JOINT DISSENTING OPINION OF JUDGES XUE, GAJA, BHANDARI AND JUDGE *AD HOC* ORREGO VICUÑA

Introduction

1. According to the view of the majority of the Members of the Court, by 1954 some kind of tacit agreement had come into existence between Peru and Chile in order to define part of the lateral boundary between their respective maritime zones. However, the elements of that agreement have not been clearly identified. There is no indication as to when and how such an agreement was supposed to have been reached.

2. With regard to maritime boundaries, the only relevant agreement that was concluded between Peru and Chile before 1954 was the Santiago Declaration of 1952. Although this Declaration did not expressly define the boundary between the maritime zones generated by the continental coasts, it contains important elements of which any interpretation could not afford to lose sight, and which would give a more solid basis to the conclusion reached by the majority on the existence of an agreed boundary. This approach does not only have theoretical significance. While the majority labours to argue in favour of the idea that the agreement between Peru and Chile covers a distance of 80 nautical miles from the continental coast, the Santiago Declaration clearly indicates that the seaward end of the boundary extends to 200 nautical miles.

The 1952 Santiago Declaration

3. The Declaration on the Maritime Zone is a treaty, which was signed at the Santiago Conference on 18 August 1952 by the representatives of Chile, Ecuador and Peru (hereafter "the Santiago Declaration", or "the Declaration"), then approved by the respective Congresses and later registered with the UN Secretary-General by a joint request of the parties. During the proceedings, Peru had expressed doubts on the legal nature of the Santiago Declaration as a treaty, but later accepted this characterization.

4. The Santiago Declaration contains a specific provision on the delimitation of maritime zones. Paragraph IV of the Declaration states:

> "In the case of island territories, the zone of 200 nautical miles shall apply to the entire coast of the island or group of islands. If 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."

This provision explicitly refers only to the delimitation between maritime zones generated by islands and those generated by continental coasts. It first states that islands are entitled to a maritime zone extending for 200 nautical miles around their coasts. It then considers the case where an island or a group of islands belonging to one State is situated at a distance of less than 200 nautical miles from the general maritime zone of another State. This would create an overlap between maritime zones belonging to two different States. In order to harmonize these claims, the Declaration adopts the criterion of cutting off the maritime zone pertaining to the island or the group of islands when it reaches the parallel passing through the point where the land frontier meets the sea *(el paralelo del punto en que llega al mar la frontera terrestre de los estados respectivos)*.

5. In paragraph IV the criterion for delimiting one general maritime zone from another such zone has not been explicitly set forth. However, when paragraph IV refers to an island or a group of islands at a distance less than 200 nautical miles from the general maritime zone of another State, it implies that some criterion has also been adopted for delimiting that general maritime zone, because it would otherwise be impossible to know whether an island or a group of islands is situated at less than 200 nautical miles from that zone.

6. Under the rules of treaty interpretation, treaty clauses must "be construed in a manner enabling the clauses themselves to have appropriate effects" (*Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13). Every term of a treaty should be given meaning and effect in light of the object and purpose of the treaty. As the Court has said in the *Territorial Dispute* between Libya and Chad, the principle of effectiveness constitutes "one of the fundamental principles of interpretation of treaties" (*Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 25, para. 51; see also *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 24). Paragraph IV of the Santiago Declaration not only establishes the maritime entitlement of islands, but also provides the delimitation criterion in case their entitlement overlaps with that of the coastal entitlement of another contracting State. The phrases in the paragraph referring to "the general maritime zone belonging to another of those countries" and determining that the maritime zone of islands "shall be limited by the parallel at the point at which the land frontier of the States concerned reaches the sea" have a direct bearing on the islands' entitlement as well as on the lateral boundaries between the parties.

7. It seems logical to infer from paragraph IV that the parallel passing through the endpoint of the land frontier on the continental coastline between adjacent States also marks the boundary between the maritime zones relating to the respective continental coasts of the same States. For instance, supposing that State A lies north of State B, it would make little sense for the maritime zone generated by an island of State A to be restricted to the south by the parallel running through the endpoint of the land border with State B if the maritime zone generated by the continental coast of the same State A could extend beyond that parallel. On the other hand, should the boundary between the maritime zones generated by the continental coasts run north of the parallel, disproportionate weight would be given to some small islands of State A if that boundary were displaced because the maritime zone of these islands had to reach the parallel running through the endpoint of the land border.

8. The minutes of the Juridical Affairs Committee of the Santiago Conference give some support to the above interpretation. The records (Memorial of Peru, Ann. 56) note that a proposal of the Ecuadorian delegate, Mr. Fernández, was unanimously approved. He had suggested that the Declaration "be drawn on the basis that the boundary line of the jurisdictional zone of each country be the respective parallel from the point at which the borders of the countries touches or reaches the sea" *(el paralelo respectivo desde el punto en que la frontera de los paises toca o llega al mar)*. There was a concordant view among all the negotiators on this proposal *(Todos los delegados estuvieron conformes con esta proposición)*. Thus, they all agreed that the parallel would mark the lateral boundary between the maritime zones of the three States. Even if this view was reflected only in part in the final text, there is no indication in the preparatory work that the negotiators had changed their view on the boundary running between the maritime zones generated by the respective continental coasts.

9. Moreover, given that the parties publicly proclaimed that they each possessed exclusive sovereignty and jurisdiction over the sea along the continental coasts of their respective countries to a minimum distance of 200 nautical miles from their coasts, and that they provided explicitly in the Santiago Declaration that the islands off their coasts should be entitled to 200-nautical-mile maritime zones, it is unpersuasive to draw the conclusion that they could have reached a tacit agreement that their maritime boundary from *the coast* would only run for 80 nautical miles, which is clearly contrary to their position as stated in the Santiago Declaration.

10. One may assume that, while there was a need, in order to avoid an overlap of conflicting claims, to select a criterion for delimiting the maritime zones of islands which were in principle entitled to a zone extending to 200 nautical miles from their entire coasts, there was a lesser perceived need to state a criterion for delimiting the maritime zones generated by the continental coasts. This is because these maritime zones were argu-

ably based on the method of *"tracé parallèle"*, with the outer limit reflecting the shape of the coast.

11. The 1947 Declaration of the President of Chile viewed the external limit of the claimed maritime zone as being constituted by "the mathematical parallel *(paralela matemática)* projected into the sea at a distance of 200 nautical miles from the coasts of Chilean territory", while the maritime zone generated by islands extended to a "projected parallel to these islands at a distance of 200 nautical miles around their coasts". The Peruvian Supreme Decree, which was enacted later in the same year, consisted in a claim over a maritime zone between the coast and an imaginary line at a distance of 200 nautical miles measured from the coast following the line of geographic parallels *(siguiendo la línea de los paralelos geográficos)*, while for the islands the area was meant to reach a distance of 200 nautical miles from their respective coasts.

12. According to the Chilean declaration, the external limit of its maritime zone ran as a parallel to the continental coast at a distance of 200 nautical miles westwards; on the basis of the Peruvian Supreme Decree, the line was composed of the points situated at the end of segments of a length of 200 nautical miles on the parallels starting from the various points on the continental coast. The resulting extension of the claims of the two countries was identical. In line with this method, the claims to maritime zones in the Santiago Declaration could be viewed as not extending beyond the parallels passing through the endpoint of the land border on the continental coastline. It should also be noted that the application of this method for defining the maritime boundary would not have required any complex cartographic exercise.

13. The Peruvian Petroleum Law of 1952 defined the seaward limit of the continental shelf as an imaginary line at a constant distance of 200 nautical miles from the low-water line along the continental coast. Peru argues that this statute and the similarly worded 1955 Supreme Resolution defined the external limit of the relevant zone on the basis of the "arcs-of-circles" method, considering the distance from any point of the continental coast. However, the wording of the Peruvian statute and that of the Supreme Resolution do not necessarily imply the use of this method. They are not inconsistent with the application of the method of *"tracé parallèle"*, which is also based on the idea of points at a "constant distance" from the continental coast, taking into account the point of the coast situated on the same parallel.

14. Supposing Peru indeed had the arcs-of-circles method in mind at that time, it would immediately have faced the situation of an overlap between its claim and that of Chile concerning their general maritime zones. This would have been much more significant than the overlap of the maritime areas generated by islands with the general zone. In fact, there is no single document in the records before the Court showing that this issue was envisaged at the Santiago Conference. Moreover, Peru, as

indicated in its Note No. 5-20-M/18 addressed to the Minister of Foreign Affairs of Panama by the Peruvian Embassy in Panama on 13 August 1954 (Counter-Memorial of Chile, Ann. 61), consistently held that its position on its maritime zone was based on three instruments: the 1947 Supreme Decree, the 1952 Petroleum Law and the 1952 Santiago Declaration. If Peru had ever envisaged the arcs-of-circles method, it should have raised its concern over the potential overlapping claims with Chile and reserved its position on maritime delimitation. In view of all the evidence before the Court, Peru did not do so until 1986 and gave expression to such method only in its Baselines Law of 2005.

15. It is also significant that the memorandum of 2000 by the Peruvian Navy concerning the United Nations Convention on the Law of the Sea, annexed to a letter of the Minister of Defence to the Foreign Minister, criticized the 1952 Petroleum Law, as well as the 1955 Supreme Resolution, precisely for having adopted the method of *"tracé parallèle"* (*ibid.*, Ann. 189).

16. One may further consider that in 1952 the issue of delimitation between adjacent States was not given the importance that it has acquired in recent times. The attention of the three States parties to the Santiago Declaration was mainly directed at asserting their 200-nautical-mile position towards those States which were hostile to such claims (see paragraphs II and III of the Declaration). It is true that Peru at that time could not foresee that the subsequent development of the law of the sea would render the *"tracé parallèle"* method unfavourable to itself, but that is a separate matter. What the Court has to decide in the present case is whether Peru and Chile did or did not reach in the Santiago Declaration an agreement on the maritime boundary.

17. According to paragraph II of the Santiago Declaration, the claims of Chile, Ecuador and Peru referred to a zone that would extend to a minimum of 200 nautical miles from their coasts *(hasta una distancia mínima de 200 millas marinas desde las referidas costas)*. While these claims could hardly find a basis in customary international law at the time they were made, a delimitation could be agreed by the three States even with regard to their potential entitlements. This was arguably done by the Santiago Declaration.

18. This interpretation finds support in the subsequent agreements concluded between the parties to the Santiago Declaration.

The 1954 Agreement relating to a Special Maritime Frontier Zone

19. In December 1954, the three parties to the Santiago Declaration adopted in Lima six additional legal instruments. These instruments further shed light on the object and purpose of the Santiago Declaration.

20. The most relevant of these instruments is the Agreement relating to a Special Maritime Frontier Zone done on 4 December 1954 (hereafter "the 1954 Agreement", or "the Agreement"). According to its final clause, the 1954 Agreement constitutes an integral and supplementary part of the Santiago instruments, including the Santiago Declaration.

21. Under the 1954 Agreement, the three parties decided to establish a special zone extending for 10 nautical miles on each side of the maritime frontier between the adjacent States. Paragraph 1 of the Agreement provides that "[a] special zone is hereby established, at a distance of 12 nautical miles from the coast, extending to a breadth of 10 nautical miles on either side of the parallel which constitutes the maritime boundary between the two countries". On the eastern end, the special zone started at 12 nautical miles from the coast, while its western seaward end was left open without any defined limit. In order to maintain the spirit of co-operation and unity among the countries signatories to the Santiago instruments, it was provided that "innocent and inadvertent violations of the maritime frontier between adjacent States" in the special zone by small fishing boats that did not have sufficient knowledge of navigation or necessary instruments to determine accurately their position on the high seas were not to be subject to penalties. Such special measure, however, was not to be construed as recognizing any right of the wrongful party to engage in fishing activities in the said special zone.

22. In order to establish such a tolerance zone, it is apparent that the existence of a maritime boundary between the parties was a prerequisite; otherwise it would have been impossible for the parties to determine which acts constituted infringements or violations of the "waters of the maritime zone". In identifying the maritime frontier between the parties, paragraph 1 of the 1954 Agreement explicitly refers to "the parallel which constitutes the maritime boundary between the two countries". The definite article "the" before the word "parallel" indicates a pre-existing line as agreed on by the parties. As noted above, the only relevant agreement on their maritime zones that existed between the parties before 1954 was the Santiago Declaration. Given the context of the 1954 Agreement, the parallel referred to can be no other line than that running through the endpoint of the land boundary, i.e., the parallel identified in the Santiago Declaration.

23. The minutes of the Lima Conference leave little doubt as to the relationship between these two instruments. The minutes of the First Session of Commission I of the Lima Conference dated 2 December 1954, which were adopted only two days before the 1954 Agreement was concluded, contained a statement by the Ecuadorean delegate who agreed, instead of including it in the Agreement itself, to record in the said minutes the understanding that "the three countries deemed the matter on the dividing line of the jurisdictional waters settled and that said line was the parallel starting at the point at which the land frontier between both countries reaches the sea". Considering the contextual coherence between

the Lima and Santiago Conferences, the 1954 Agreement could not have possibly led to the conclusion that Peru and Chile had *tacitly agreed* on a maritime boundary that is much shorter than that agreed among the parties to the Santiago Declaration. Ecuador's clarification of "the dividing line of the jurisdictional waters" as the parallel identified in the Santiago Declaration may be taken as a further confirmation that the maritime boundary would run up to 200 nautical miles along that parallel.

24. The 1954 Agreement has a rather limited purpose, only targeting innocent and inadvertent incidents caused by small vessels. It does not provide where, and with regard to what kind of fishing activities, larger vessels of each State party should operate. Logically, ships other than small boats referred to above could fish well beyond the special zone, but within the limits of the maritime frontier between the adjacent States. Moreover, the parties' enforcement activities were not in any way confined by the tolerance zone. In the context of the Santiago Declaration, by no means could the parties to the 1954 Agreement have intended to use the fishing activities of small vessels as a pertinent factor for the determination of the extent of their maritime boundary. Should that have been the case, it would have seriously restrained the potential catching capacity of the parties to the detriment of their efforts to preserve fishing resources within 200 nautical miles, thus contradicting the very object and purpose of the Santiago Declaration. The fact that the seaward end of the special zone is not specifically mentioned in the 1954 Agreement and the fact that, while the parties' fishing activities greatly expanded in the ensuing years, the 1954 Agreement is still in force support the above interpretation.

25. There is a distinct difference between the maritime zone that each party claims under the Santiago Declaration and the special zone under the 1954 Agreement. The latter is drawn by the parties to serve a particular purpose, which has nothing to do with the scope of the former. The only element that applies to both zones is the parallel that serves as the maritime boundary of the parties: the parallel that divides the general maritime zones and serves as a reference line for the special zone. Given the object and purpose of the 1954 Agreement, it is rather questionable to construe this limited-purpose agreement as limiting the maritime boundary to the extent of the inshore fishing activities as of 1954. This construction of the Agreement is neither consistent with the object and purpose of the Agreement, nor with the context in which it was adopted.

26. The purpose of the 1954 Agreement is to maintain the maritime order in the frontier area. This indicates that the parties had not only delimited the lateral boundary of their maritime zones, but also intended

to maintain it. Notwithstanding the tolerance shown towards the small ships of each other, the Agreement clearly states that the parties do not recognize any right arising from such infringing acts caused by small ships in their respective maritime waters, which means that the rights of each party in the general maritime zone are limited by the maritime boundary. In establishing the special zone, each party committed itself to observe the lateral boundary, which was only confirmed rather than determined by the parties in the 1954 Agreement.

The 1955 Protocol of Accession to the Declaration on "Maritime Zone"

27. In addition to the 1954 Agreement, the adoption of the Protocol of Accession to the Declaration on "Maritime Zone" of Santiago done at Quito on 6 October 1955 by the three parties (hereafter "the 1955 Protocol", or "the Protocol") is also significant. Even if it did not enter into force, the Protocol offers evidence of the nature and extent of the maritime boundaries between the parties to the Santiago Declaration.

28. When the Santiago Declaration was opened to other Latin-American States for accession, the parties reiterated in the Protocol the basic principles of the Santiago Declaration. In this regard, it is worth noting that on the terms of accession the Protocol omitted paragraph IV of the Santiago Declaration and explicitly excluded its paragraph VI from the scope of the Protocol. The Protocol underscored that, at the moment of accession,

> "every State shall be able to determine the extension and form of delimitation of its respective zone whether opposite to one part or to the entirety of its coastline, according to the peculiar geographic conditions, the extension of each sea and the geological and biological factors that condition the existence, conservation and development of the maritime fauna and flora in its waters".

29. This passage from the Protocol shows that at the time of the conclusion of the Santiago Declaration, notwithstanding their primary concern with their 200-nautical-mile maritime claims, the parties did have the issue of maritime delimitation in mind, albeit as a less significant question. It also illustrates that the parties did not envisage any general rule applicable to delimitation and that paragraph IV was a context-specific clause, applicable only to the parties to the Santiago Declaration.

30. The Protocol reaffirmed the parties' claims to their exclusive jurisdiction and sovereignty over maritime zones extending to 200 nautical miles, including the sea-bed and subsoil thereof. As a legal instrument adopted by the parties subsequent to the 1954 Agreement, this Protocol offers an important piece of evidence that disproves any tacit agreement

between Peru and Chile that their maritime boundary would run only up to 80 rather than 200 nautical miles along the parallel passing through the point where the land frontier meets the sea.

The 1968 Arrangement on the Installation of Lighthouses

31. In 1968, Peru and Chile agreed to install, and subsequently indeed installed, two leading marks (or lighthouses) at the seashore near the first land marker, Boundary Marker number one (No. 1) (see the Document of 26 April 1968 adopted by the Parties, hereafter "the 1968 arrangement"). One lighthouse was to be built with daylight and night signaling near Boundary Marker No. 1 on Peruvian territory, while the other, 1,800 metres away behind the first mark in the direction of the parallel of the maritime frontier, was located on Chilean territory. As was stated in the 1968 arrangement, the object of the installation was to make the lighthouses visible from the sea so as "to materialise the parallel of the maritime frontier originating at Boundary Marker number one (No. 1)".

32. Apparently, the installation of the two lighthouses was designed to enforce the maritime delimitation between the Parties. From the correspondence between the Parties on this matter and the text of the 1968 arrangement, it is clear that the Parties intended to ensure that with the facilities of the lighthouses, ships would observe the maritime boundary between the two countries.

33. More importantly, by locating the exact positions of the lighthouses the Parties clarified their understanding of the phrase in paragraph IV of the Santiago Declaration: "the parallel at the point at which the land frontier of the States concerned reaches the sea".

34. Even if done for a limited purpose, the installation of the two lighthouses further confirms that this parallel constitutes the lateral boundary between Peru and Chile. Consistent with their position taken at Santiago, the boundary along the parallel that is materialized by the lighthouses on the territories of Peru and Chile runs for 200 rather than 80 nautical miles.

Conclusion

35. The text of paragraph IV of the 1952 Santiago Declaration implies that the parallel that passes through the point where the land frontier reaches the sea represents the lateral boundary of the general maritime zones of the Parties, which, on the basis of the Parties' maritime claims as pronounced in the Santiago Declaration, extends for 200 nautical miles. Some subsequent agreements concluded between the Parties confirm this interpretation of the Declaration, in particular the 1954 Agreement, the 1955 Protocol and the 1968 arrangement. These instruments provide a

solid legal basis for the existence of a maritime boundary that extends along the parallel for 200 nautical miles from the continental coasts of Peru and Chile. It may also be noted that consequently Peru is entitled to sovereign rights and jurisdiction, as accepted under the modern international law of the sea, in the "outer triangle" that lies beyond the general maritime zone of Chile so delimited.

(Signed) XUE Hanqin.

(Signed) Giorgio GAJA.

(Signed) Dalveer BHANDARI.

(Signed) Francisco ORREGO VICUÑA.