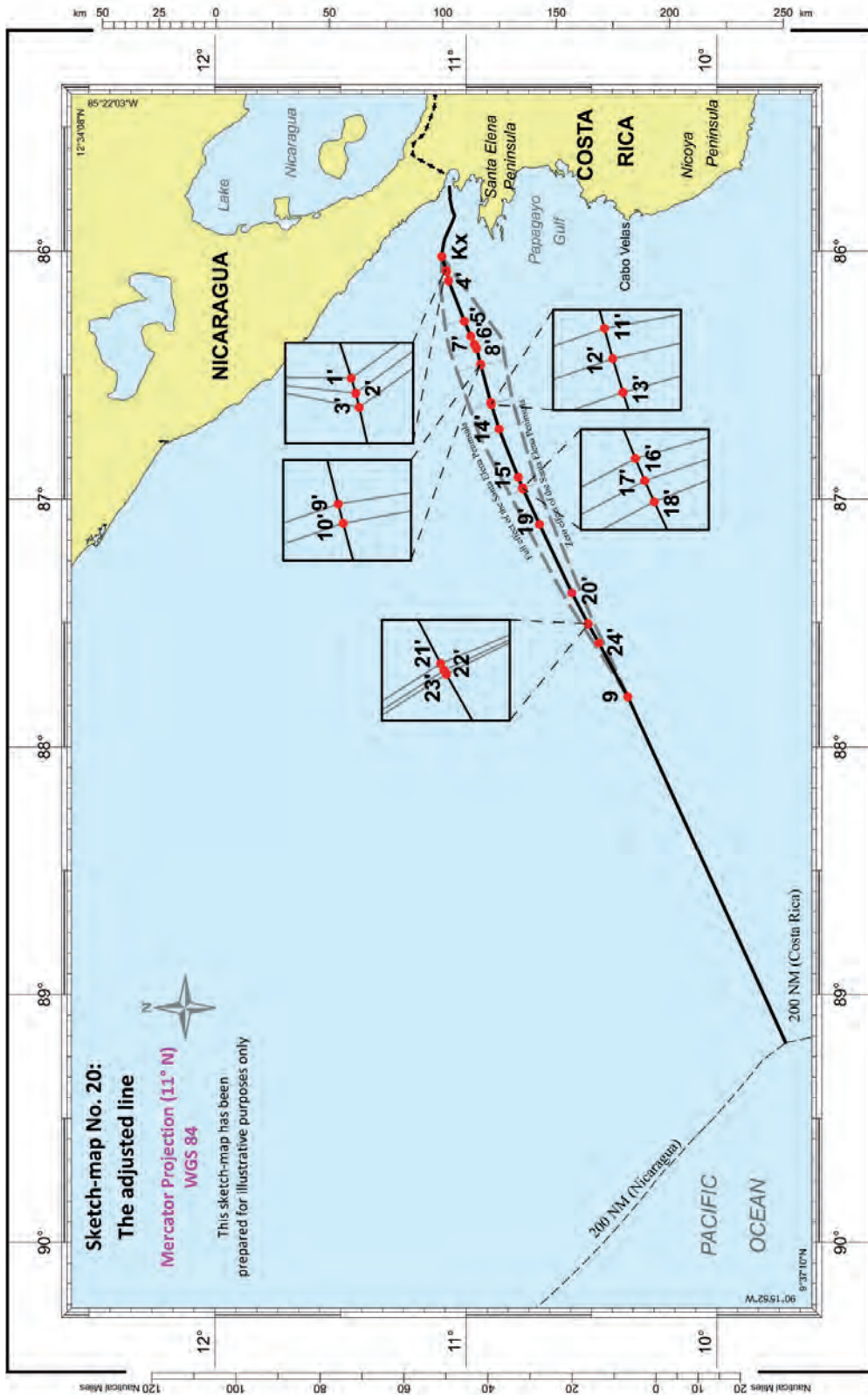
<i>Turning point</i>	<i>Latitude north</i>	<i>Longitude west</i>
9'	10° 56' 32.8"	86° 27' 24.2"
10'	10° 56' 30.5"	86° 27' 33.0"
11'	10° 54' 07.7"	86° 36' 39.6"
12'	10° 54' 03.9"	86° 36' 53.4"
13'	10° 53' 59.3"	86° 37' 08.7"
14'	10° 52' 07.4"	86° 43' 05.5"
15'	10° 47' 32.1"	86° 54' 46.9"
16'	10° 46' 31.9"	86° 57' 17.5"
17'	10° 46' 27.7"	86° 57' 27.6"
18'	10° 46' 23.5"	86° 57' 37.2"
19'	10° 42' 27.4"	87° 06' 09.7"
20'	10° 34' 41.9"	87° 22' 45.7"
21'	10° 30' 50.2"	87° 30' 16.1"
22'	10° 30' 48.6"	87° 30' 19.2"
23'	10° 30' 47.6"	87° 30' 20.9"
24'	10° 28' 13.7"	87° 34' 56.4"
9 (last turning point, same as last turning point on provi- sional equidistance line)	10° 21' 17.1"	87° 47' 54.5"

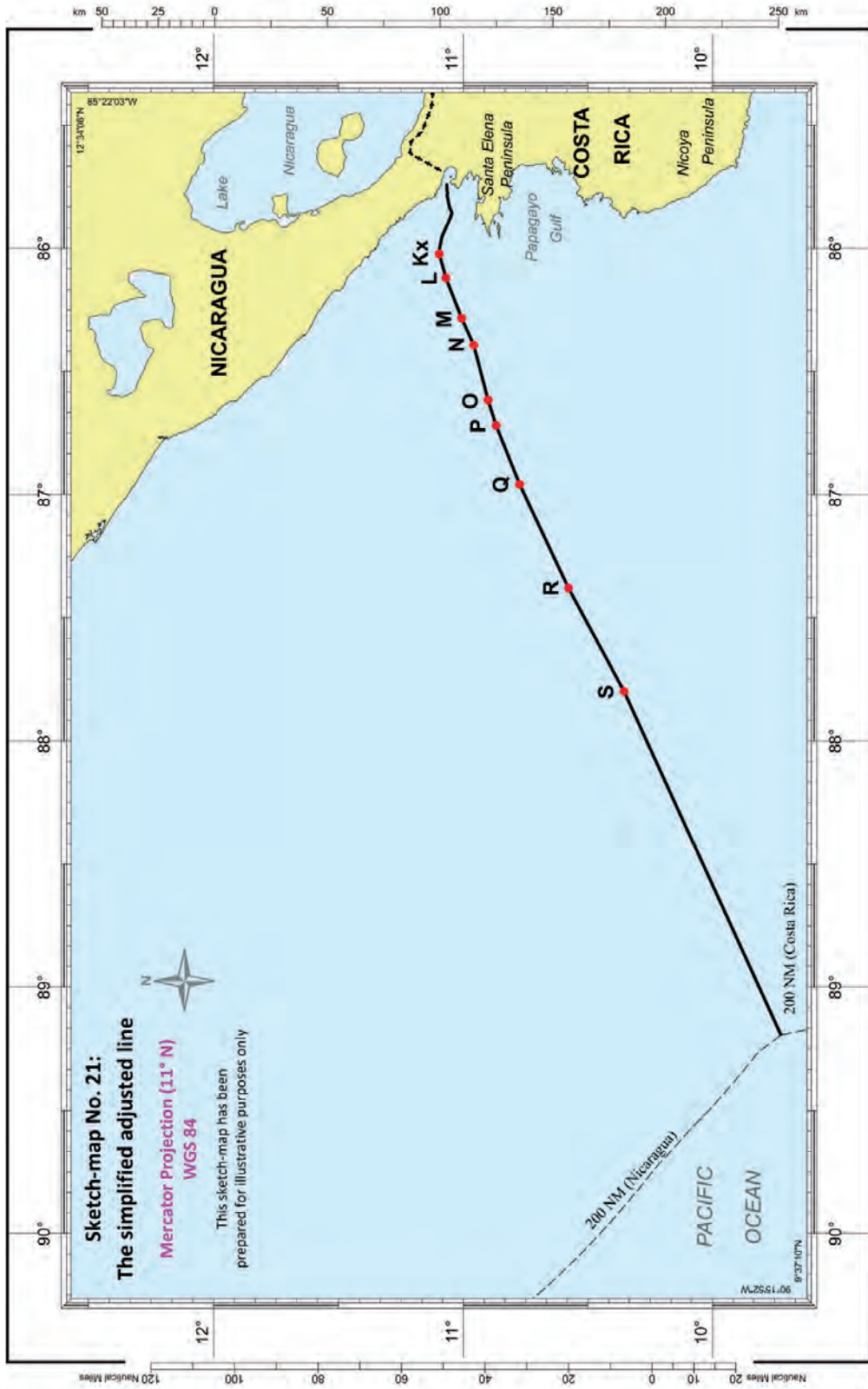
From point 9, the adjusted line continues along the geodetic line starting at an azimuth of 245° 38' 27.4" until it reaches the 200-nautical-mile outer limits of the exclusive economic zones of the Parties (see below, p. 222, sketch-map No. 20).

201. Given the complexity of the line described in the previous paragraph, 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 composed of the points with the following co-ordinates in WGS 84 datum:

<i>Turning point</i>	<i>Latitude north</i>	<i>Longitude west</i>
Kx (endpoint of the delimitation of the territorial sea)	11° 05' 49.5"	86° 01' 21.7"
L	11° 04' 11.6"	86° 07' 11.4"
M	11° 00' 25.1"	86° 16' 59.0"
N	10° 57' 30.0"	86° 23' 33.0"
O	10° 54' 03.9"	86° 36' 53.4"
P	10° 52' 07.4"	86° 43' 05.5"
Q	10° 46' 27.7"	86° 57' 27.6"
R	10° 34' 41.9"	87° 22' 45.7"
S	10° 21' 17.1"	87° 47' 54.5"

From point S, the delimitation line continues along the geodetic line starting at an azimuth of 245° 38' 27.4" until it reaches the 200-nautical-mile line (see below, p. 223, sketch-map No. 21).





(d) *Disproportionality test*

202. The Court now turns to the disproportionality test, which is the third stage of the methodology for the delimitation of maritime boundaries in the exclusive economic zone and on the continental shelf (see paragraphs 159-161 above).

203. The relevant coast of Costa Rica in the Pacific Ocean is 416.4 km long (see paragraph 181 above), and the relevant coast of Nicaragua in the Pacific Ocean is 292.7 km long (see paragraph 180 above). 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 (see paragraphs 184-185 above) 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 (see paragraph 201 above) achieves an equitable solution in accordance with Articles 74 and 83 of UNCLOS.

204. Consequently, the delimitation concerning the exclusive economic zone and the continental shelf between the Parties in the Pacific Ocean shall follow the line described in paragraph 201 above.

* * *

205. For these reasons,

THE COURT,

(1) By fifteen votes to one,

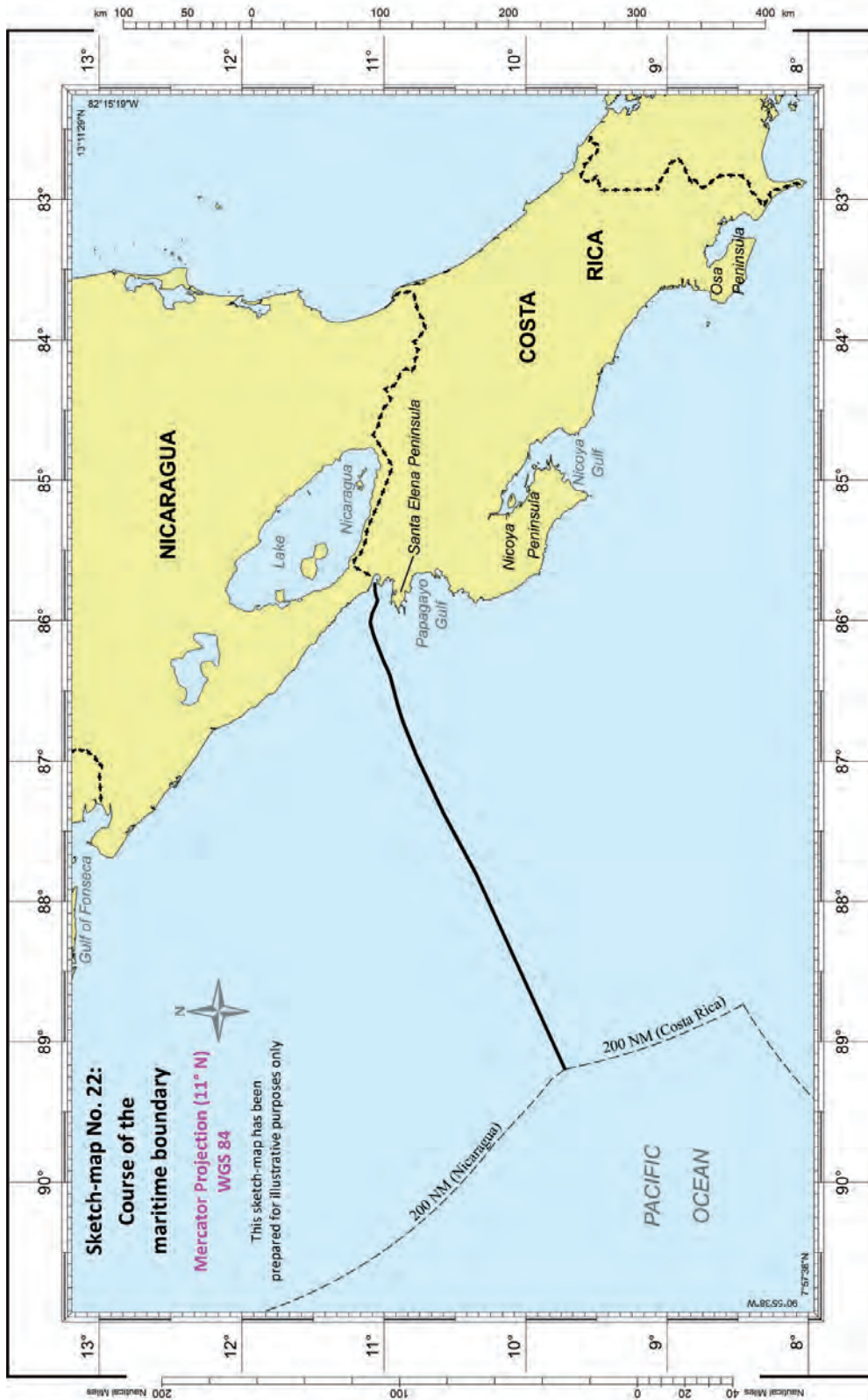
Finds that the Republic of Nicaragua's claim concerning sovereignty over the northern coast of Isla Portillos is admissible;

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.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this second day of February, two thousand and eighteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Costa Rica and the Government of the Republic of Nicaragua, respectively.

(*Signed*) Ronny ABRAHAM,
President.

(*Signed*) Philippe COUVREUR,
Registrar.

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.

(Initialed) R.A.

(Initialed) Ph.C.

DECLARATION OF JUDGE TOMKA

[English Original Text]

Search for an equitable solution in the delimitation of the exclusive economic zone and the continental shelf — Need to avoid a pronounced cut-off effect of the maritime boundary line — Adjustment of the provisional equidistance line — Appropriate balancing of the entitlements of the Parties.

1. Although I have voted in favour of all of the findings of the Court, I am not fully satisfied with the way in which the Court has determined the maritime boundary between the Parties in the Caribbean Sea. In my view, the first segment of the maritime boundary as determined by the Court produces a cut-off effect for a non-negligible — indeed a substantial — part of the Nicaraguan concave coast in the Bahía de San Juan del Norte.

2. The applicable law for the delimitation of the exclusive economic zone and the continental shelf between Costa Rica and Nicaragua, both States being party to the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”), is to be found in its Articles 74 and 83 respectively. These almost identical provisions (the only difference being that Article 74 refers to the exclusive economic zone while Article 83 refers to the continental shelf) stipulate that:

“1. The delimitation of the [exclusive economic zone/continental shelf] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV . . .”.

3. Being of a very general nature, these provisions do not provide clear guidance. States are expected to negotiate with the aim of agreeing on a delimitation of the exclusive economic zone and the continental shelf which achieves “an equitable solution”. What is “equitable” is a matter of their perception. But once they reach agreement, they are deemed to be satisfied that they have achieved such “an equitable solution”. Should they, however, be unable to agree, they are to refer the unresolved issue of their maritime boundary to dispute settlement procedures. Where the Court is chosen as the forum for the settlement of that dispute, its function in fact substitutes for that which originally appertained to the States concerned, namely the reaching of “an equitable solution”. In practical

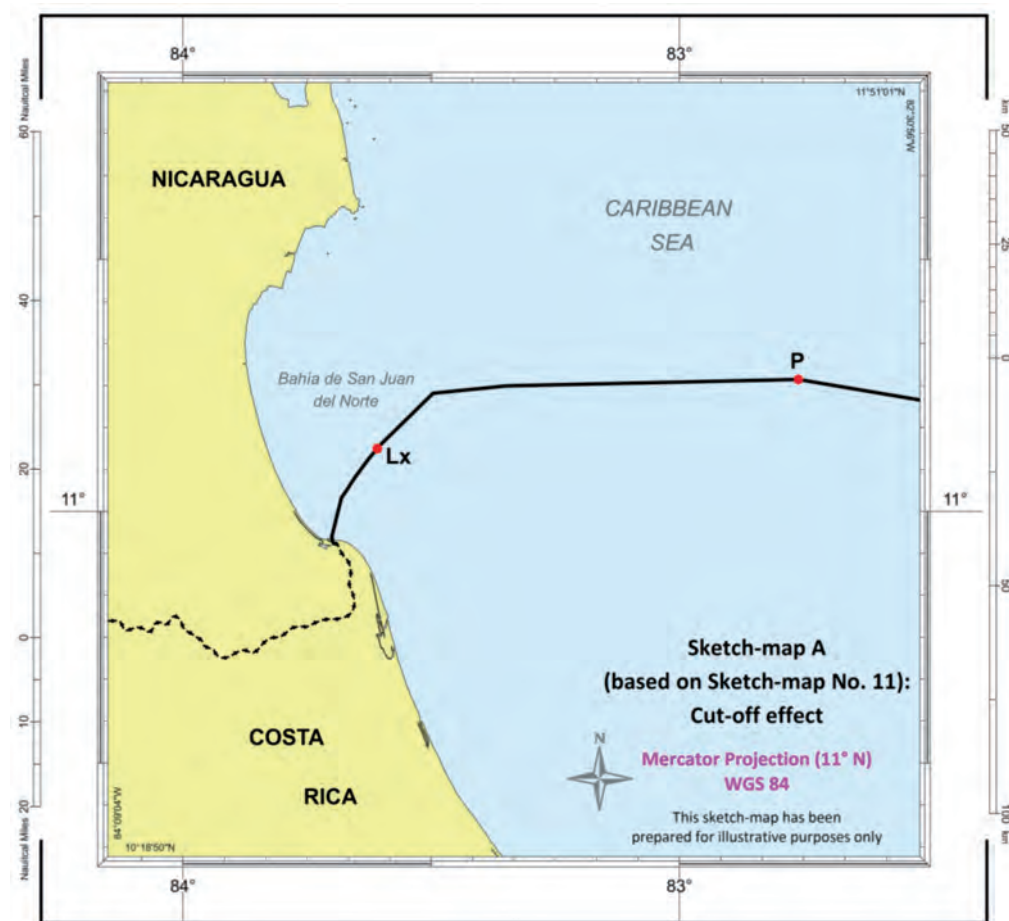
terms, the outcome will be a delimitation line upon which a majority of the Judges sitting are able to agree.

4. That exercise could lead to a result which, although binding on the parties, may be more or less convincing. The Court has elaborated its jurisprudence in order to provide guidance on how maritime delimitation should be undertaken, always with the aim of reaching “an equitable solution”. According to that jurisprudence, a boundary line should not lead to a cut-off of the maritime projections of the coast of one of the parties (see *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Judgment*, *I.C.J. Reports 2012 (II)*, pp. 703-704, paras. 215-216). As the Court stated in *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, the line drawn by it should allow “the adjacent coasts of the Parties to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way” (*Judgment*, *I.C.J. Reports 2009*, p. 127, para. 201). When required in order to achieve “an equitable solution”, the Court has considered that provisional equidistance line which produces a cut-off is to be adjusted (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Judgment*, *I.C.J. Reports 2012 (II)*, pp. 703-704, para. 215). Similarly, the International Tribunal for the Law of the Sea, considering the coast of one of the parties “decidedly concave” and causing the provisional equidistance line to produce “a pronounced cut-off effect on the southward maritime projection of [its] coast”, qualified this as “a relevant circumstance, requiring an adjustment of the provisional equidistance line” (*Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh /Myanmar)*, *Judgment*, *ITLOS Reports 2012*, p. 87, paras. 323-324).

5. In my view, the Court, in the present case, has not fully succeeded in avoiding the cut-off effect generated by the first part of the delimitation line in the Caribbean Sea. As illustrated on the following sketch-map A (p. 230), which is an enlargement based on sketch-map No. 11 in the Court’s Judgment, the delimitation line runs as follows.

6. This sketch-map reveals that the initial part of the delimitation line has the effect of cutting off Nicaragua’s coastal projections (not only employing radial projections, but also employing frontal projections) as they relate to almost half of its significant concave coast in the Bahía de San Juan del Norte. I do not consider this solution as fully equitable. The Court should have undertaken some adjustment of the line relating to the exclusive economic zone and the continental shelf to alleviate this cut-off. In my view, an appropriate adjustment of the boundary line would have been to join point Lx (the endpoint of the maritime boundary line in the territorial sea) to point P (marked on sketch-map A) by a straight line.

7. This adjustment would have better served the purpose of balancing more appropriately the entitlements of both Parties and reaching a more equitable overall solution, particularly since the Court decided “not [to]



take into account any entitlement which might result from” the sandbar separating Harbor Head Lagoon from the Caribbean Sea (Judgment, para. 105). Sovereignty over that sandbar and lagoon appertain to Nicaragua (*ibid.*, para. 205, subpara. (2)). The Court, without making any finding as to whether the sandbar generates any maritime entitlement for Nicaragua, simply observes 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” (*ibid.*, para. 105). While one can perhaps understand this pragmatic approach, one could also have expected a more balanced approach by the Court when it dealt with the impact of the pronounced concave Nicaraguan coast in the Bahía de San Juan del Norte, in combination with the short convex Costa Rican coast immediately adjacent thereto.

(Signed) Peter TOMKA.

SEPARATE OPINION OF JUDGE XUE

1. Notwithstanding my vote on subparagraph (4) of the operative part of the Judgment, I wish to place on record my disagreement 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* case.

2. First of all, I am 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).

3. In this joint case, 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. The Parties do not disagree that the 1858 Treaty of Limits, the Cleveland Award and the Alexander Awards constitute the legal basis for the determination of the land boundary between the two countries. Notwithstanding the continuous geographical changes in the Isla Portillos in the course of the last one and half centuries, the provisions of the 1858 Treaty and the terms of the arbitral awards remain applicable. In other words, the starting-point of the land boundary has to be determined on the basis of these legal documents.

4. By its Order of 31 May 2016, the Court decided to appoint two experts to conduct site visits to the coast of the northern part of Isla Portillos and to advise the Court regarding 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. The Court put the following questions for the experts to answer:

- “(a) What are the geographical co-ordinates of the point at which the right bank of the San Juan River meets the sea at the low-water line?
- (b) What are the geographical co-ordinates of the land point which most closely approximates to that identified by the first Alexander Award as the starting-point of the land boundary?
- (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? Is Los Portillos/Harbor Head Lagoon separated from the sea?

- (d) To what extent is it possible, or probable, that the area concerned will undergo major physical changes in the short and long term?" (*Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, Order of 31 May 2016, *I.C.J. Reports 2016 (I)*, pp. 237-238.)

5. In their report, the Court-appointed experts located the original starting-point of the land boundary, now submerged under the sea, in accordance with the terms of the 1858 Treaty and the arbitral awards, and marked the geographical co-ordinates of the land point which most closely approximates to that identified by the first Alexander Award as the starting-point of the land boundary.

6. The experts' report 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 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.

7. In the present Judgment, the Court considers that it has 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*, where 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" (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, *I.C.J. Reports 2015 (II)*, p. 703, para. 92). A closer perusal of the relevant paragraphs of the 2015 Judgment shows that this interpretation of the said Judgment is questionable.

8. In the first place, the location of the starting-point of the land boundary did not fall within the scope of the jurisdiction of the Court in that case. That issue depends on the determination of the sovereignty over the coast of the northern part of Isla Portillos. If the coast belonged to Nicaragua, the land boundary should extend eastward to Harbor Head Lagoon; otherwise, the boundary would start at the mouth of the river on the western side of Isla Portillos. In the present case, the question whether the watercourse that channelled the San Juan River and Harbor Head Lagoon still bears on who has the sovereignty over the coast of the northern part of Isla Portillos. By interpreting paragraphs 69 and 70 of the

2015 Judgment, the Court states that, “no decision was taken by the Court 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 conclusion means that the status of the last segment of the land boundary including its starting-point, as determined by General Alexander, was yet to be determined.

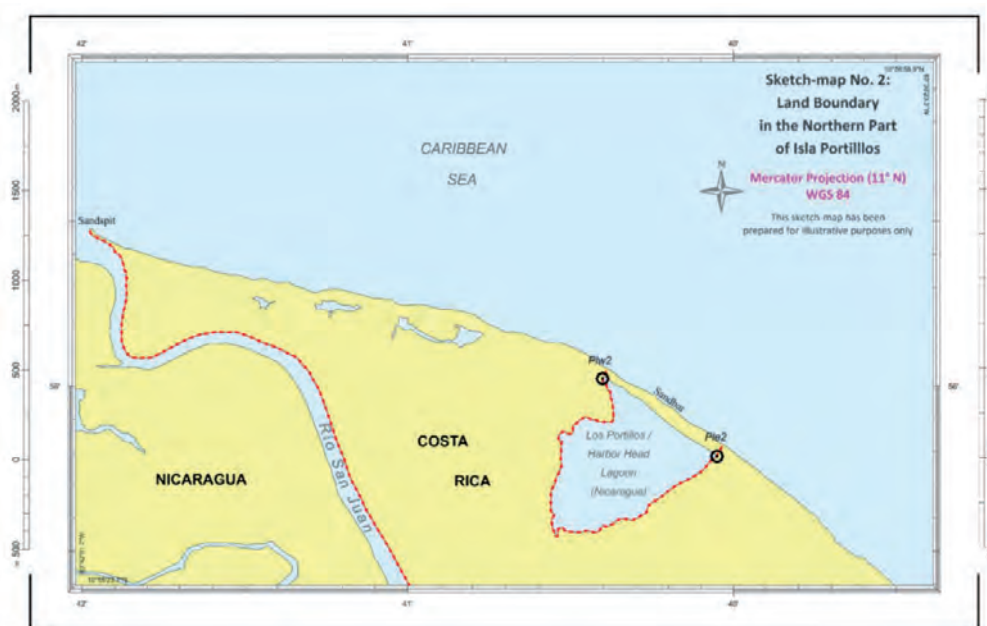
9. Moreover, should the Court have determined the starting-point of the land boundary as at the mouth of the San Juan River in the 2015 Judgment, it would not have been reasonable for the Court to instruct the experts to relocate the original starting-point of the land boundary and to find the geographic co-ordinates of the land point that most closely approximates to the original starting-point identified by General Alexander, because the boundary would follow the natural course of the San Juan River to the sea and it would be pointless to identify these points.

10. 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. Although it was mentioned that “[t]he ownership of any accretion to said Punta de Castilla is to be governed by the laws applicable to that subject” (see 1888 Cleveland Award, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVIII, p. 209), the situation of what now stands as partial disappearance of the watercourse was not envisaged.

11. It is true that General Alexander made it clear that in the practical interpretation of the 1858 Treaty, the San Juan River must be considered a navigable river. However, 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.

12. When the Court, on the basis of the experts’ report, 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 (see sketch-map No. 2 of the Judgment, reproduced below, p. 234).

13. The Court’s decision that Harbor Head Lagoon and the sandbar separating it from the Caribbean Sea are under Nicaragua’s sovereignty (Judgment, para. 73) 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.

14. 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 (e.g. Anzilotti, Bardonnnet, Bouchez, Caffisch)¹. In the present case, so far as the land boundary is concerned, there are two relevant factors that should be taken into account. First, the starting-point of the land boundary, even after being relocated, remains in an unstable situation. As the experts pointed out in their report,

“the position of the mouth of the San Juan River experiences continuous variations, mainly related to changes in the spit of Isla Portillos, i.e., westward growth by accumulation of sand and destruction by erosion (. . .). The growth of the spit by sediment accretion is a progressive process, whereas its destruction, including the opening of channels, may occur rapidly by strong waves (e.g., hurricanes) and floods of the San Juan River. Consequently, the mouth of the San Juan

¹ D. Bardonnnet, “Frontières terrestres et frontières maritimes”, *Annuaire français de droit international*, Vol. 35, 1989, pp. 10-11, citing D. Anzilotti’s 1914 study of State practice published in the *Rivista italiana di diritto internazionale*; L. J. Bouchez, “The Fixing of Boundaries in International Boundary Rivers”, *International and Comparative Law Quarterly*, Vol. 12, 1963, p. 807; L. Caffisch, «Règles générales du droit des cours d’eau internationaux», *Recueil des cours de l’Académie de droit international de La Haye*, Vol. 219, 1989, p. 82.

River and its right bank are *highly mobile*.” (Report of the Court-Appointed Experts, 30 April 2017, p. 42, para. 117; emphasis added.)

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. Secondly, 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. Whether Harbor Head Lagoon and its frontal sandbar would eventually disappear as a result of coastal recession, as claimed by Costa Rica, the enclave, as it currently stands, should form part of the geomorphological circumstances of the coast for the maritime delimitation, a point I now turn to.

15. The location of the starting-point of the land boundary is not a hard issue. So far as the land boundary is concerned, it does not matter where to locate its starting-point; whether it is identified at the eastern headland of Harbor Head Lagoon, or at the mouth of the San Juan River as a result of the disappearance of the water channel, the boundary continues to serve its purposes well despite the break-up of the initial segment of the boundary. What matters in this case is the impact of the coastal change on 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, it 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. That is to say, to use the point suggested by Nicaragua as the starting-point of the maritime boundary, Costa Rica’s coast would be cut off from the sea. To use the point suggested by Costa Rica, on the other hand, there would also be some cut-off effect on Nicaragua’s enclave.

16. The Court stated 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).

In the present case, 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.

17. I agree 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. I doubt, however, 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. This is because, first, that point is equally unstable and secondly, little consideration is given to Nicaragua's access to Harbor Head Lagoon.

18. 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 my opinion, this is not a convincing reasoning to ignore Nicaragua's entitlement from the enclave, no matter how small it is.

19. The prevailing geographical phenomenon of the coast is instability. In considering the special circumstances in the delimitation of the territorial sea, the Court does not attach much importance to the experts' advice that the overall coast will undergo continuous changes due to coastal erosion and whether the mouth of the San Juan River would move further westwards or eastwards is unpredictable. Indeed, the Court cannot base its decision on the prediction of future changes, but on the factual situation of today. To treat the enclave as negligible, however, in my view, cannot be regarded as "a special solution".

20. 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, the starting-point of the maritime delimitation, in my opinion, can be detached from the starting-point of the land boundary. To provide access to Harbor Head Lagoon for Nicaragua, in light of the geographical situation of the coast, 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, 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 (see, for example, *Territorial and Mar-*

itime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007 (II), p. 756, para. 311; Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau, Award of 14 February 1985, United Nations, RIAA, Vol. XIX, pp. 149-196).

(Signed) XUE Hanqin.

DECLARATION OF JUDGE SEBUTINDE

Application of the principle of res judicata as reflected in Articles 59 and 60 of the Statute of the Court — Neither the precise course of the land boundary in the northern part of Isla Portillos, nor the issue of sovereignty over the beach of Isla Portillos, were definitively settled with the force of res judicata in the Court’s Judgment of 16 December 2015 — In determining the present course of the land boundary in the northern part of Isla Portillos, the Court should do so in reference to the 1858 Treaty of Limits as interpreted by the Cleveland and Alexander Awards and taking account of the geomorphic changes that have since occurred in the area — The resultant land boundary comprises two distinct sectors with three termini.

I. INTRODUCTION

1. I have voted with the majority in favour of all aspects of the operative clause (para. 205) of the present Judgment. However, there are aspects of the Court’s reasoning that in my view, do not adequately or fully reflect all the issues involved in reaching the Court’s decision particularly in the case concerning the *Land Boundary in the Northern Part of Isla Portillos* (Part III of the Judgment). First, whilst I agree with the Court’s conclusion in paragraph 69 that the issue of sovereignty over the coast of Isla Portillos was not a question definitively decided with the force of *res judicata* in the Court’s Judgment of 16 December 2015 (“2015 Judgment”) in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*¹, the present Judgment (paras. 59-69) omits to mention another important and related issue between the Parties, namely, whether or not the Court determined with the force of *res judicata*, the course of the land boundary in the northern part of Isla Portillos in the Court’s Judgment of 2015. In my view, this latter aspect, which is one of the issues that divide the Parties, should clearly have been addressed in the present Judgment. I endeavour to do so in this declaration.

2. Secondly, whilst I agree with the Court’s depiction of the course of the land boundary in the northern part of Isla Portillos shown in

¹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), p. 665.

sketch-map No. 2 of the Judgment, the Court's reasoning contained in paragraphs 70-73 of the present Judgment does not, in my view, adequately explain the geomorphic changes that have occurred in the area or their effect upon the original land boundary in the said area, as described in the 1858 Treaty of Limits and interpreted by President Cleveland and General Alexander. I endeavour to do so in greater detail in this declaration.

II. EFFECT OF THE *CERTAIN ACTIVITIES* JUDGMENT OF 16 DECEMBER 2015 AND *RES JUDICATA*

3. Presently, both Parties claim sovereignty over the three-kilometre-long beach/coast of Isla Portillos abutting the Caribbean Sea, between Harbor Head Lagoon and the mouth of the San Juan River, including the location on that beach where Nicaragua's military post is currently stationed. Costa Rica's claim to sovereignty over that beach is premised on the argument that the Court, in its 2015 Judgment in the *Certain Activities* case², already adjudged territorial sovereignty over the said beach to belong to Costa Rica. Consequently, according to Costa Rica, the matter is *res judicata* and all that remains is for the Court (*a*) to determine the precise location of the land boundary separating each end of the Harbor Head Lagoon sandbar from Isla Portillos; (*b*) to enlave the Nicaraguan lagoon and sandbar and (*c*) to declare the presence of Nicaragua's military presence on the beach a violation of Costa Rica's territorial sovereignty³.

4. Nicaragua's claim to sovereignty over the beach of Isla Portillos is premised on its interpretation of the 1858 Treaty of Limits (as interpreted by the Alexander and Cleveland Awards), which it claims granted sovereignty over the said beach, including the current location of its military camp, to Nicaragua. Furthermore, the Respondent disagrees that the issue of the course of the land boundary in the northern part of Isla Portillos is *res judicata*, arguing that the Court in its 2015 Judgment, deliberately excluded the beach in the northern part of Isla Portillos from its definition of "the disputed area, which question remains open for determination in the present proceedings"⁴.

5. The case concerning the *Land Boundary in the Northern Part of Isla Portillos* raises three interrelated issues, namely, (*a*) whether the Court in its 2015 Judgment determined with *res judicata* effect the question of sovereignty over the stretch of beach north of Isla Portillos located between Harbor Head Lagoon and the mouth of the San Juan River and if so, whether by consequence it also determined the course of the land bound-

² *I.C.J. Reports 2015 (II)*, p. 665.

³ See Final Submissions of Costa Rica.

⁴ Counter-Memorial of Nicaragua (CMN), para. 2.3 and Nicaragua's Final Submissions.

ary between the Parties in that area; (b) if not, what is the course of the land boundary between the Parties in the northern part of Isla Portillos taking into account the 1858 Treaty, the relevant Cleveland and Alexander Awards and the geomorphic changes that have since occurred in the area; and (c) whether by stationing its military observation post on the beach of Isla Portillos, Nicaragua is in violation of Costa Rica's territorial sovereignty.

6. The principle that a matter which has been adjudicated and settled by a competent court may not be pursued further by the same parties (*res judicata*) is embodied in the language and structure of Articles 59 and 60 of the Statute of the Court which provide, respectively, that "the decision of the Court has no binding force except between the parties and in respect of that particular case" and that the Court's judgments are "final and without appeal"⁵. The Court has maintained that although the binding element of a judgment is contained in the operative part (*dispositif*) and not the legal reasoning (*motif*), it may be necessary, in order to ascertain what is covered by *res judicata*, to determine the meaning and scope of the operative clause by reference to the reasoning set out in that judgment⁶. The Court further stated that

"in respect of a particular judgment it may be necessary to distinguish between, first, the issues which have been decided with the force of *res judicata*, or which are necessarily entailed in the decision of those issues; secondly any peripheral or subsidiary matters, or *obiter dicta*; and finally matters which have not been ruled upon at all . . . If a matter has not in fact been determined expressly or by necessary implication, then no force of *res judicata* attaches to it; and a general finding may have to be read in context in order to ascertain whether a particular matter is or is not contained in it."⁷

7. In order for a plea of *res judicata* to succeed in the present case, the following elements must be proven to exist, namely, (a) that the Parties in the *Certain Activities* case (the "former case")⁸ are identical to those in the case concerning the *Land Boundary in the Northern Part of Isla*

⁵ *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections (Nigeria v. Cameroon), Judgment, I.C.J. Reports 1999 (I)*, p. 36, para. 12; *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, p. 53; and *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 (I)*, p. 90, para. 116.

⁶ *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 (I)*, p. 95, para. 125.

⁷ *Ibid.*, para. 126.

⁸ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015 (II)*.

Portillos (“the latter case”)⁹ (*eadem personae*); (b) that the dispute or claim in both cases is the same (*eadem petitum*); (c) the legal grounds underlying the dispute or claim in both cases are the same (*eadem causa petendi*); and (d) that the dispute or claim raised in the latter case was, in fact, finally and definitively settled by the Court in the former case¹⁰.

8. The disputed paragraphs (69, 70 and 229) of the 2015 Judgment read 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 that 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).

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

⁹ *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)*.

¹⁰ *Questions 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, I.C.J. Reports 2016 (I)*, p. 126, para. 59.

boundary more precisely with regard to this coast. Accordingly, the Court will refrain from doing so.¹¹ (Emphasis added.)

229. [. . .] THE COURT,

(1) By fourteen votes to two,

Finds that Costa Rica has sovereignty over the ‘disputed territory’, as defined by the Court in paragraphs 69-70 of the present Judgment.”¹²

9. While the Parties involved in the *Certain Activities* case (the former case) are identical to those in the present proceedings (the latter case), none of the other elements required for a plea of *res judicata* to succeed are fulfilled. First, the claim or dispute in the former case (*petitum*) pertained to territorial sovereignty over a particular area of Isla Portillos clearly identified in that case as “the disputed territory” where Nicaragua had carried out the activities complained; while that in the latter case pertains to demarcation of the land boundary between the Parties in a slightly different area and sovereignty over the beach of Isla Portillos. Although the Court discussed the issue of the land boundary between the Parties in the former case, this was only for the purpose of identifying and/or defining the “disputed territory” upon which the activities complained upon were taking place, and not for the purpose of demarcating that land boundary finally or definitively.

10. Second, and more importantly, the Court in paragraph 70 of the 2015 Judgment cited above, deliberately excluded from its definition of the “disputed territory” *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 area now in dispute in the present proceedings, and expressly declined to define the land boundary more precisely with regard to that coast. This was because the Parties in the former case did not provide the Court with detailed information concerning the geographic configuration of the coast, nor did they request the Court to define the land boundary more precisely with regard to that coast¹³. Thus, when the Court adjudged in the operative clause (para. 229) that “Costa Rica has sovereignty over the ‘disputed territory’, as defined by the Court in paragraphs 69-70 of the present Judgment” that area did not include the stretch of coast abutting the Caribbean Sea which lies between the Harbor Head Lagoon and the mouth of the San Juan River, the area now in dispute in the present proceedings, nor did the Court determine the course of the land boundary between the Parties in that area.

¹¹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), pp. 696-697, paras. 69-70.

¹² *Ibid.*, p. 740, para. 229 (1).

¹³ *Ibid.*, p. 697, para. 70.

11. In conclusion, neither the issue of the precise course of the land boundary in the northern part of Isla Portillos, nor the issue of who has sovereignty over the stretch of coast abutting the Caribbean Sea which lies between the Harbor Head Lagoon and the mouth of the San Juan River, were finally or definitively settled in the 2015 Judgment. Accordingly, Costa Rica's plea of *res judicata* on both counts fails and Nicaragua's claim concerning sovereignty over the northern coast of Isla Portillos is admissible.

III. THE COURSE OF THE LAND BOUNDARY IN THE NORTHERN PART OF ISLA PORTILLOS

12. The Parties agree that in the 1858 Treaty of Limits, they agreed on a "shifting boundary" whose course would change with the geography of the area¹⁴. Accordingly, they also agree that the Court should, in determining the present course of the land boundary along the disputed stretch of coast, do so in accordance with the 1858 Treaty of Limits as interpreted by the Alexander and Cleveland Awards, taking into account any relevant geographical changes that may warrant adjustment of the historical boundary¹⁵. The Parties do, however, disagree regarding the extent and effect of those geographical changes on the course of the historical boundary.

13. According to Nicaragua, the Court should maintain the starting-point of the land boundary where it was historically fixed, namely, "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"¹⁶. Nicaragua further maintains that the boundary then cuts the sandbar across Harbor Head Lagoon and follows the water's edge around the lagoon until it meets the channel connecting Harbor Head Lagoon to the Lower San Juan (Alexander's "first channel met"). Nicaragua argues that the land boundary should separate Isla Portillos, which belongs to Costa Rica, and the coast or sandy beach of that promontory directly abutting the Caribbean Sea, [in] which [the] entire coast belongs to Nicaragua¹⁷.

14. On its part, Costa Rica contends that the northern part of Isla Portillos has undergone significant geomorphic changes which have affected the course of the historical land boundary, the most significant of which is that the channel that once connected Harbor Head Lagoon to the Lower San Juan has now disappeared and what once formed the left or

¹⁴ Memorial of Costa Rica (MCR), paras. 2.2, 2.55 and 2.57; and CMN, paras. 2.21-2.25.

¹⁵ MCR, paras. 2.2, 2.55 and 2.57; and CMN, paras. 2.21-2.25.

¹⁶ CMN, paras 2.4, 2.21, 2.23, 3.10-3.23.

¹⁷ *Ibid.*, paras. 4.9-4.19; *ibid.*, para. 4.20; *ibid.*, fig. 4.16.

northern bank of that channel (and consequently the border with Nicaragua) is totally eroded, leaving no feature capable of constituting territory appertaining to a State immediately in front of the beach of Isla Portillos. Costa Rica argues that Isla Portillos has consequently emerged as a coastal territory with an unobstructed front on the Caribbean Sea and the land boundary between the Parties now meets the Caribbean Sea in three points, namely, on the right bank the San Juan River at its mouth, and at each end of the sandbar seaward of the lagoon¹⁸. In Costa Rica's view, the land boundary should run from the north-eastern corner of Harbor Head Lagoon by the shortest line to the Caribbean Sea and from the north-western corner of the lagoon by the shortest line to the Caribbean Sea. Costa Rica thus claims sovereignty over the beach of Isla Portillos, and argues that the only Nicaraguan territory in the area is Harbor Head Lagoon and the sandbar in front of it (in so far as this sandbar remains above water at all times and is capable of appropriation) which lagoon and sandbar the Court should enclave¹⁹. Accordingly, Costa Rica requests the Court 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 so doing 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”²⁰.

Costa Rica adds that, considering that the coastal geography in this area is likely to continue undergoing changes, it is not appropriate to describe the boundary using specific co-ordinates. Instead, a verbal description of the boundary would be sufficiently precise and would allow the line to change with the geography, as envisaged in the second Alexander Award²¹.

(a) *Original Course of the Land Boundary under the 1858 Treaty, Alexander and Cleveland Awards*

15. In determining the course of the land boundary in the disputed coastal area the Court should, in my view, begin by examining the 1858 Treaty of Limits and relevant Awards before taking into account

¹⁸ MCR, paras. 2.5-2.10, 2.36 and 2.52-2.53.

¹⁹ *Ibid.*, paras. 2.1-2.2 and 2.54.

²⁰ Application instituting proceedings of Costa Rica (ACR), para. 22; MCR, p. 59 and Final Submissions of Costa Rica.

²¹ MCR, paras. 2.56-2.58.

any relevant geographical changes to the area. According to Article II of the 1858 Treaty:

“The dividing line between the two Republics, starting from the Northern 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 the said river up to a point three English miles distant from Castillo Viejo . . .”²²

However, in interpreting this provision in his First Award, General Alexander observed:

“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 north-eastward, and probably between 600 and 1,600 feet distant, but it can not now be certainly located. Under these circumstances it best fulfils the demands of the treaty and of President Cleveland’s award to adopt what is practically the headland of to-day, or the north-western 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 the initial line of the boundary to run as follows, to wit:

Its direction shall be due north-east and south-west, 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 north-west side from the small hut now standing in that vicinity. On reaching the waters of Harbor Head Lagoon the boundary line shall turn to the left, or south-eastward, 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.”

16. As observed in paragraph 74 of the Court’s 2015 Judgment, the second Alexander Award envisaged the possibility that the banks of the San Juan River would “not only gradually expand or contract but that there would be wholesale changes in its channels”. He further observed 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

²² *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), p. 697, para. 71.

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.

The proposed measurement and demarcation of the boundary line will not have any effect on the application of those principles.”²³

17. In his third Award, General Alexander concluded thus:

“Let me sum up briefly and provide a clearer understanding of the entire question in accordance with the principles set out in my first award, to wit, that in the practical interpretation of the 1858 Treaty, the San Juan River must be considered a navigable river. I therefore rule that *the exact dividing line between the jurisdictions of the two countries is the right bank of the river, with the water at ordinary stage and navigable by ships and general-purpose boats*. At that stage, every portion of the waters of the river is under Nicaraguan jurisdiction. Every portion of land on the right bank is under Costa Rican jurisdiction.”²⁴ (Emphasis added.)

It is clear from the foregoing that by the time General Alexander rendered his five Awards defining the land boundary between the Parties in 1897, significant geomorphic changes had already occurred around the mouth of the lower San Juan River. He anticipated that further geomorphic changes were in future likely to occur to the banks of the San Juan River and its channels and to affect the course of the historical boundary.

18. More than a century later, in the 2015 Judgment, the Court when interpreting the 1858 Treaty, in light of the Cleveland and Alexander Awards held:

“[T]he 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 (quoted in full at paragraph 133 below [of the 2015 Judgment]), 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 [of the 2015 Judgment] above). *In the*

²³ United Nations, *Reports of International Arbitral Awards*, Vol. XXVIII, p. 224, cited in the *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), p. 699, para. 74.

²⁴ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), p. 700, para. 75.

*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.”*²⁵ (Emphasis added.)

19. It is clear from the foregoing that, in determining the course of the boundary line in the disputed coastal area today, including any necessary adjustments, the Court must as far as is possible, be faithful to the 1858 Treaty in ensuring that (a) the San Juan River continues to be a “navigable outlet of commerce” and (b) that Costa Rica’s rights of navigation as envisaged under the 1858 Treaty²⁶, which rights the Court held, are inextricably linked with its sovereignty over the right bank of the San Juan River as far as the mouth of the river²⁷ are guaranteed.

*(b) Geomorphic Changes
in the Northern Part of Isla Portillos*

20. For purposes of ascertaining the current geographical situation in the northern part of Isla Portillos, the Court commissioned a group of experts who made two site visits to the area in question (December 2016 and March 2017). The experts submitted to the Court and Parties their Report²⁸ in which they identified a number of geographical or geomorphic changes that have, over the years, occurred in the northern part of Isla Portillos, the most significant of which include the following:

- the point identified by Alexander and the Parties’ Demarcation Commissions as the starting-point of the land boundary in 1897 is now submerged in the Caribbean Sea due to coastal erosion²⁹. However, the headland of Punta de Castilla still exists today as a geomorphic and geographical feature in the landscape, notwithstanding that it has experienced significant retreat due to coastal erosion it³⁰.
- The channel connecting Harbor Head Lagoon to the Lower San Juan (referred to by General Alexander as the “first channel met”) once

²⁵ *I.C.J. Reports 2015 (II)*, p. 700, para. 76.

²⁶ In particular Articles II and VI of the 1858 Treaty.

²⁷ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, *I.C.J. Reports 2015 (II)*, p. 700, para. 76.

²⁸ Report of the Court-Appointed Experts dated 30 April 2017.

²⁹ *Ibid.*, para. 132.

³⁰ *Ibid.*, para. 131.

navigable, has almost completely disappeared, leaving in its place, a series of “elongated discontinuous coast-parallel lagoons” that are not navigable³¹.

- What once formed the left or northern bank of that channel (formerly comprising Nicaraguan territory) is totally eroded and there is no feature capable of constituting territory appertaining to a State, immediately in front of the beach of Isla Portillos³².
- Consequently, Isla Portillos has emerged as a coastal territory with a “broad and continuous sandy beach” that directly abuts the Caribbean Sea, and that is covered by tree vegetation³³.
- The Lower San Juan River no longer flows eastwards via a channel, into Harbor Head Lagoon but rather flows north-westwards, directly into the Caribbean Sea³⁴.
- Harbor Head Lagoon has significantly reduced in size and no longer opens out to the Caribbean Sea but is closed off by “a ribbon-shaped and coast-parallel” sand barrier with no vegetation³⁵.

21. It is clear from the above findings of the experts, that the original course of the land boundary as envisaged in the 1858 Treaty of Limits and relevant Awards, inevitably has to be adjusted, taking into account the above geomorphic changes. The result is a land boundary comprising two distinct segments or sectors with three termini as shown in sketch-map No. 2 of the Judgment.

*(c) The Three Termini of the Land Boundary
in the Northern Part of Isla Portillos*

22. When interpreting the 1858 Treaty, General Alexander envisaged that the starting-point of the land boundary would be based on solid, stable land on what was at that time “the headland of Punta de Castilla, or the north-western extremity of what seems to be the solid land, on the east side of Harbor Head Lagoon”. Given the geomorphic changes referred to above, it would not be practicable or appropriate today to use either Punta de Castilla or the initial marker (both of which are currently submerged at sea) as the starting-point of the land boundary today. However, the experts pointed out that although the “headland of Punta de Castilla” has experienced significant retreat due to coastal erosion, it still exists today as a geomorphic and geographical feature in the landscape³⁶.

³¹ Report of the Court-Appointed Experts dated 30 April 2017, p. 33, para. 106 and figs. 41-42.

³² *Ibid.*, paras. 105-106.

³³ *Ibid.*, pp. 34-36.

³⁴ *Ibid.*, p. 33, para. 103 and fig. 21.

³⁵ *Ibid.*, p. 25, para. 99 and fig. 21.

³⁶ *Ibid.*, p. 46, para. 131.

In my view the Court should adopt as the starting-point of the first segment of the land boundary, what is the north-western extremity of what seems to be solid land, on the east side of Harbor Head Lagoon as it exists in 2017. That point is identified in sketch-map No. 2 as Ple2. The second terminus or endpoint of the first segment is the point identified on sketch-map No. 2 as PLw2, to the west of the sandbar³⁷. What the Court refers to in the present Judgment as “the starting-point of the land boundary” currently located at the end of the sandspit bordering the San Juan River where “the right bank of the San Juan River reaches the low-water mark of the coast of the Caribbean Sea” (para. 71) is in my view, more appropriately described as the starting-point of the second sector of the land boundary. For the reasons given in the Judgment, I do agree with the majority that the start of the maritime delimitation in the Caribbean should in principle, coincide with this point.

(d) Tracing the First Sector of the Land Boundary

23. In my view, the first sector of the land boundary should run as follows. Its direction shall be due north-east and south-west, across the bank of sand, from the Caribbean Sea into the waters of Harbor Head Lagoon. It shall pass at its nearest point at Point Ple2 (with the co-ordinates described in paragraph 73 of the Judgment). On reaching the waters of Harbor Head Lagoon the boundary line shall follow the water’s edge around Harbor Head Lagoon until it meets the north-western extremity of the lagoon where it cuts across the sandbank into the Caribbean Sea, at Point Plw2 (with the co-ordinates described in paragraph 73 of the Judgment). This first sector of the land boundary enclaves the waters of Harbor Head Lagoon and ensures that the lagoon, as well as the sandbar in front of it, remain Nicaraguan as stipulated in the 1858 Treaty.

(e) Tracing the Second Sector of the Land Boundary

24. Since Alexander’s “first channel met” no longer exists, the second sector of the land boundary is disconnected and separated from the first by the beach of Isla Portillos. The second sector must start at the north-western extremity of Isla Portillos at the mouth of the San Juan River proper, on solid ground at the base of the sandspit where the right bank of the San Juan River reaches the low-water mark of the coast of the Caribbean Sea. Up the river proper, the line shall continue to ascend as directed in the 1858 Treaty.

(Signed) Julia SEBUTINDE.

³⁷ See the co-ordinates of these two termini referred to in paragraph 73 of the present Judgment.

SEPARATE OPINION OF JUDGE ROBINSON

1. An interesting and not esoteric question has been raised in this case. It was not necessary for the Court to pronounce on it in explicit terms. However, the question may have implications for the functioning of what the Preamble to the United Nations Convention on the Law of the Sea (hereinafter “the UNCLOS” or “the Convention”) calls “a legal order for the seas and oceans”¹, the establishment of which was the primary goal of the Convention.

2. Nicaragua argued that there is a “convergence in maritime delimitation methodology”² in respect of the territorial sea, the exclusive economic zone (hereinafter the “EEZ”) and the continental shelf. In effect, Nicaragua espouses an approach whereby the principles set out in Articles 74 and 83 of the Convention, for the delimitation of the EEZ and continental shelf would apply equally to delimitation of the territorial sea under Article 15 of the Convention. Indeed, Costa Rica argued that the effect of Nicaragua’s submission on this point is that delimitation of the territorial sea under Article 15 of the Convention “must be undertaken in such a manner as not to prevent or undermine the achievement of an equitable solution to the delimitation of the EEZ and continental shelf under Articles 74 and 83”³. I understand Nicaragua’s submission to mean that the law under the UNCLOS calls for a convergence in maritime delimitation methodology.

3. This opinion argues that there is no such convergence for the three zones, although, it is possible for States by agreement to use a single methodology for all three zones. The opinion maintains that a proper interpretation of the Convention shows that it calls for a dichotomous approach, whereby the territorial sea is delimited on the basis of the median line/special circumstances approach and the EEZ and continental shelf are delimited on the basis of any method that would result in an equitable solution.

4. The decision to convene the Third United Nations Conference on the Law of the Sea was, in part, a response to the claims of many countries, in particular developing countries from Latin America, Asia and Africa, to an extensive zone of jurisdiction beyond the territorial sea. The precise nature of this zone, which came to be called the exclusive eco-

¹ Preamble, United Nations Convention on the Law of the Sea of 10 December 1982.

² CR 2017/11 (Lowe), p. 12, para. 15.

³ CR 2017/07 (Ugalde), p. 23, para. 16.

conomic zone, (although in Latin America it was originally called the patrimonial sea) was among the most difficult issues faced by the Conference, and the issue of delimitation of the EEZ between neighbouring States was perhaps the most intractable problem in the Conference. In 1980, six years after the Conference commenced and just two years before it concluded, no agreement had been reached on the delimitation of the EEZ and continental shelf. There was however, at that time, broad agreement on the régime for the delimitation of the territorial sea, which generally followed Article 12 (1) of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone.

5. It will be recalled that the equidistance/special circumstances rule⁴ in the 1958 Convention on the Territorial Sea and Contiguous Zone, which was employed for the delimitation of the territorial sea, also applied to the delimitation of the continental shelf under the 1958 Convention on the Continental Shelf. However, UNCLOS' drafting history⁵ shows that, owing to the potential for natural geographical overlap between the continental shelf and the newly created EEZ, the provisions for delimitation of the continental shelf moved closer to those for the delimitation of the EEZ, the two sets of provisions becoming congruent with each other to the extent that Articles 74 and 83 have identical formulations. No doubt this congruence is one explanation for the practice that has developed of a single maritime boundary being used to delimit these two zones.

6. During the Conference, States exhibited a preference for equity to play a greater role in the delimitation of maritime boundaries as one moved further seaward. An explanation for this preference is that the potential distorting effects of the equidistance line are more magnified in the more distant EEZ and continental shelf than in the territorial sea. In the *North Sea Continental Shelf* cases⁶, the Court said that the distorting effect of equidistance lines are "comparatively small within the limits of territorial waters, but produce their maximum effect in the localities where the continental shelf areas lie further out".⁷

7. During the Conference, some countries favoured the use of the median line in the delimitation of the EEZ; others, taking their cue from the *North Sea Continental Shelf* cases, favoured the use of equitable principles. Obviously any framework for delimitation of the EEZ had to take account of the differences between the legal régime of the territorial sea

⁴ See Article 6 (1) of the 1958 Convention on the Continental Shelf and Article 12 (1) of the 1958 Convention on the Territorial Sea and Contiguous Zone.

⁵ See generally, Satya N. Nandan and Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. II, Martinus Nijhoff Publishers, 1985, pp. 132-143, pp. 796-821 and pp. 948-962; *Third United Nations Conference on the Law of the Sea, Official Records*, Vol. XIII, (Summary Records, Plenary, General Committee, First and Third Committees, as well as Documents of the Conference, Ninth Session), A/CONF.62/SR.126, 126th Plenary Meeting (1980).

⁶ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, p. 3.

⁷ *Ibid.*, p. 37, para. 59.

and that of the EEZ, described in Article 55 of the Convention as “an area beyond and adjacent to the territorial sea”. For some States, including the strongest supporters of an extensive maritime zone of jurisdiction for the coastal State, the rights of the coastal State in that zone should be emphasized, while for others, the high seas freedoms of all States in the zone should receive maximum protection. Articles 56 and 58 of the Convention reflect the compromise that was reached between both groups of States.

8. This tug between States was reflected in a proposal by Venezuela in 1980 that the concept of equity should govern delimitation in the territorial sea, EEZ and continental shelf⁸. In the result, that approach was not accepted. Article 15 of the Convention reads as follows:

“Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.”

Articles 74 and 83 of the Convention read as follows:

“The delimitation of the exclusive economic zone [continental shelf] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.”

9. The main difference between the legal régime of the territorial sea and that of the EEZ is that whereas, in accordance with Article 2 (1) of the Convention “[t]he sovereignty of a coastal State extends . . . to . . . the ‘territorial sea’”, in the EEZ the coastal State only has, in accordance with Article 56 (1), sovereign rights and jurisdiction in respect of certain functions. Moreover, Article 56 (2) provides that a coastal State in carrying out its functions in the EEZ, “shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention”.

10. In the territorial sea, therefore, the rights of the coastal State, based as they are on that State’s sovereignty, are clearly different from the sov-

⁸ *Third United Nations Conference on the Law of the Sea, Official Records, Vol. XIII* (Summary Records, Plenary, General Committee, First and Third Committees, as well as Documents of the Conference, Ninth Session), A/CONF.62/SR.126, 126th Plenary Meeting (1980), paras. 137 (statements by Venezuela) and 88 (statement by Argentina).

foreign but functional rights and jurisdiction that the coastal State enjoys in the EEZ. The rights of the coastal State receive their greatest recognition and deference in the territorial sea. This difference between the territorial sea and the EEZ is reflected in the drafting of Article 15 on the one hand, and that of Articles 74 and 83 on the other. While Article 15 prescribes a specific methodology of delimitation, the median line/special circumstances method, Articles 74 and 83 do not prescribe a particular method, but point to the achievement of an equitable solution as the goal of the delimitation. Over the years the equidistance/relevant circumstances method, which has evolved through this Court's judicial interpretation of Articles 74 and 83, has become applicable for delimitation of the EEZ and continental shelf. In any event, as a practical matter, delimitation — whether of the territorial sea or the EEZ and continental shelf — begins with a provisional median/equidistance line. The different methods of delimiting the various zones derive from the differences in their legal régimes. Another distinction between the two régimes is that Articles 74 and 83 have an explicit reference not only to the dispute settlement procedures in Part XV of the Convention, but also directs the parties in the interim period, pending agreement on delimitation, to conduct themselves in a manner that would not jeopardize or hamper the reaching of a final agreement. This indicates a greater sensitivity to the potential for disputes on a provision which does not identify a specific method, but places its focus on the search for an equitable solution.

11. The first rule of interpretation is that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”⁹. A plain reading of the relevant articles shows that Article 15 sets out more definitive and objective criteria for the delimitation of the territorial sea than do Articles 74 and 83 for the delimitation of the EEZ and continental shelf. Article 15 requires that if States cannot agree on the delimitation of their territorial sea, absent special circumstances, “neither of the two States is entitled . . . to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured”¹⁰. Thus, a departure from the median line is envisaged only in situations where “special circumstances” exist. Article 15, by prescribing the method for delimitation, identifies the median line as the specific basis for delimitation of the territorial sea. In *Guyana/Suriname*¹¹, the Tribunal affirmed the primacy of the median line in the

⁹ Article 31, Vienna Convention on the Law of Treaties of 23 May 1969.

¹⁰ Article 15, United Nations Convention on the Law of the Sea of 10 December 1982.

¹¹ *Award in the Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname*, Award of 17 September 2007, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXX (Part One), p. 93, para. 296.

delimitation of the territorial sea. On the other hand, Articles 74 and 83 are wholly result-oriented; no specific method is identified, although in practice, the judicially developed equidistance line/relevant circumstances approach prevails. After the *Black Sea* case¹² (described in more detail in paragraph 16), one must add to that approach, the element of disproportionality.

12. The explicit reference to the median line as a method to delimit the territorial sea in Article 15 can be contrasted with the silence of Articles 74 and 83 on the method of delimitation. Absent special circumstances, the elements of predictability and certainty resulting from the requirement to employ the more objective criterion of the median line in the territorial sea are not present in the delimitation of the EEZ and continental shelf, which may be seen as offering greater flexibility in methodology, the aim of which is to find an equitable solution.

13. Given the differences between the legal régime of the territorial sea and that of the EEZ and continental shelf, an interpretation of the Convention, as requiring a single method for delimiting all three zones would indeed be difficult to understand. This is so because a single method may not reflect, or reflect sufficiently, the varying rights of the coastal State in the territorial sea on the one hand, and in the EEZ and continental shelf on the other.

14. The Court also commented on this difference in the *Nicaragua v. Honduras*¹³ case when it stated that,

“The methods governing territorial sea delimitations *have needed to be*, and are, more clearly articulated in international law than those used for the other, more functional maritime areas. Article 15 of UNCLOS, like Article 12, paragraph 1, of the 1958 Convention on the Territorial Sea and Contiguous Zone before it, refers specifically and expressly to the equidistance/special circumstances approach for delimiting the territorial sea.” (Emphasis added.)

This unequivocal statement of what the Court obviously sees as an imperative requirement to have more clearly articulated delimitation methods for the territorial sea than in the EEZ and continental shelf is a telling judicial comment supporting the need for a dichotomous approach. The dictum means that there is something in the territorial sea, or more specifically, in the nature of the territorial sea that calls for greater clarity in the methods for delimiting that zone — that “something” is the territorial

¹² *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61.

¹³ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007 (II), p. 740, para. 269.

rights enjoyed by the coastal State in the territorial sea. The basis of that analysis by the Court must be the marked difference in the legal régime of the various zones. For it is this difference that will generally call for different methodologies if the basic law governing the zones is not to be controverted. Thus, the provisional median line in the territorial sea has a different value from the provisional median line in the EEZ and continental shelf, and while special circumstances and relevant circumstances are both modifiers, they too, will have different values. This was one of the reasons why the Arbitral Tribunal in *Bangladesh/Myanmar*¹⁴ in delimiting the territorial sea gave full effect to St. Martin's Island, a Bangladeshi island, even though it is located on Myanmar's side of the equidistance line, but gave it no effect in the EEZ and continental shelf. Another example comes from the instant case in which the Court refused to modify the median line on account of the Santa Elena peninsula, giving it full effect in the territorial sea. But the peninsula was given half-effect in the EEZ and continental shelf.

15. However, since under Articles 74 and 83 it is open to States to choose any method for delimitation (in order to arrive at an equitable solution) and under Article 15, States may agree not to use the median line, it is possible for States under UNCLOS to agree to utilize a uniform methodology for delimiting the three zones. In *Ghana/Côte d'Ivoire*¹⁵, a Special Chamber of the ITLOS, although acknowledging that different rules apply to the delimitation of the territorial sea and the EEZ, having heard the submissions of the parties, determined that there was an implicit agreement that a single methodology should be used for the various zones.

16. The Court's case law as well as the decisions of arbitral tribunals have consistently followed a dichotomous approach to the delimitation of the territorial sea and the delimitation of the EEZ and continental shelf. When the ICJ cases are carefully examined, it will be found that the Court has never applied a single delimitation methodology for all three zones. (I do not consider *Nicaragua v. Honduras*¹⁶ to be a case in which the Court applied a single methodology, since the Court used the angle-bisector method for drawing of the single maritime boundary and the equidistance method to delimit the overlapping territorial seas generated by

¹⁴ *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, p. 47, para. 152; p. 86, paras. 316-319.

¹⁵ *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, ITLOS Case No. 23, judgment of 23 September 2017, p. 78, paras. 259-260.

¹⁶ *Supra* note 13, *I.C.J. Reports 2007 (II)*, p. 746, para. 286; p. 752, paras. 304-305.

some islands situated in the territorial sea.) *Cameroon v. Nigeria*¹⁷ does not indicate otherwise. It will be recalled that, in *Cameroon v. Nigeria*, this Court had said,

“The Court has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdictions is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for an adjustment or shifting of that line in order to achieve an ‘equitable result’.”¹⁸

Three comments are appropriate. First, it follows from the position that I have taken, in particular on the question of differing values (see paragraph 14) that I would have some difficulty with the last sentence in that dictum, if by it the Court meant that in substance the equitable principles/relevant circumstances method is similar to the equidistance/special circumstances method. For there are clearly substantial differences between the two methods. One such a difference may be found at the end of the third sentence in the reference to adjustments of the equidistance line in order to achieve an equitable result, a goal that has no application to the median line/special circumstances method. If however, the Court was merely referring to a procedural similarity between the two methods — that is, in both cases one begins with a provisional median/equidistance line, followed by consideration as to whether it should be adjusted — I would have less difficulty with that analysis. Second, this was not a case where the Court delimited all three maritime zones, as the Court was not called upon to delimit the territorial sea in light of its finding that that zone had already been delimited by previous agreements¹⁹. Third, at the time of this decision in *Cameroon v. Nigeria*, the Court had not yet developed the three-stage approach in *Black Sea*. In the *Black Sea* case²⁰ the Court outlined the three-stage methodology for the delimitation of the EEZ and continental shelf. In the first stage, a provisional equidistance line is drawn; in the second stage, an examination is carried out to determine whether there are any relevant circumstances requiring an adjustment or shifting of that line; in the third stage, a check is carried out to ensure that there is no disproportionality between the relevant coasts and relevant areas to be delimited.

¹⁷ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 303.

¹⁸ *Ibid.*, p. 441, para. 288.

¹⁹ *Ibid.*, p. 440, para. 285; p. 431, para. 268.

²⁰ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61.

17. The *Black Sea* approach, in particular, the third stage in which the Court checks that there is no disproportionality, confirms the difference alluded to before, between the median line/special circumstances approach under Article 15 and the equitable solution approach of Articles 74 and 83. The addition of the disproportionality test at the third stage in the delimitation ensures that the focus of a delimitation under Articles 74 and 83 remains the achievement of “an equitable solution”. Under Article 15, disproportionality, itself an element of equitableness, plays no role in the delimitation of the territorial sea. Therefore, *Cameroon v. Nigeria*, is not an authority for the proposition that the Court’s case law supports a uniform methodology for delimiting all three maritime zones.

18. Another case that might appear to show the Court’s use of a uniform methodology for delimiting the three maritime zones is *Peru v. Chile*²¹. However, examination of that case shows that there is no basis for that conclusion. It will be recalled that in *Peru v. Chile* the Court had found that the Parties had agreed on their maritime boundary up to 80 nautical miles and therefore, began the delimitation at that endpoint²². The question of delimitation of the territorial sea, therefore, did not arise. Since the Court did not delimit all three maritime zones, that case can hardly provide support for the proposition that the Court favours a single method of delimitation for all three zones.

19. Therefore, Articles 15, 74 and 83 properly interpreted, as well as the case law of the Court, do not support the proposition that there is a “convergence in maritime delimitation methodology”²³ for the delimitation of the territorial sea, EEZ and the continental shelf. A case such as *Croatia v. Slovenia*²⁴, which posits that there is such a convergence, must be treated cautiously²⁵. In light of the fact that in that case the delimitation of all three zones did not arise, the following statement at paragraph 1000 is difficult to understand:

“In relation to the delimitation both of the territorial sea and of the maritime zones beyond the territorial sea, international law thus calls for the application of an equidistance line, unless another line is required by special circumstances. That is reflected in the practice of the ICJ, which has applied the ‘equidistance/special circumstances’

²¹ *Maritime Dispute (Peru v. Chile)*, Judgment, I.C.J. Reports 2014, p. 3.

²² *Ibid.*, p. 65, para. 177; p. 66, para. 183.

²³ CR 2017/11 (Lowe), p. 12, para. 15.

²⁴ *Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009 (Croatia v. Slovenia)*, PCA Case No. 2012-04, Final Award of 29 June 2017.

²⁵ For discussion of this case, see Massimo Lando, “The Croatia/Slovenia Arbitral Award of 29 June 2017: Is there a Common Method for Delimiting all Maritime Zones under International Law?”, *Rivista Di Diritto Internazionale*, Vol. 100 (4), p. 1184.

approach in the drawing of single maritime boundaries without distinguishing between its application to the territorial sea and its application beyond the territorial sea.”²⁶

In support of its finding that the Court’s practice favours a single methodology for delimitation of the territorial sea and the maritime zones beyond it, the Tribunal cites *Cameroon v. Nigeria* and *Peru v. Chile*. However, as the analysis in paragraphs 16 to 18 of this opinion shows, this is not the case.

20. In the instant case, the Court drew a single maritime boundary, but was explicit in applying the median line/special circumstances approach in respect of the territorial sea, and the *Black Sea* three-stage approach, incorporating the equidistance line/relevant circumstances and disproportionality tests, for the EEZ and continental shelf.

21. Moreover, in accordance with Article 32 of the Vienna Convention on the Law of Treaties, recourse may be had to the *travaux préparatoires* for the purpose of confirming the meaning resulting from the general rule of interpretation. In that regard, reference has already been made to the Venezuelan proposal in 1980 that the concept of equity should apply to delimitation of the territorial sea, the EEZ and the continental shelf. The rejection of that proposal supports the conclusion that unless the parties have agreed otherwise, for the purposes of delimitation, the territorial sea is treated differently from the EEZ and continental shelf, that is, there is no convergence in maritime delimitation methodology in respect of the three zones intended by the drafters of the Convention.

22. The Venezuelan proposal is also relevant for another reason. In order to substantiate its proposition of a convergence in maritime delimitation methodology, Nicaragua attempted to show that Article 15 of UNCLOS was simply transposed from the 1958 Convention on the Territorial Sea and Contiguous Zone, thereby suggesting that the topic of the territorial sea was somewhat uncontroversial. However, during the ninth session of the Third Conference, Venezuela indicated that it could not accept the wording of Article 15 because, in its view, the concept of equity should influence the delimitation of all maritime spaces; for that reason it proposed that Article 15 should be brought into line with Articles 74 and 83, which at that time included references to equitable considerations. The introduction of the Venezuelan proposal shows that, at that time, some countries had difficulties with the régime for delimitation of the territorial sea; in particular, they did not accept the absence of a reference to equitable principles in Article 15.

²⁶ *Supra* note 24, p. 311, para. 1000.

23. I turn now to address an argument that may be said to favour Nicaragua's approach.

24. Over the years, State practice in maritime delimitation has shown a marked preference for a single maritime boundary delimiting the various maritime areas. The Court itself has on some occasions been requested to draw a single maritime boundary for the EEZ and the continental shelf as well as the territorial sea, the EEZ and the continental shelf.

25. Nicaragua interprets this practice as supporting its theory of convergence in maritime delimitation methodologies. In the oral proceedings it made several submissions in support of this proposition; for example, it submitted that "UNCLOS Articles 15, 74 and 83 apply to the drawing of different segments of one continuous line"²⁷. It also submitted that when the Court is asked to draw a territorial sea boundary, it is "a reasonable presumption that it will draw it so that the part in the territorial sea joins up with the part beyond the territorial sea"²⁸.

26. A single delimitation line does not necessarily mean a single delimitation method, as the instant case and several others have shown. The point is that even when a single delimitation line is employed, the segment of the line delimiting the territorial sea will have an entirely different legal significance from the segment of the line reflecting delimiting the EEZ and continental shelf. For those segments would have been arrived at on entirely different legal bases: the first on the basis of a median line, that because it relates to an area where the rights of the coastal State are territorial, remains virtually unassailable, and the second on the basis of a median line, which because it relates to an area in which the rights of the coastal State are only functional, is more susceptible to adjustment in the search for an equitable solution. The best explanation for the advent of the single delimitation line as an emerging practice in delimitation agreements between States is the element of simplicity and convenience that it offers. Thus, the question whether this practice in any way supports the claims for a single delimitation methodology must be answered in the negative.

27. The Court has employed the single line approach, but has always distinguished between delimitation methods for the territorial sea on the one hand, and those for the EEZ and continental shelf on the other²⁹. It follows from the position I have taken in paragraphs 16 to 18 that I do not treat as true examples of a uniform approach, *Cameroon v. Nigeria* and *Peru v. Chile*, since in those cases the Court did not have to delimit all three maritime areas.

²⁷ CR 2017/11 (Lowe), p. 12, para. 16.

²⁸ *Ibid.*, p. 13, para. 16.

²⁹ See for example, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, *Merits, Judgment, I.C.J. Reports 2001*, pp. 94-110, paras. 178-223.

28. In *Nicaragua v. Honduras*, despite the exceptional circumstances of the case, the Court was careful to stress that the median line remains “the general rule”³⁰. In *Qatar v. Bahrain*, where the Court was asked to determine the course of a single maritime boundary for the territorial sea, EEZ and continental shelf, it stated that delimitation of the EEZ and the continental shelf “does not present comparable problems [to delimitation of the territorial sea] since the rights of the coastal State in the area concerned, [territorial sea] are not functional but territorial, and entail sovereignty over the sea-bed and the super adjacent waters and air column”³¹.

29. No development after 1982 has changed the marked distinction made by the Convention and affirmed by the Court between delimitation of the territorial sea on the one hand, and that of the EEZ and continental shelf on the other. At the First United Nations Conference on the Law of the Sea (UNCLOS I) in 1958, Sir Gerald Fitzmaurice, the United Kingdom’s Representative said, in respect of the territorial sea: “for reasons of equity . . . special circumstances may exist which could make it difficult to accept the true median line as the actual line of delimitation”³². However, as is patent, that comment was made long before the adoption of the Convention in 1982, which effected a bifurcation between the delimitation of the territorial sea on the one hand, and delimitation of the continental shelf and EEZ on the other. Today, as a result of the UNCLOS, it will not avail a disgruntled State (party to the Convention) to aver that the delimitation of its territorial sea has not produced an equitable solution, if that term is used synonymously with “equitable solution” in Article 74 and 83 of UNCLOS.

30. Today there is certainly less leeway for departing from the median line in the territorial sea on the basis of special circumstances than there is for departing from the equidistance line in the EEZ and continental shelf on the basis of relevant circumstances in the search for an equitable solution. The special circumstances must indeed be very special to warrant adjustment to or departure from the median line in the territorial sea; for example, in the *Nicaragua v. Honduras* case, due to geomorphological conditions at the mouth of the River Coco, it was not possible to identify suitable base points for the drawing of the median line and the Court therefore used the angle-bisector method³³.

31. Prior to 1982, in view of the similarity in the provisions for delimitation relating to the territorial sea and the continental shelf, it may have been correct to speak of a unity of delimitation methods for both zones.

³⁰ *Supra* note 13, *I.C.J. Reports 2007 (II)*, p. 745, para. 281.

³¹ *Supra* note 29, *I.C.J. Reports 2001*, p. 94, para. 174.

³² Satya N. Nandan and Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. II, Martinus Nijhoff Publishers, 1985, p. 135, para. 15.2.

³³ *Supra* note 13, *I.C.J. Reports 2007 (II)*, pp. 742-743, paras. 277-280.

However, today it is not correct to say that equity or equitable principles apply to the territorial sea, if those terms are used synonymously with the term “equitable solution” in Articles 74 and 83. Such a conclusion is contradicted by the plain reading of the relevant articles, and the drafting history of the Conference, in which — after eight years of negotiations that expressly considered the use of the median line or equitable principles for the delimitation of the EEZ — 158 countries decided on a formulation for the EEZ that focused on an equitable solution. The phrase “equitable solution” has therefore become a term of art and its usage should be confined to the situations covered by Articles 74 and 83.

CONCLUSIONS

- I. Properly interpreted, Articles 15, 74 and 83 of the UNCLOS call for a dichotomous approach in the delimitation methodology for the territorial sea on the one hand, and the EEZ and continental shelf on the other.
- II. However, it is possible under the Convention for States to agree to utilize a uniform method.
- III. It is the difference in the legal régime for the territorial sea on the one hand and the EEZ and continental shelf on the other, that explains why the Convention calls for a dichotomous approach in maritime delimitation methodology.
- IV. Different values are attached to the various elements relevant to the delimitation in the various zones. Thus, 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. If one were to apply the territorial sea-median line/special circumstances method to the EEZ and continental shelf, one would have to do so fully sensitive to the fact that the provisional equidistance line in the EEZ and continental shelf will be more susceptible to adjustment than the provisional median line in the territorial sea.
- V. The Court has used the dichotomous approach consistently in its work, and generally, so have arbitral tribunals.
- VI. The three-stage approach set out in the *Black Sea* case is a major development in the Court’s case law, but it has in no way affected the dichotomous approach employed by the Court. In fact, it has served to confirm that approach.

(Signed) Patrick L. ROBINSON.

DECLARATION OF JUDGE GEVORGIAN

Land boundary in the northern part of Isla Portillos — 1858 Treaty of Limits — Punta de Castilla as the starting-point of the boundary — Cleveland and Alexander Awards — the Court-appointed experts referred to the “remnants” of a former channel — Stability and finality of boundaries — Nicaragua’s military camp — No need for a finding of breach of sovereignty — The area was disputed territory — Maritime delimitation in the Caribbean Sea — The “Alexander Point” as starting-point of the maritime boundary — Nicaragua’s entitlement to a territorial sea in Harbor Head Lagoon.

1. I have voted against two findings of the Court concerning the land boundary: first, that “the Republic of Costa Rica has sovereignty over the whole northern part of Isla Portillos, including its coast, up to the mouth of the San Juan River” (Judgment, paragraph 2 of the *dispositif*); second, 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” (Judgment, paragraph 3 of the *dispositif*). In this declaration, I shall explain the reasons of my vote and comment on certain aspects of the Court’s delimitation of the maritime boundary in the Caribbean Sea.

I. LAND BOUNDARY

2. When General Alexander initiated the demarcation of the boundary between Costa Rica and Nicaragua in 1897, he took Punta de Castilla (not the San Juan River mouth or some other point) as a reference. His first Award was particularly telling in this regard. Therein he explained in great detail the reasons why the drafters of the Treaty of Limits between Costa Rica and Nicaragua of 15 July 1858 (hereinafter “the 1858 Treaty of Limits”) and President Cleveland had chosen Punta de Castilla (a point of “no importance, political or commercial”) as starting-point of the boundary¹. In his view, “the makers of the treaty intended to designate the mainland on the east of the harbor” in order to keep all the geomorphological features situated between such mainland and Punta Arenas under Nicaraguan sovereignty². As he explained, it was “*impos-*

¹ First Award under the Convention between Costa Rica and Nicaragua of 8 April 1896 for the demarcation of the boundary between the two Republics, United Nation, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVIII, p. 217.

² *Ibid.*, p. 219.

sible to conceive that Nicaragua had conceded this extensive and important territory to Costa Rica”³.

3. At the time, the area had undergone important geomorphological changes in relation to the situation that existed in 1858. As General Alexander observed, “[t]he exact spot which was the extremity of the headland of Punta de Castillo [*sic*] April 15, 1858, has long been swept over by the Caribbean Sea”⁴. Moreover, the area had long ceased to have the economic prominence it once had. But despite these changes, General Alexander fixed the starting-point of the boundary at the point that best corresponded to the geographical characteristics of Punta de Castilla as defined in the 1858 Treaty of Limits. Such a point was “the headland of to-day, or the northwestern extremity . . . on the east side of Harbor Head Lagoon”⁵. He then defined the direction of the boundary by reference to the “first channel met”, which was a continuous line of water connecting Harbor Head Lagoon with “the river proper”⁶. Finally, anticipating possible geomorphological changes, he expressed the view that the land boundary was to follow the fluctuations of the river in accordance with the relevant rules of international law⁷.

4. In my opinion, General Alexander’s approach remains valid today. Despite the continuous geomorphological changes, Punta de Castilla remains of prime importance as starting-point of the boundary by virtue of Article II of the 1858 Treaty of Limits, as interpreted in the Cleveland and Alexander Awards. Indeed, General Alexander’s demarcation line can still be identified in the current geography of the area.

In support of the opposite conclusion — that the geomorphological changes occurred in the area render Punta de Castilla and General Alexander’s line irrelevant — the Judgment heavily relies on two factual findings made by the Court-appointed experts: first, that “[o]ff the coastline, there are no features above water even at low tide”; second, that west of Harbor Head Lagoon “the coast is made up of a broad sandy beach with

³ First Award under the Convention between Costa Rica and Nicaragua of 8 April 1896 for the demarcation of the boundary between the two Republics, United Nation, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVIII; emphasis added.

⁴ *Ibid.*, p. 220.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ See General Alexander’s second and third Awards for the demarcation of the boundary between Costa Rica and Nicaragua (1897-1898). See also the 1888 Award of the President of the United States in regard to the validity of the Treaty of Limits between Costa Rica and Nicaragua (“Cleveland Award”). Both referred to certain “principles” or “rules” of international law as governing the possible fluctuations of the San Juan River (see respectively *RIAA*, Vol. XXVIII, pp. 208-211 [Cleveland Award], pp. 223-225 [second Alexander Award] and pp. 227-230 [third Alexander Award]).

discontinuous and coast-parallel enclosed lagoons in the backshore”⁸. However, the Judgment avoids mentioning the experts’ identification of a series of “discontinuous coast-parallel lagoons” which are “essentially *remnants* of the channel-like water gap that used to exist in recent times between Isla Portillos and the spit of Los Portillos/Harbor Head Lagoon”⁹. Such a finding is in my view significant since, on the record before the Court, it is possible to observe that during the past century the channel mentioned by the experts was not swallowed by the sea, but rather continued to exist while moving southwards as a consequence of coastal recession¹⁰. It follows that the “remnants” identified by the experts have their origin in General Alexander’s “first channel met”. It is therefore possible to identify his line in the current geomorphological situation. The Court should have aimed to take the “stability and finality” of this boundary into consideration¹¹.

5. This conclusion is supported by two other important considerations. First, in the proceedings before the Court, Costa Rica has not rejected Nicaragua’s sovereignty for decades over the channel connecting the lagoon with the river mouth, despite not being anymore an outlet for commerce in the sense of Article VI of the 1858 Treaty of Limits¹². This shows the continuous importance of General Alexander’s line throughout the years despite the geomorphological changes in the area. Second, if one were to follow the Applicant’s logic, Harbor Head Lagoon would have been Costa Rican. Instead, in 2015, the Court assumed the Parties’ positions when it excluded the lagoon from the definition of the “disputed

⁸ See paragraph 71 of the present Judgment.

⁹ Report of the Court-Appointed Experts, CRNIC-CRNIP 2017/18, 1 May 2018, para. 106 and fig. 26 (emphasis added) and Question Put to the Experts by Judge Tomka: Answer of the Court-Appointed Experts, CRNIC-CRNIP 2017/29, 15 June 2017.

¹⁰ See in particular the aerial photographs taken in 1960, 1961 and 1981 (CMN, pp. 30, 41 and 42) and the 1966 map of the US Corps of Engineers (CMN, p. 39). See also the topographic sheets respectively made by Costa Rica’s Instituto Geológico Nacional and Nicaragua’s INETER in 1970 and 1988 (Report of the Court-Appointed Experts, p. 27, fig. 26).

¹¹ *Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 34. See also General Alexander’s third Award, *RIAA*, Vol. XXVIII, p. 228.

¹² See CR 2017/8, p. 34, para. 42 (Kohen): “[i]t does not assist Nicaragua to refer to Costa Rican maps based on aerial photography of the 1960s when there was some channel, and when the argument that it seeks to make *at least had some factual basis*”; emphasis added.

According to Article VI of the 1858 Treaty,

“[t]he Republic of Nicaragua shall have exclusive *dominium* and *imperium* over the waters of the San Juan River from its origin in the lake to its mouth at the Atlantic Ocean; the Republic of Costa Rica shall however have a perpetual right of free navigation on the said waters between the mouth of the river and a point located three English miles below Castillo Viejo”.

area” — for this reason, despite having voted against paragraph 2 of the *dispositif*, I am in full agreement with the last phrase thereof, which attributes sovereignty over Harbor Head Lagoon to Nicaragua.

6. Accordingly, it is my view that not only the lagoon, but also the beach of northern Isla Portillos, should have been declared under Nicaraguan sovereignty in accordance with Article I of the 1858 Treaty of Limits.

II. MILITARY CAMP

7. I am also unable to concur with the Court’s finding according to which Nicaragua’s military camp has violated Costa Rica’s sovereignty. In the Court’s Judgment in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (hereinafter “the 2015 Judgment”), the Court maintained the definition of the disputed territory (introduced in its Order on provisional measures of 8 March 2011) as “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”¹³. But at the same time, it excluded from this definition “the stretch of coast abutting the Caribbean Sea which lies between the Harbor Head Lagoon . . . and the mouth of the San Juan River”. One of the reasons for doing so was that the Parties had not “provide[d] detailed information concerning the coast”¹⁴.

This shows, as the present Judgment explains, that

“no decision was taken by the Court 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 . . . it is not possible for the issue of sovereignty over that part of the coast to be *res judicata*. Therefore, the Court cannot declare inadmissible Nicaragua’s claim concerning sovereignty over that stretch of coast of Isla Portillos.”¹⁵

In sum, the territory at stake was disputed territory¹⁶.

¹³ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, *I.C.J. Reports 2015 (II)*, p. 697, para. 69 (quoting from *I.C.J. Reports 2011 (I)*, p. 19, para. 55).

¹⁴ *Ibid.*, p. 697, para. 70.

¹⁵ See paragraph 69 of the present Judgment.

¹⁶ This is confirmed by the fast-changing geomorphological conditions of the area, which is characterized by the presence of temporary channels connecting Harbor Head Lagoon with the Caribbean Sea (Report of the Court-Appointed Experts, p. 29, fig. 29).

8. In my declaration on the 2015 Judgment, I already addressed the problems arising from the Court's ruling on sovereignty over the disputed area. I expressed my disagreement with the Court's decision to declare "Costa Rica's sovereignty over an area whose limits are far from being clear" and pointed out that such a decision may be "the source of future disagreement between the Parties"¹⁷. In my opinion, these views apply *a fortiori* in the present case. A ruling on sovereignty, together with an order to remove Nicaragua's camp from Costa Rica's territory, would have been sufficient relief for the Applicant. Such a decision would have been closer to the realities on the ground, as only on 2 February 2018 (that is, the date of delivery of the present Judgment) has Costa Rica's sovereignty over the territory where Nicaragua's camp was located been established¹⁸. It would also have been in line with the Court's Judgment in *Cameroon v. Nigeria*, in which the Court ruled (in relation to the presence of Nigerian forces in a disputed territory) that "by the very fact of the present Judgment and of the evacuation of the Cameroonian territory occupied by Nigeria", the injury suffered by Cameroon had been addressed¹⁹.

III. MARITIME BOUNDARY IN THE CARIBBEAN SEA

9. I am in broad agreement with the maritime boundary in the Caribbean Sea as delimited by the Court. However, in line with my previous reasoning on the starting-point of the land boundary, I am inclined to consider that the starting-point of the maritime boundary should have been situated at the so-called "Alexander Point" (that is, the point at which General Alexander fixed the starting-point of the land boundary). Such a solution would have fully respected the 1858 Treaty of Limits and the Cleveland and Alexander Awards. However, since, in practical terms, the starting-point identified in the present Judgment does not significantly move the course of the would-be boundary line²⁰, I have voted in favour of paragraph 4 of the *dispositif*.

¹⁷ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), declaration of Judge Gevorgian, pp. 831-832, paras. 4 and 6.

¹⁸ I am aware of the Court's statement in *Frontier Dispute* that the effect of any judicial decision rendered in a territorial dispute is "a clarification . . . of a given legal situation with declaratory effect from the date of the legal title upheld by the court" (*Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 563, para. 17). However, this finding should not be taken to its ultimate consequences. In reaching the opposite conclusion, the Court has given full effect to the legal fiction of retroactivity.

¹⁹ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 452, para. 319.

²⁰ See sketch-map No. 5.

Some other aspects of the case could also have been addressed differently. In particular, I consider that, as territory under its sovereignty, Nicaragua's Harbor Head Lagoon generated an entitlement to a territorial sea to Nicaragua. The Court instead concludes that the "instability" of the sandbar separating the lagoon from the Caribbean Sea and its situation as a "small enclave within Costa Rica's territory" justified the opposite conclusion²¹. Leaving aside the problems arising within this reasoning, it appears unjustified not to compensate Nicaragua for its loss of territory in the maritime area generated by the sandbar in front of the lagoon.

10. Other relevant questions concern the practical differences between the methods employed to delimit the territorial sea and the economic exclusive zone and continental shelf, the legal effects of the 1977 Treaty on Delimitation of Marine and Submarine Areas and Maritime Cooperation between Costa Rica and Colombia (not yet ratified, but strictly applied by Costa Rica for more than forty years), the legal effects of the 1980 bilateral treaty concluded between Panama and Costa Rica (referred to by Costa Rica, but never registered in accordance with Article 102, paragraph 1, of the United Nations Charter) and the limited use in international jurisprudence of radial projections in the determination of relevant areas. Certainly, these are important issues which the Court could have addressed in more detail. However, overall, I consider that the Judgment strikes a fair balance between the respective entitlements of the two Parties in the Caribbean Sea and the Pacific Ocean.

(Signed) Kirill GEVORGIAN.

²¹ See paragraph 105 of the present Judgment.

DECLARATION OF JUDGE *AD HOC* SIMMA

1980 Treaty concerning Delimitation of Marine Areas and Maritime Co-operation between the Republic of Costa Rica and the Republic of Panama — Relevance to this case — Obligations under Article 102 of the Charter of the United Nations.

1. I have voted in favour of each of the Judgment's operative paragraphs and agree, for the most part, with the reasoning set out therein. I wish, in this short declaration, to comment on a point which has not been addressed in the Judgment, relating to Article 102 of the Charter of the United Nations.

2. Article 102 of the Charter provides:

“1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.”

3. In this case, both Parties made reference to the Treaty concerning Delimitation of Marine Areas and Maritime Co-operation 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 (the “1980 Treaty”) (see Judgment, para. 57). While the text of that Treaty is available on the website of the United Nations Division for Ocean Affairs and the Law of the Sea (and is reproduced in Annex 2 to Costa Rica's Memorial in the case concerning *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*), it does not appear to have been registered in accordance with the requirements of Article 102, paragraph 1, of the United Nations Charter.

4. In their respective pleadings in this case, both Parties made reference to the 1980 Treaty in discussing the maritime boundaries already delimited by Costa Rica. The 1980 Treaty played a role in determining the approach of both Parties to the limits of the relevant area in the southerly part of the Caribbean Sea (see Judgment, paras. 117-119), the Court ultimately following in this respect that suggested by Costa Rica (*ibid.*, para. 164).

5. In making its arguments regarding the cut-off generated by a “three-State concavity” that it suffers in the Caribbean Sea, Costa Rica did not

point to the boundary delimited in the 1980 Treaty but to equidistance lines creating such an effect (see also Judgment, para. 150). In response, Nicaragua pointed to the terms of the 1980 Treaty, and Costa Rica acknowledged that part of its maritime boundary with Panama was indeed delimited by that treaty.

6. Nicaragua also referred to the 1980 Treaty in another respect, arguing that “[t]he terms of the 1980 Treaty are binding and inescapable and must be taken into account and given their due weight” in asserting the relevance of treaties signed by Costa Rica to the question of delimitation between the Parties in the Caribbean Sea (see also Judgment, paras. 123-129).

7. According to paragraph 2 of Article 102, “[n]o party to any such treaty or international agreement which has not been registered . . . may invoke that treaty or agreement before any organ of the United Nations”. The International Court of Justice being, according to Article 92 of the United Nations Charter, “the principal judicial organ of the United Nations”, it follows that such unregistered treaties cannot be invoked before it¹. This does not, however, as the Court has observed, “have any consequence for the actual validity of the agreement, which remains no less binding upon the parties” (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 122, para. 29).

8. The concept of “invocation” has been taken, in the context of Article 102 of the Charter, to mean that “a party relies upon a treaty as the foundation of its claim or counter-claim, or where the particular legal right that it alleges has been infringed has its basis in the terms thereof”². In this case, it does not appear that Costa Rica has attempted to so invoke the 1980 Treaty.

9. For its part, Nicaragua did appear to rely on the 1980 Treaty to establish, at least indirectly, that Costa Rica had renounced certain maritime entitlements to its benefit (see Judgment, paras. 124-134). However, it is not necessary in the present case to determine whether Nicaragua has “invoked” the 1980 Treaty within the meaning of Article 102, paragraph 2, given that Nicaragua is not a party to that Treaty and therefore does not fall within the scope of Article 102, paragraph 2, in respect of it³.

¹ See, for example, the discussion in E. Martens, “Article 102” in B. Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary*, Vol. II, 3rd ed., Oxford University Press, 2012, pp. 2106-2109.

² *Ibid.*, p. 2106, citing M. Brandon, “The Validity of Non-Registered Treaties” (1952), *British Yearbook of International Law*, Vol. 29, p. 198.

³ See E. Martens, *supra* note 1, p. 2106. (“Only parties to an unregistered agreement can be concerned by the sanction. Third parties are at liberty to invoke it at any time, subject, of course, to the rule of *res inter alios acta*.”) See also M. Brandon, *supra* note 2, p. 192; J.-P. Jacque, “Article 102” in J.-P. Cot *et al.* (eds.), *La Charte des Nations Unies: Commentaire article par article*, Vol. II, 3rd ed., Paris: Economica, 2005, p. 2130.

10. Notwithstanding that neither Party was thus probably captured by the terms of Article 102, paragraph 2, of the Charter in this case, that provision is, as a whole, an important element in maintaining the international rule of law⁴ and States should respect their obligations thereunder. It is therefore disappointing that the parties to the 1980 Treaty appear to have treated their obligations under Article 102 of the Charter in a somewhat cavalier fashion and that the Court did not take the opportunity to acknowledge this in its Judgment.

(Signed) Bruno SIMMA.

⁴ See, for example, United Nations General Assembly resolution 70/118, “The rule of law at the national and international levels” (14 December 2015), para. 8 (*b*).

DISSENTING OPINION
OF JUDGE *AD HOC* AL-KHASAWNEH

Dissent is confined to land delimitation — Importance of putting to rest a long running dispute — Ambiguity of 1858 Treaty — Producing no less than six arbitrations — And bilateral commissions — And negotiations — Court dealing with various aspects of dispute since 2005 — 2015 Judgment and present Judgments are res judicata — In conflict with earlier res judicata decisions — Caribbean shore in general retreat — New point chosen by Court ephemeral — And unjustified — Alexander Point submerged by sea but still identifiable — Mouth of river was not crucial for territorial delimitation — Discontinuous, elongated lagoons suggest a recently disappeared caño — Represent border between Parties — Harbor Head Lagoon and land barrier under Nicaraguan sovereignty — But no maritime entitlements — Lack of reasoning and based on hope — Clarification as to voting on dispositif.

I am essentially in agreement with my learned colleagues with regard to the maritime delimitation effected in the Caribbean Sea and the Pacific Ocean. A difference of opinion with the majority with respect to the scope of the concept of equity on delimitation in the Pacific warrants a separate declaration and will be enunciated therein.

It is on land that I regrettably part company with my colleagues, as I am unconvinced of their findings and remain unpersuaded by the reasoning underlying those findings. I must therefore dissent.

Before explaining in detail the reasons that led me to take this position, I wish to make some general introductory remarks.

It is incontestable that the aim of any judicial settlement is to put to rest, on the basis of law, an existing dispute before a judicial body. In the case of the Court, the principal judicial organ of the United Nations, a solution of an extant dispute on the basis of international law helps also in the preservation of international peace — which is one of the highest aims of the Organization — and in preventing or at least minimizing conflict between its Member States.

This consideration assumes a special pertinence in the present case(s) given a long history of conflict, centring mainly on territorial disputes between the Parties, that started even before the conclusion of the Treaty of Limits of 1858 between them. It says much about the “creative” ambiguity of that Treaty that it has since generated no less than six Awards on

its interpretation and application, a number of bilateral commissions, and stalled bilateral negotiations right up to the first recourse to the Court in 2005¹. The Court itself has had to deal with various aspects of this ongoing territorial dispute, in the course of which it effected, in its 2015 Judgment, a partial and imprecise delimitation of the area in question, the northern part of Isla Portillos. That partial delimitation, curiously made in the context of a case on State responsibility, has undoubtedly the force of *res judicata*. Moreover, the findings in the present Judgment are largely predicated on those of the 2015 Judgment where, as a primary example, the Court chose the mouth of the San Juan River, as it stood then, as the boundary between the two States rather than the original starting-point of the land boundary fixed by General Alexander, which is now long submerged at sea. The latter is nevertheless still identifiable and capable of providing a starting-point for territorial delimitation by linking it to the nearest point on shore (see figures 84 and 85 of the Report of the Court-Appointed Experts, reproduced below).

Thus, in effect, we are faced with two sets of conflicting decisions, each possessing the force of *res judicata*: on the one hand, the Cleveland Award of 1888 and the first and second Alexander Awards of 1897 and, on the other hand, the 2015 Judgment, in which the Court, at paragraph 92, concluded 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” and the present Judgment, which fixes the starting-point for territorial delimitation at the sandspit at the mouth of the river (para. 71).

Had the shore as it stands today displayed any inclination to stability, there could have been some justification to choose the new point(s), but the geographical and geomorphic realities of the shore of the Caribbean in question attest that there has been an ongoing coastal retreat over the last 160 years since the conclusion of the 1858 Treaty. How literally true is Shakespeare’s sonnet:

“ . . . I have seen the hungry ocean gain
Advantage on the kingdom of the shore”².

This general coastal retreat will most probably continue. Both the Court-appointed experts acknowledged this much and the Court concurred, resorting to a fixed hinge point at sea to ensure against medium and long-term changes to the mouth of the river. Thus — and this is not without irony — a point at sea possessing a long pedigree, which is described precisely in the 1858 Treaty, the Cleveland Award, and the first

¹ *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Application instituting proceedings filed by Costa Rica on 29 September 2005.

² William Shakespeare, *Sonnet 64* (1609).

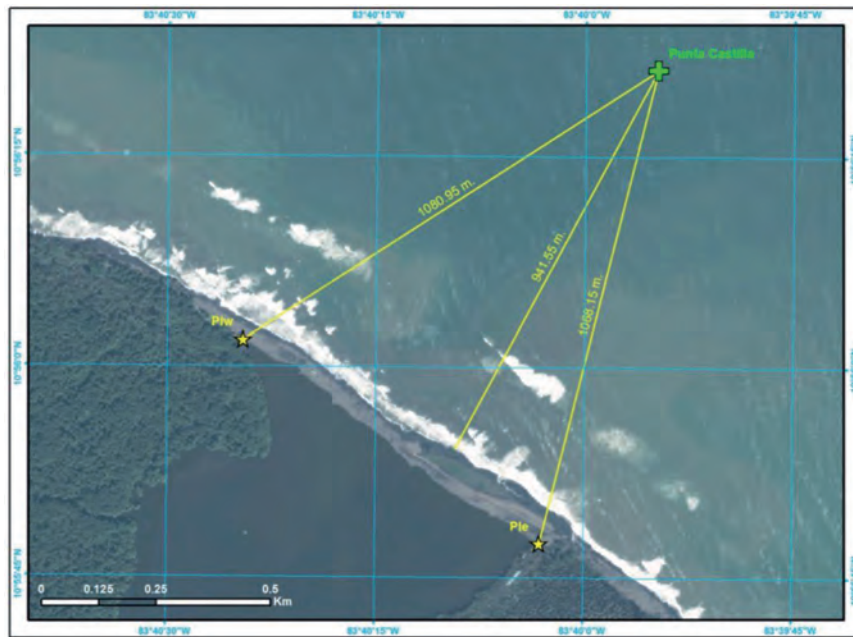


Figure 84. Distances between the location estimated for Punta de Castilla to the closest land point on a satellite image from 22 January 2016 and points Plw and Ple measured during the first site visit.

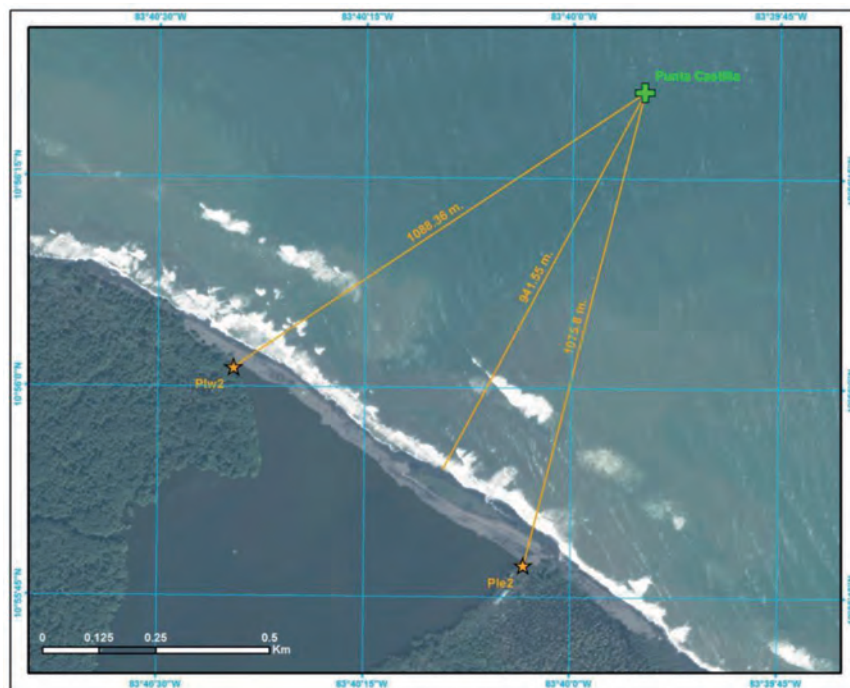


Figure 85. Distances between the location estimated for Punta de Castilla to the closest land point on a satellite image from 22 January 2016 and points Plw2 and Ple2 measured during the second site visit.

and second Alexander Awards, has been replaced by another point linked to a hinge point at sea, the location of which varies according to where the mouth of the river is presently situated. But we can safely predict that the mouth of the river is ephemeral and may revert to empty again into Harbor Head Lagoon³. Would not the cause of the stability and permanence of boundaries, a concept of paramount importance to an international society made of sovereign States, have been better served, had the Court not abandoned the original delimitation fortified by the force of *res judicata* in favour of a shifting river and an ongoing general coastal retreat? And, should the existence of a lagoon enclosed from the sea by a sandbar and recognized by both Parties to be under Nicaraguan sovereignty not have alerted the Court to the fact that the area in dispute *had* been under Nicaraguan sovereignty before the river shifted to the north-west and that *a priori* the sea-abutting shore between it and the location of the mouth of the river must be under Nicaraguan sovereignty?

It is to these issues that I shall now turn. I start by acknowledging that, had the Court in its 2015 Judgment, and consequently in the present one, opted to commence the land boundary at the original Alexander Point, this would not coincide with the mouth of the river at its right bank. It would have left Nicaragua in possession of land on both sides of the river, but this is neither a calamitous occurrence nor one not contemplated by the two Arbitrators, President Cleveland and General Alexander. Thus, when President Cleveland was called upon to decide on “various points of doubtful interpretation communicated by Nicaragua”, he decided, in point 3 (I) of his 1888 Award that:

“The boundary line between the Republics of Costa Rica and Nicaragua, 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 ownership of any accretion to said Punta de Castilla is to be governed by the laws applicable to that subject.” (*Award in regard to the Validity of the Treaty of Limits between Costa Rica and Nicaragua of 15 July 1858* (22 March 1888), United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVIII, p. 209; emphasis added.)

Almost ten years later, when, in 1897, it had become clear that Punta de Castilla was already submerged under the sea, General Alexander fixed the starting-point of the land boundary by reference to that point. As Nicaragua points out in its written pleadings⁴, he was not looking for

³ Report of the Court-Appointed Experts, CRNIC-CRNIP 2017/18, p. 77, para. 195.

⁴ *Dispute concerning the Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, Counter-Memorial of the Republic of Nicaragua, 18 April 2017, p. 25, para. 3.22.

the mouth of the river, which would have been a much easier task than trying to find out where Punta de Castilla was located, because he recognized the latter to be where the fixed starting-point for the border was to be found.

Any lingering doubt that General Alexander was looking for the mouth of the river is dispelled by the operative part of his first Award. He expressly determined that the coast of the eastern extremity of Harbor Head Lagoon was Punta de Castilla, and that from there “the boundary line shall turn to the left, or south-eastward, and shall follow the water’s edge around the harbor *until it reaches the river proper* by the first channel met”⁵ (emphasis added). It is abundantly clear that the starting-point was not the river mouth.

There is also ample evidence that, in the bilateral commissions that met after the rendering of the Award, both Parties viewed the original Alexander Point as the starting-point of land delimitation and strove to identify and repair the first marker placed by General Alexander, which had been submerged by the sea, by linking the Alexander Point to points further inland.

Indeed, when one assesses the position of the Parties over the past 120 years since the Alexander Award was rendered, one cannot but notice that there had been long-term acceptance by the Parties of the original starting-point of boundary delimitation and that this state of affairs remained so until recently when the Court started to be seised by the disputes between the Parties.

Turning to the question of whether there is a water channel connecting the river and Harbor Head Lagoon, I differ with my learned colleagues in drawing firm conclusions from the existence of “elongated . . . coast-parallel lagoons”.

While there is no continuous water channel connecting the lagoon and the river at present, the experts indicated that “in the *recent past*” (emphasis added), there was a “channel-like water gap between the spit and firm land, and that the Los Portillos/Harbor Head Lagoon was connected to the sea via the San Juan River”⁶. Given this, I respectfully believe that the firm inference my colleagues made somewhat hastily from the fact that, at the time of their visit, the experts found this channel to be disconnected, does not lead to the conclusion that the shore abutting the Caribbean and the partly dried channel is under Costa Rican sovereignty.

It is worth recalling that in arid parts of the world it is common to delineate boundaries by reference to dried or partly dried riverbeds. I am

⁵ *First Award of the Engineer-Umpire, under the Convention between Costa Rica and Nicaragua of 8 April 1896 for the Demarcation of the Boundary between the Two Republics* (30 September 1897), RIAA, Vol. XXVIII, p. 220.

⁶ Report of the Court-Appointed Experts, CRNIC-CRNIP 2017/18, p. 26, para. 100.



Figure 41. Report of the Court-Appointed Experts, CRNIC-CRNIP 2017/18, p. 35.

strongly inclined to the view that those elongated but discontinuous lagoons running parallel to the Caribbean shore were what was meant by the experts when they spoke of a channel-like water gap between the pit and the firm land that existed “in the recent past”⁷.

This I believe is the boundary between the Parties. The majority however dismissed this evidence and chose to believe that such a *caño* had been submerged by the sea. But this conclusion is not supported by any evidence and remains pure conjecture.

Turning to the sand barrier separating the water of the lagoon from the sea, which is recognized by Costa Rica to be under Nicaraguan sovereignty “in so far as [it] remains above [sea level]”⁸, the Judgment came to the conclusion that it does not generate maritime entitlements.

This conclusion is totally unreasoned. No analysis is offered as to why a piece of *terra firma* abutting the shore should not have maritime entitlement, not even in the territorial sea where judicial discretion is expressly constrained. It is self-evident that this conclusion has no basis in law and is no more than a necessary consequence of the wrong decision on the appurtenance of the shore from the end of the sand barrier till the mouth of the river to Costa Rica.

Not knowing what to do with this inconvenient fact, the Court decided to do nothing in the hope that the hungry waves and the sands would

⁷ Report of the Court-Appointed Experts, CRNIC-CRNIP 2017/18, p. 26, para. 100.

⁸ CR 2017/14, p. 27, para. 10 (2) (a) (Ugalde Alvarez, Final submissions in the *Land Boundary* case).

rectify what the Court did not do, thus giving a new and literal meaning to a line by Hafez of Shiraz: “The house of hope is built on sand.”⁹

It is equally possible that the early demise of the sand barrier will not meet the Court’s expectations and that through sedimentation or human actions the lagoon itself will transform into *terra firma* enclosed in Costa Rica’s territory, but not entitled to a maritime space. The Court’s decision carries the seed of a future dispute.

Before ending this dissenting opinion, I wish to make two clarifications:

First, paragraph 2 of the *dispositif* amalgamates two proposals that are in reality eminently separable, namely Costa Rican sovereignty over the whole northern part of Isla Portillos, including its coast and, as an exception, Nicaraguan sovereignty over the Harbor Head Lagoon and the sandbar separating it from the Caribbean. I had no choice but to vote against the paragraph as a whole. This vote in no way detracts from my opinion that the lagoon and sandbar appertain to Nicaragua.

Secondly, I voted in favour of paragraph 3 (b) of the *dispositif* which finds that Nicaragua must remove its military camp from Costa Rican territory. This vote reflects my view that notwithstanding my continued opinion that the area in question is not Costa Rican, in view of the earlier finding of the Court in paragraph 2 of the *dispositif*, the withdrawal of the military camp is a necessary consequence of that finding.

(Signed) Awn AL-KHASAWNEH.

⁹ Shams-ud-din Mohammed, better known as Hafez of Shiraz (born circa 1320 AD) is one of the greatest poets not only of Iran and Islam but of humanity at large. The full quotation is:

“The house of hope is built on sand,
And life’s foundations rest on air.”

DECLARATION OF JUDGE *AD HOC* AL-KHASAWNEH

Discretion left to judges in delimitation of EEZ/continental shelf — Court should assess equity of delimitation holistically — Court should not limit itself to assessing gross disproportionality at third step of delimitation.

Maritime delimitation is, of necessity, a compromise between the need for certainty and predictability of the law on the one hand and, on the other, the need to take cognizance of the realities of geography which are never the same in different cases.

Judges are enjoined not to “completely refashion nature” (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, pp. 49-50, para. 91), which might be no more than an awkward way of saying they could do so provided this “refashioning” is not complete or blatant. In reality this is what they do all the time. The weight to be ascribed to a given island always carries an element of subjectivity. Similarly, a decision as to when the drawing of an equidistance line constitutes “a cut-off” cannot be made on purely mathematical basis. This subjectivity is both normal and legitimate and I have always believed that the legislator should leave room to the judge.

With regard to delimitation in the exclusive economic zone and the continental shelf, the proposition can be safely advanced that — to the extent that any guidance can be gleaned from the negotiations leading to the adoption of the Law of the Sea Convention — the negotiators consciously left much room for judicial discretion in recognition of the well-nigh impossibility of providing uniform legislative answers.

Still the judicial mind is predisposed to reduce subjectivity, thus the jurisprudence of the Court reveals a success in turning “creative equity” into the more constrained “corrective equity” and this has been done by following methods and techniques, the most notable of which is the three-stage approach to delimitation which has been employed in recent jurisprudence. This is sound and useful, as long as we do not lose sight of the fact that it is no more than a method and that what matters is that the end result must be equitable. A less attractive aspect of this *modus operandi* is that the third stage is tied to the extremely easy test (which no delimitation has failed) of checking gross disproportionality of maritime entitlement against the objective yardstick of the length of the Parties’ relevant coasts, which is an important factor in determining lack of gross disproportionality but is not the only factor. The self-imposed reduction

of an equitable solution finds no support in the text of Articles 74 and 83 of the Law of the Sea Convention, which suggest a comprehensive assessment of the equitable nature of the result at the end of the delimitation even if admittedly a subjective element is present in such an assessment.

Applied to delimitation in the Pacific, I believe that a more equitable result would have been obtained had the Nicoya Peninsula been given considerable but not complete effect in so far as delimitation in the exclusive economic zone and the continental shelf are concerned. This would have been justified given its proximity to the starting-point of delimitation and the absence of any qualitative difference between it and St. Elena, thus a refashioning of nature but certainly not a complete one.

(Signed) Awn AL-KHASAWNEH.
