International Court of Justice — Jurisdiction — Unilateral application — American Treaty on Pacific Settlement, 1948 ("Pact of Bogotá")

Treaties — Binding international agreements — Role of unilateral proclamations in establishing existence of an agreed boundary — Whether 1952 Santiago Declaration establishing boundary between Chile and Peru — Treaty interpretation — Vienna Convention on the Law of Treaties, 1969 — Articles 31 and 32 — Whether tacit agreement existing between Chile and Peru on their maritime boundary — Role of subsequent treaties in ascertaining tacit agreement — Whether 1954 Special Maritime Frontier Zone Agreement acknowledging existence of tacitly agreed boundary — Whether lighthouse arrangements confirming existence of agreed boundary — Extent of tacitly agreed boundary — Whether fishing and enforcement activities indicating extent of tacitly agreed boundary — Whether developments in law of the sea indicating extent of tacitly agreed boundary — Whether Bákula Memorandum indicating extent of tacitly agreed boundary — Starting point of tacitly agreed boundary — 1929 Treaty of Lima — Whether 1930 Mixed Commission determining starting point of maritime boundary — Whether starting point of maritime boundary coinciding with end point of land boundary

Sea — United Nations Convention on the Law of the Sea, 1982 — Articles 74 and 83 — Customary international law — Maritime boundary delimitation — Single maritime boundary — All-purpose maritime boundary — Territorial sea — Exclusive economic zone — Continental shelf — Three-stage approach — Equidistance — Relevant circumstances — Proportionality — Relevant coast — Relevant area — *Tracé parallèle* — Arcs of circle — Whether Peru having sovereign rights and jurisdiction in area beyond 200 nautical miles from Chile's coast but within 200 nautical miles of Peru's coast

Maritime Dispute

(Peru *v.* Chile)[1]

International Court of Justice. 27 *January* 2014

(Tomka, *President*; Sepúlveda-Amor, *Vice-President*; Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Xue, Donoghue, Gaja, Sebutinde and Bhandari, *Judges*; Guillaume and Orrego Vicuña, *Judges ad hoc*)

Summary:[2] *The facts*:—On 16 January 2008, Peru unilaterally instituted proceedings against Chile before the International Court of Justice, both in respect of maritime boundary delimitation between the Parties in the Pacific Ocean, and in respect of the recognition of Peru's sovereign rights in a maritime area lying within 200 nautical miles ("nm") from Peru's coast but that Chile considered to be part of the high seas. Peru sought to found the Court's jurisdiction on Article XXXI of the American Treaty on Pacific Settlement of 30 April 1948 ("the Pact of Bogotá"). Chile was a party to the United Nations Convention on the Law of the Sea, 1982 ("UNCLOS"), while Peru was not.

Peru maintained that no agreed maritime boundary existed between the two countries and asked the Court to plot a boundary line based on the equidistance method in order to achieve an equitable result. Chile maintained that the two States had agreed upon a boundary along the parallel of latitude passing through the starting point of the land boundary and extending to a minimum of 200 nm.[3]

On 23 June 1947, Chile issued a unilateral proclamation in which it declared itself to have jurisdiction "over all the seas contained within the perimeter formed by the coast and the mathematical parallel projected into the sea at a distance of 200 nautical miles from the coasts of Chilean territory". On 1 August 1947, Peru issued a similar unilateral proclamation, under which it would have "national sovereignty and jurisdiction" over the area "covered between the coast and an imaginary parallel line to it at a distance of two hundred nautical miles measured following the line of the geographical parallels".

Peru argued that the Parties' 1947 Proclamations only constituted an assertion of sovereignty and jurisdiction over a maritime zone extending to 200 nm from the Parties' own coasts. Conversely, Chile contended that the 1947 Proclamations were "concordant", and that, by referring to a parallel of

[1] Counsel for Peru and Chile are listed in paragraph 11 of the Judgment.
[2] Prepared by Mr M. Lando.
[3] See sketch map No 2 at p. 22 below.

latitude as the manner in which to determine the outward limit of the Parties' maritime zones, they *ipso facto* also established the lateral limits between such maritime zones as parallels of latitude. According to Chile, the 1947 Proclamations were antecedents to the Santiago Declaration, and could be seen as part of the circumstances in which the Parties later concluded the Santiago Declaration.

On 18 August 1952, Chile, Ecuador and Peru signed the Declaration on the Maritime Zone ("the Santiago Declaration"). Paragraph II of the Santiago Declaration stated that the States Parties asserted "exclusive sovereignty and jurisdiction over the sea along the coasts of their respective countries to a minimum distance of 200 nautical miles from these coasts". Under paragraph IV of the Santiago Declaration, "[i]f an island or group of islands belonging to one of the countries making the declaration is situated less than 200 nautical miles from the general maritime zone belonging to another of those countries, the maritime zone of the island or group of islands shall be limited by the parallel at the point at which the land frontier of the States concerned reaches the sea".[4]

Chile argued that the signatories of the Santiago Declaration always intended it to be a binding treaty, while for Peru it was only a non-binding declaration. Peru also argued that the Santiago Declaration lacked the characteristics of a boundary treaty as it did not clearly describe the course of any boundary. Chile contended that a boundary agreement could take any form, and that it followed from paragraph IV of the Santiago Declaration that the Parties established their boundary for a length of 200 nm along the parallel of latitude beginning at the land boundary terminus. However, Peru argued that the Santiago Declaration only established the maritime entitlements of the Parties' coasts and of the islands off the Parties' coasts. Peru argued that the 1947 Proclamations could not be circumstances surrounding the conclusion of the Santiago Declaration in the sense of Article 32 of the Vienna Convention on the Law of Treaties, 1969, since they predated the Santiago Declaration by five years.

On 4 December 1954, Chile, Ecuador and Peru signed a number of agreements. The Complementary Convention to the Santiago Declaration ("the Complementary Convention") reasserted each State's 200 nm claim to sovereignty and jurisdiction over a belt of sea adjacent to its coast. The Agreement relating to Measures of Supervision and Control of the Maritime Zones of the Signatory Countries ("the Supervision and Control Agreement") provided that each party had to "supervise and control the exploitation of the resources in its Maritime Zone by the use of such organs and means as it considers necessary". The Agreement relating to a Special Maritime Frontier Zone ("the Special Maritime Frontier Zone Agreement") instituted, beginning at 12 nm from the coasts of the States Parties, a 10 nm special zone on either

[4] For details of other agreements concluded that day, see para. 20 of the Judgment.

side of the parallel constituting the boundary between Chile and Peru and between Ecuador and Peru.[5]

Chile contended that the Supervision and Control Agreement and the Special Maritime Frontier Zone Agreement were based on the understanding that the Parties had already agreed on their maritime boundary in the Santiago Declaration. Peru argued that the Special Maritime Frontier Zone Agreement only concerned the boundary between Ecuador and Peru, that the fact that Chile had delayed ratifying the Agreement until 1967 and registering it until 2004 showed its limited importance, and that the treaty related only to the Parties' claim to functional jurisdiction. Chile rejected Peru's arguments, stating that the Special Maritime Frontier Zone Agreement applied between Ecuador and Peru as well as between Chile and Peru, that the delay in ratification and registration did not affect the scope and effect of the treaty, and that the basic predicate of the treaty was that the Parties had already established their lateral boundaries.

In 1968-9, Chile and Peru entered into arrangements ("the lighthouse arrangements") in order to build a lighthouse each "at the point at which the common border reaches the sea, near boundary marker number one". The Parties appointed a Mixed Commission with the task of identifying the point at which Boundary Marker No 1 was located. Beacons were erected in the implementation of the lighthouse arrangements.

In 1975-6, Chile entered into negotiations with Bolivia concerning the cession of a parcel of territory which would allow Bolivia to have access to the Pacific Ocean. In accordance with the 1929 Treaty of Lima, Peru was consulted in the negotiations. In January 1976, Peru acknowledged receipt of the documents from Bolivia and Chile, and expressed its views. In July 1976, Chile informed Peru that it would seek from Bolivia assurances that Bolivia would comply with the Special Maritime Frontier Zone Agreement. The negotiations between Bolivia and Chile did not lead to an agreement.

On 23 May 1986, Peruvian Ambassador Bákula sent a Memorandum to the Chilean Foreign Ministry ("the Bákula Memorandum"), according to which, in order to strengthen the two States' reciprocal confidence, "[o]ne of the cases that merits immediate attention is the formal and definitive delimitation of the marine spaces". On 13 June 1986, Chile's Foreign Ministry issued an official communiqué, which stated that "Ambassador Bákula expressed the interest of the Peruvian Government to start future conversations between the two countries on their points of view regarding maritime delimitation." The communiqué stated that Chile's Foreign Ministry "took note" of the Bákula Memorandum.

According to Peru, the Bákula Memorandum clearly stated that the Parties had not agreed on a maritime boundary between them. Chile contended that the Bákula Memorandum was simply calling for a renegotiation of the maritime boundary previously agreed upon by the Parties.

[5] For details of other agreements concluded that day, see para. 20 of the Judgment.

Both Parties agreed that the land boundary between them was delimited by the 1929 Treaty of Lima. The land boundary terminus, called Point Concordia, was identified by the Joint Instructions of the Chilean and Peruvian Foreign Ministers as the point of intersection between the Pacific Ocean and an arc with a radius of 10 km having its centre on the bridge over the River Lluta. Point Concordia was to be identified by Boundary Marker No 1. However, Peru argued that Boundary Marker No 1 did not represent the actual land boundary terminus with Chile, and thus the starting point of the maritime boundary, but simply marked a point on the arc constituting the land boundary. Chile contended that Boundary Marker No 1 identified the land boundary terminus with Peru, and thus the starting point of the maritime boundary.

Peru argued that in delimiting the maritime boundary between the Parties, the Court should use the three-stage approach, starting with an equidistance line, adjusted should relevant circumstances so require, followed by the proportionality test. Chile made no arguments with respect to the applicable delimitation method. Peru also contended that the area beyond the end point of the boundary lying beyond 200 nm from Chile's coast was subject to Peru's sovereign rights and jurisdiction. Chile argued that the Santiago Declaration made it clear that the maritime jurisdiction of Peru did not extend south of the parallel of latitude starting at the Parties' land boundary terminus.

Held:—(1) (by fifteen votes to one, Judge Gaja dissenting) The starting point of the single maritime boundary delimiting the respective maritime areas between Peru and Chile was the intersection of the parallel of latitude passing through Boundary Marker No 1 with the low-water line.

(a) During the preparations for the lighthouse arrangements, the Chilean and Peruvian delegates communicated to their governments their understanding that Boundary Marker No 1 constituted the maritime frontier between the two States. The governments of Chile and Peru confirmed this understanding. The Act of the Chile–Peru Mixed Commission in Charge of Verifying the Location of Boundary Marker No 1 and Signalling the Maritime Boundary of 22 August 1969 referred to Boundary Marker No 1 as the starting point of the Parties' maritime boundary (paras. 164-7).

(b) The cartographic evidence and the evidence relating to fishing in the region was not useful in determining the starting point of the maritime boundary (paras. 170-3).

(c) The lighthouse arrangements were compelling evidence that the Parties understood their maritime boundary to be the parallel of latitude starting at Boundary Marker No 1. Therefore, the maritime boundary between Peru and Chile started at the intersection of the parallel of latitude passing through Boundary Marker No 1 with the low-water line. The end point of the Parties' land boundary, Point Concordia, could be distinct from the starting point of the maritime boundary. However, the Court was not called upon to determine the exact location of Point Concordia (paras. 174-6).

(2) (by fifteen votes to one, Judge Sebutinde dissenting) The initial segment of the single maritime boundary followed the parallel of latitude passing through Boundary Marker No 1 westward (paras. 176-7).

(3) (by ten votes to six, President Tomka and Judges Xue, Gaja, Sebutinde, Bhandari and Judge ad hoc Orrego Vicuña dissenting) This initial segment ran up to a point (Point A) situated at a distance of 80 nm from the starting-point of the single maritime boundary.

(a) The reference, in the Parties' 1947 Proclamations, to the parallel of latitude was not sufficient evidence of their intention to use the parallel of latitude as their eventual maritime boundary. The language of the 1947 Proclamations was also conditional, which could not commit the Parties to using the parallel of latitude as the method for delimiting their maritime boundary (paras. 40-2).

(b) (i) The ordinary meaning of the words in the Santiago Declaration did not convey that it established a maritime boundary between the Parties. Neither paragraph II nor paragraph III of the Santiago Declaration implicitly established a boundary between Chile and Peru, as such provisions simply expressed the Parties' seaward maritime claims. Concerning paragraph IV of the Santiago Declaration, the reference to the maritime entitlements of islands being curtailed by the parallel of latitude could not imply that such parallel of latitude was also the maritime boundary between the Parties. The Parties simply prevented future disputes concerning the maritime entitlements of islands, but did not establish a final boundary between them (paras. 58-61).

(ii) The object and purpose of the Santiago Declaration was connected to the conservation of fishing resources and to issues of large-scale whaling. The minutes of the conference at which the Santiago Declaration was adopted were simply the *travaux préparatoires* of the Santiago Declaration itself, not a binding treaty as Chile contended (paras. 63-5).

(iii) Since the ordinary meaning of the words in the Santiago Declaration already permitted a clear interpretation, there was no need to resort to supplementary means of interpretation (para. 66).

(c) (i) The Complementary Convention had the primary purpose of reasserting the claims to sovereignty made in the Santiago Declaration. The Supervision and Control Agreement gave no indication of the location or course of the boundary between the Parties (paras. 77-9).

(ii) The Special Maritime Frontier Zone Agreement was in no way limited to Ecuador and Peru, but was also applicable as between Chile and Peru. Chile's delay in ratifying and registering the Special Maritime Frontier Zone Agreement did not show that it lacked importance. In any event, such a delay had no bearing on the scope or effect of the agreement. The Special Maritime Frontier Zone Agreement recorded that a boundary already existed by 1954, and, given that the Santiago Declaration had not established a boundary between Chile and Peru, the Special Maritime Frontier Zone Agreement could only refer to a tacitly agreed boundary (paras. 85-7 and 90-1).

(d) The purpose of the lighthouse arrangements was limited, and they did not refer to any pre-existing maritime boundary between the Parties. However, the lighthouse arrangements proceeded on the assumption that a boundary beyond 12 nm already existed between the Parties (para. 99).

(e) The boundary tacitly agreed upon by the Parties had to be understood in the context of the 1947 Proclamations and of the Santiago Declaration. Therefore, the boundary covered the water column, the seabed and the subsoil, as referred to in the 1947 Proclamations and in the Santiago Declaration (para. 102).

(f) (i) In order to decide the extent of the agreed maritime boundary, the practice of the Parties was diachronically analysed. According to the data provided by the Parties, in the 1950s fishing took place within 60 nm of the Parties' coasts. However, evidence of fishing activities could not by itself be determinative of the extent of the agreed boundary (paras. 103-11).

(ii) Taking into account the Parties' fishing activity, the relevant practice of other States and the work of the International Law Commission leading up to the adoption of the 1958 Geneva Conventions,[6] the agreed maritime boundary along the parallel could not extend beyond 80 nm from its starting point. The legislative practice of the Parties was of no assistance to determining the extent of the agreed maritime boundary. The 1955 Accession Protocol to the Santiago Declaration was unhelpful in determining the extent of the agreed boundary. Enforcement activities did not put into question the conclusion that the agreed boundary could not extend beyond 200 nm from the Parties' coasts (paras. 119-29).

(iii) The lighthouse arrangements were of no consequence for establishing the extent of the agreed boundary. Neither were the negotiations between Chile and Bolivia for allowing Bolivia access to the Pacific Ocean, and the statements of the Parties at the Third United Nations Conference on the Law of the Sea. The Bákula Memorandum was not a request to renegotiate an existing boundary, but a request to delimit the complete maritime boundary (paras. 130-41).

(iv) The evidence showed that the maritime boundary tacitly agreed upon by the Parties extended along a parallel of latitude for 80 nm from its starting point, which was the intersection of the parallel of latitude passing through Boundary Marker No 1 with the low-water line (para. 149).

(4) (by ten votes to six, President Tomka and Judges Xue, Gaja, Sebutinde, Bhandari and Judge ad hoc Orrego Vicuña dissenting) From Point A, the single maritime boundary continued south-westward along the line equidistant from the coasts of Peru and Chile, as measured from that point, until its intersection (at Point B) with the 200 nm limit measured from the baselines from which the territorial sea of Chile was measured. From Point B, the single

[6] Convention on the Continental Shelf; Convention on Fishing and Conservation of the Living Resources of the High Seas; Convention on the High Seas; and Convention on the Territorial Sea and the Contiguous Zone. All four conventions were adopted on 29 April 1958.

maritime boundary continued southward along that limit until it reached the point of intersection (Point C) of the 200 nm limits measured from the baselines from which the territorial seas of Peru and Chile, respectively, were measured.[7]

(a) UNCLOS Articles 74 and 83 were part of customary international law. The methodology employed to draw the maritime boundary beyond 80 nm was divided into three stages: first, to draw an equidistance line; secondly, to adjust that line based on relevant circumstances; thirdly, to assess the proportionality between the length of the Parties' coasts and the marine area appertaining to them (paras. 179-80).

(b) (i) The existence of an agreed boundary running along the parallel of latitude for 80 nm presented an unusual situation. In order to select the base points on Peru's coast for constructing the equidistance line, an arc of a circle was traced from Point A and with an 80 nm radius. Subsequently, appropriate base points were selected on Peru's coast north of the point at which the arc of a circle thus traced intersected Peru's Pacific coast. The final segment of the boundary, from Point B to Point C, ran in a southerly direction along the 200 nm limit of Chile's exclusive economic zone (paras. 185 and 190).

(ii) There were no relevant circumstances justifying the adjustment of the equidistance line. Concerning proportionality, the existence of an agreed boundary up to 80 nm from Chile's coast made it impossible to identify clearly the relevant coast and the relevant area. Nevertheless, a broad assessment of proportionality could be conducted. No disproportion existed that would have called into question the equitableness of the boundary (paras. 191-4).

(5) (by fifteen votes to one, Judge ad hoc Orrego Vicuña dissenting) There was no need to rule on the second submission of Peru concerning sovereign rights and jurisdiction in the area beyond 200 nm from Chile's coast. A boundary formed by a first agreed segment and a second traced segment was established *de novo*. Owing to the course of the boundary, the maritime area lying beyond 200 nm from Chile's coast and south of the parallel of latitude along which the first segment of the boundary ran fell entirely within 200 nm of Peru's coast. Therefore, it was encompassed within Peru's maritime entitlements under UNCLOS. As a consequence, Peru's second submission, requesting the Court to decide that Peru had sovereign rights and jurisdiction in that maritime area, became moot (paras. 187-9).

Declaration of President Tomka: (1) The Court was correct in relation to the starting point of the boundary. However, the Court should not have found that there existed an agreed boundary running along the parallel of latitude only to a distance of 80 nm. The Special Maritime Frontier Zone Agreement acknowledged that the boundary was the parallel of latitude, but the Court should have recognized that the boundary ran for the entire length of the

[7] See sketch map No 3 at p. 77 below.

Parties' claims to maritime jurisdiction. There was insufficient evidence to decide that the agreed boundary was only 80 nm long (paras. 1-3).

(2) The Santiago Declaration did not ostensibly establish a complete boundary between the Parties since its paragraph IV only referred to the maritime entitlements of islands. However, the documents of the conference leading to the adoption of the 1954 treaties showed that the Parties, as well as Ecuador, recognized that the Santiago Declaration established a boundary for the full extent of the maritime zones claimed by them. Overall, the Santiago Declaration served as evidence of the Parties' agreement on their maritime boundary, although not as the legal source of that agreement (paras. 13-16 and 22).

(3) The Court was correct to declare that Peru's second submission became moot (para. 26).

Declaration of Vice-President Sepúlveda-Amor: The record did not support the view that by 1954, when the Special Maritime Frontier Zone Agreement was concluded, there already existed an agreed maritime boundary between the Parties. The Special Maritime Frontier Zone Agreement had a narrow scope, which did not include confirming the existence of an agreed boundary. On such an important matter as maritime delimitation, one would expect the Court to have found additional material to support its finding that there was a tacitly agreed boundary. This especially concerned the analysis of State conduct, which was underdeveloped and peripheral in the Court's reasoning (paras. 2, 6, 10 and 16).

Separate Opinion of Judge Owada: (1) The Court was right to reject the main contentions of both Parties. However, the finding that there was a tacitly agreed boundary extending to 80 nm from Chile's coast, evidenced by the Special Maritime Frontier Zone Agreement and the lighthouse arrangements, was not entirely persuasive. Specifically, the Court did not fully substantiate both its finding that there were actions or omissions by the Parties on which the existence of a tacitly agreed maritime boundary could be founded, and its finding that the boundary extended to 80 nm from Chile's coast (paras. 3 and 5-6).

(2) The conclusion that the Special Maritime Frontier Zone Agreement acknowledged the existence of a tacitly agreed boundary was not uncontroversial since its language was not clear in this regard. The plain language of the Special Maritime Frontier Zone Agreement, without additional evidence, could not show that it recognized the existence of a tacitly agreed boundary between the Parties. The stringent test set out in the 2007 *Nicaragua* v. *Honduras* judgment was not met.[8] The *travaux préparatoires* showed that Article I of the Special Maritime Frontier Zone Agreement was drafted with

[8] *Nicaragua* v. *Honduras (Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea)*, 144 ILR 1, para. 253.

the intention of reiterating what had been stated in the Santiago Declaration, and thus not with the intention of acknowledging an existing boundary (paras. 9-12 and 16-17).

(3) Concerning the agreed boundary's length, if the Parties had agreed that the parallel was the definitive boundary for all purposes, there was no reason to doubt that it could have extended to 200 nm from Chile's coast. The judgment referred to fishing and enforcement activities in order to establish the boundary's length. However, in that case the Court should have viewed the boundary not as a permanent delimitation line but as a line concerned only with the creation of a regulatory regime for fishing purposes. Nevertheless, the Court was justified in selecting 80 nm as the length of the agreed section of the maritime boundary (paras. 22, 25 and 27).

Declaration of Judge Skotnikov: The logic that the Parties could not have established a 200 nm maritime boundary in the 1950s because international law did not allow such claims over maritime areas at that time was unconvincing. The 1947 Proclamations and the Santiago Declaration showed that the Parties were willing to make claims that did not enjoy widespread acceptance at the time. The Parties' extractive and enforcement capacity in 1954 could not have determined the extent of the agreed boundary since the Special Maritime Frontier Zone Agreement only acknowledged the existence of an agreed boundary. In addition, the evidence relied upon by the Court did not warrant a finding that the maritime boundary extended to 80 nm from Chile's coast (paras. 4-6).

Joint Dissenting Opinion of Judges Xue, Gaja, Bhandari and Judge ad hoc Orrego Vicuña: (1)(a) The Santiago Declaration clearly indicated that the Parties' maritime boundary extended along a parallel of latitude up to 200 nm from Chile's coast. When referring to the curtailment of the maritime zones of islands, paragraph IV of the Santiago Declaration implied that a certain criterion was adopted for delimiting the Parties' general maritime zone. It was logical to infer from paragraph IV of the Santiago Declaration that the parallel of latitude passing through the Parties' land boundary terminus was the boundary delimiting the maritime entitlements generated by the Parties' coasts. Since the Parties proclaimed, in the Santiago Declaration, that they had sovereignty and jurisdiction up to 200 nm from their coasts, it was unpersuasive to find that they reached a tacit agreement on a boundary extending to 80 nm from Chile's coast (paras. 2-9).

(b) While it was conceivable that the Parties needed a criterion to establish the extent of the maritime zones of certain islands, a similar criterion was not needed in relation to the Parties' general maritime zone due to its outer limits being drawn by means of the *tracé parallèle* method. If the arcs-of-circle method had been used instead of the *tracé parallèle*, Peru would have had overlapping entitlements with Chile, raising a problem much more serious than that of the entitlements of certain islands. Moreover, in the 1950s the