DISSENTING OPINION OF JUDGE SEBUTINDE

The Court should have determined the maritime boundary between the Parties de novo *— There is no agreement between the Parties, tacit or otherwise, establishing a permanent all-purpose maritime boundary — Neither Party invokes the 1954 Agreement as a basis for a pre-existing maritime boundary — The Parties' practice does not reflect the existence of an agreement concerning an all-purpose maritime boundary along the parallel of latitude up to 80 nautical miles — The stringent standard of proof required for the inference of a tacit agreement is not met.*

Introduction

1. I agree with the Court's finding in point 1 of the operative paragraph of the Judgment that "the starting-point of the single maritime boundary delimiting the respective maritime areas between the Republic of Peru and the Republic of Chile is the intersection of the parallel of latitude passing through Boundary Marker No. 1 with the low-water line". However, I have voted against points 2 and 3 of the operative paragraph in which the Court decides, respectively, that "the initial segment of the single maritime boundary follows the parallel of latitude passing through Boundary Marker No. 1 westward" and that "this initial segment runs up to a point (Point A) situated at a distance of 80 nautical miles from the starting-point of the single maritime boundary". Consequently, I also voted against point 4 of the operative paragraph of the Judgment in which the Court determines the course of the second segment of the single maritime boundary, starting from Point A.

2. For the reasons set out in this opinion, I do not concur with the view of the majority of the Court that an agreed all-purpose maritime boundary already exists between the Parties along the parallel of latitude passing through the Boundary Marker No. 1 up to a distance of 80 nautical miles. In my view no agreement of the Parties to this effect (tacit or otherwise) can be inferred from the evidence submitted to the Court. Accordingly, the Court should have determined the entirety of the single maritime boundary line between the Parties, by applying its well-established three-step delimitation method in order to achieve an equitable result. The following reasons underpin my opinion.

I. Neither Party Invokes the 1954 Agreement as a Basis for a Pre-existing Maritime Boundary

3. Chile consistently maintains that it is the 1952 Santiago Declaration

concluded between Chile, Ecuador and Peru (and not the 1954 Agreement) that effected an all-purpose maritime delimitation between Chile and Peru and accordingly requests the Court to confirm this delimitation. According to Chile, the 1954 Agreement merely demonstrates the practice of the Parties confirming and implementing the pre-existing maritime boundary. Acknowledging that the Santiago Declaration contains no clear and unequivocal delimitation provision, Chile asserts that Article IV thereof should be interpreted as establishing an international maritime boundary between Chile and Peru along the parallel of latitude passing through the starting-point of their land boundary and extending to a minimum of 200 nautical miles seaward. Peru, on the other hand, consistently denies that it has ever concluded with Chile, any agreement establishing an international maritime boundary, nor has it given up, expressly or tacitly, the maritime zones to which it is entitled under international law. Peru accordingly asks the Court to plot a boundary line applying the equidistance method in order to achieve an equitable result. Applying the established principles of treaty interpretation to the 1952 Santiago Declaration and in particular to Article IV thereof, the Court rightly rejects the very foundation of Chile's claim and concludes that the Parties "did not, by adopting the 1952 Santiago Declaration, agree to the establishment of a lateral maritime boundary between them along the line of latitude running into the Pacific Ocean from the seaward terminus of their land boundary" (Judgment, para. 70).

While the Court is not bound by the Parties' submission, the fact that either Party asserts the existence of a tacit agreement either in 1952 or in 1954 regarding the establishment of a permanent maritime boundary, is, in my view, a strong indication that there was no meeting of the minds between the Parties on this important issue, and that the Court should have taken this factor into account before presuming the existence of one.

II. The Stringent Standard Required for the Inference of a Tacit Agreement Is not Met

4. In the absence of a formal maritime delimitation agreement between Chile and Peru, a legally binding maritime boundary between them could only be based on a tacit agreement or upon acquiescence. Peru discounts the existence of an all-purpose maritime boundary with Chile based on either of these notions, while Chile deliberately and expressly refrained from basing its claim upon a tacit agreement or upon acquiescence, even on a subsidiary basis. Nevertheless, the Court holds that it is precisely on the basis of "a tacit agreement" that an all-purpose maritime boundary already exists between the Parties along the parallel of latitude passing through the Boundary Marker No. 1 up to a distance of 80 nautical miles.

5. The Court finds evidence of such tacit agreement in the 1954 Special

Maritime Frontier Zone Agreement (hereinafter the "1954 Agreement") concluded between the three parties to the Santiago Declaration (Chile, Ecuador and Peru), specifically, in a reference, contained in Article 1 thereof, to "the parallel which constitutes the maritime boundary between the two countries". The Court, while acknowledging that "the operative terms and purpose of the 1954 Special Maritime Frontier Zone Agreement are indeed narrow and specific", concludes, nevertheless, that Article 1 of that Agreement read together with the Preamble, "acknowledge[s] in a binding international agreement that a maritime boundary already exists" (Judgment, para. 90). Noting that the 1954 Agreement "gives no indication of the nature or extent of the maritime boundary . . . [n]or does it indicate its extent" (*ibid.*, para. 92) and that it "does not indicate when and by what means that boundary was agreed upon", the Court nevertheless considers that "[t]he Parties' express acknowledgment of its existence can only reflect a tacit agreement which they had reached earlier" (*ibid.*, para. 91). The Court then refers back to the 1952 Santiago Declaration, pointing out that certain elements of that Declaration, together with the 1947 Proclamations of the Parties, "suggested an evolving understanding between the Parties concerning their maritime boundary" (*ibid.*, paras. 43, 69 and 91); and that the 1954 Agreement "cements the tacit agreement" which has somehow "evolved" in the two intervening years (*ibid.*, para. 91).

6. In my view, the above analysis of the evidence before the Court and conclusion thereon, fall short of the stringent and well-established standard of proof which the Court itself has set for establishing a permanent maritime boundary in international law on the basis of a tacit agreement. In *Nicaragua* v. *Honduras*, the Court set out that standard as follows:

> "Evidence of a tacit legal agreement must be compelling. The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed. A *de facto* line might in certain circumstances correspond to the existence of an agreed legal boundary or might be more in the nature of a provisional line or of a line for a specific, limited purpose, such as sharing a scarce resource. Even if there had been a provisional line found convenient for a period of time, this is to be distinguished from an international boundary." (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 735, para. 253.)

7. Respectfully, I am not at all convinced that the evidence on which the Court has based its finding regarding the existence of a tacit agreement establishing a permanent maritime boundary is "compelling"; nor am I convinced that it was the intention of the parties under the 1952 Santiago Declaration or the 1954 Agreement to establish such a boundary.

8. While the 1954 Agreement is an important element to be taken into account in determining whether Peru and Chile agreed to delimit their respective maritime zones, taken on its own, that Agreement does not sufficiently prove the existence of an agreement in respect of an all-purpose maritime boundary. The existence or otherwise of such an agreed boundary has to be determined by reference to a thorough examination of the practice of the Parties to the dispute, of which the 1954 Agreement is just one example. Contrary to what the Court asserts in the Judgment, the language of the 1954 Agreement cannot be said to have clearly acknowledged the existence of an all-purpose maritime boundary along the parallel of latitude beyond a distance of 12 nautical miles from the coast (Judgment, paras. 90 and 102). In my view, the provisions of the 1954 Agreement must be carefully construed not only in light of the object and purpose of that treaty, but also as "an integral and supplementary part of . . . the resolutions and agreements adopted at the Conference on the Exploitation and Conservation of the Maritime Resources of the South Pacific, held in Santiago de Chile in August 1952" (see Article 4 of the 1954 Agreement).

9. It will be recalled that the object and purpose of the 1952 Santiago Declaration (of which the 1954 Agreement is an integral part), was to establish a process of tripartite maritime co-operation (between Chile/Peru/Ecuador) with a view to protecting the adjacent sea from the predatory activities of foreign fleets, thereby jointly protecting and conserving the marine resources of their peoples. This joint action was preceded by the unilateral claims made by Chile and Peru in 1947 in relation to their new maritime areas (the 1947 Proclamations). The object of the 1952 Declaration was not to establish permanent maritime boundaries between the three States. Accordingly, the object and purpose of the 1954 Agreement which must be understood in the overall context of the Santiago resolutions and agreements of 1952, is "narrow and specific" as correctly observed by the Court, and was to create a special zone of tolerance aimed at averting disputes involving accidental transgressions of "the maritime frontier *[la frontera marítima]* between adjacent States" by small fishing vessels manned by crews with insufficient knowledge of navigation or not equipped with the necessary instruments to determine accurately their position on the high seas, with a view to fostering the spirit of co-operation and unity amongst the States parties to the Santiago instruments. It is noteworthy that this agreement was between Ecuador, Peru and Chile, and not just between the Parties to the present case. To this end, Article 1 of the 1954 Agreement established in relation to each pair of adjacent countries (Ecuador/Peru and Peru/Chile), a "special zone . . . 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 *[el límite marítimo]* between the two countries". Article 2 provides that the "accidental presence" of small fishing vessels of either of the adjacent countries within the special zone "shall not be considered to be a violation of the waters of the maritime zone". While the wording of Articles 1 to 3 indicates the existence of some sort

of a maritime boundary between the adjacent States along an undetermined parallel running beyond a distance of 12 nautical miles from the coast, this is, in my view, a reference to "provisional lines" for a specific purpose (namely, the sharing of fishing resources) and is not determinative of a permanent, all-purpose maritime boundary as understood in international law. Those provisions (which, as the Court notes, contain no indication of the nature or extent of a maritime boundary) were aimed at dealing with small fishing boats accidentally straying into waters on either side of those provisional lines, and cannot easily be construed as clearly confirming the existence of a tacit agreement in respect of a permanent, all-purpose international maritime boundary along a parallel of latitude beyond a distance of 12 nautical miles from the coast. It is my considered opinion that it is this narrow and strict interpretation of the 1954 Agreement that accords with the resolutions and agreements adopted at the tripartite Conference on the Exploitation and Conservation of the Maritime Resources of the South Pacific, held in Santiago de Chile in August 1952, and reflected in the Santiago Declaration of 1952.

10. This interpretation is further confirmed by the historical context in which the 1954 Agreement was concluded, particularly by the fact that back in 1954, the concepts of an exclusive economic zone or of a 12-nautical-mile territorial sea entitlement were alien to international customary law. Accordingly, to the extent that the special tolerance zone established by the 1954 Agreement started at a distance of 12 nautical miles from the coast of Peru and Chile along the "parallel which constitutes the maritime boundary", it concerned what at the time were considered high seas and could not be presumed to have concerned maritime zones over which the Parties had exclusive sovereign rights under international law. Furthermore, the most important instances of State practice pointing to the existence of a "maritime boundary" between the Parties invariably concern the water column (not the subsoil).

III. The Parties' Practice Does not Reflect the Existence of an Agreement concerning an All-purpose Maritime Boundary along the Parallel of Latitude that Extends up to 80 Nautical Miles out to Sea

11. In the Judgment, the Court rightly finds that the unilateral 1947 Proclamations cannot be interpreted as "reflecting a shared understanding of the Parties concerning maritime delimitation" (Judgment, para. 43) and that the 1952 Santiago Declaration cannot be said to reflect an agreement of the Parties regarding "the establishment of a lateral

maritime boundary between them along the line of latitude" (Judgment, para. 70). These two findings make it all the more imperative to interpret the 1954 Agreement with caution and not to read into it inferences that are far from obvious.

12. The Parties' practice (contemporaneous and subsequent), viewed in the light of the object and purpose of the 1952/1954 arrangements, confirms the above view. That practice, in my opinion, indicates that the Parties' intention was to regulate the sharing of a common resource and to protect that resource vis-à-vis third or non-States parties, rather than to effect a maritime delimitation. While certain documents and/or events that were considered by the Court may be said to reflect some degree of the Parties' shared understanding that there was a "maritime boundary" in place between them along the parallel of latitude passing through the coastal terminus of their land boundary, there are others that could equally be said to demonstrate the absence of such an agreement. Besides, even those potentially "confirmatory" examples do not unambiguously prove that the Parties were acting (or failing to act) on an assumption that this line constituted an all-purpose and definitive maritime boundary delimiting all possible maritime entitlements of the Parties. Furthermore, all these ambiguities and uncertainties are set against the backdrop of a complete absence of any international or domestic legal instrument dating from the post-1954 period, which would unequivocally stipulate that an agreed international maritime boundary exists between Peru and Chile along the parallel of latitude passing through the coastal terminus of the land boundary.

13. It is on the basis of these same considerations that I also find highly problematic the basis upon which the Court has arrived at its conclusion that the "agreed maritime boundary running along the parallel of latitude" extends up to a distance of 80 nautical miles out to sea. By the Court's own admission, all the practice involving incidents between the two Parties, including enforcement activities, was within about 60 nautical miles of their coasts and usually much closer. It was only starting in 1996 that arrests frequently occurred beyond 60 nautical miles (*ibid.*, paras. 128, 146 and 147). Yet notwithstanding the above findings, the Court draws the conclusion that

> "the evidence at its disposal does not allow it to conclude that the maritime boundary, the existence of which the Parties acknowledged at that time, extended beyond 80 nautical miles along the parallel from its starting-point. The later practice which it has reviewed does not lead the Court to change that position. The Court has also had regard to the consideration that the acknowledgment, without more, in 1954 that a 'maritime boundary' exists is too weak a basis for holding that it extended far beyond the Parties' extractive and enforcement capacity at that time." (*Ibid.*, para. 149.)

14. It is unclear to me how the Court's conclusion that the Parties could not be said to have tacitly agreed on a maritime boundary beyond 80 nautical miles can simply be turned into a legal finding that they have agreed on a boundary up to 80 nautical miles (or on any other distance beyond 12 nautical miles for that matter). In my view, this finding of the Court rests on dangerously weak and speculative grounds.

Conclusion

15. The legal bar set by the Court for establishing a permanent, all-purpose maritime boundary on the basis of a tacit agreement is very high, and for good reason. All elements considered, I remain of the view that the strict standard laid down in *Nicaragua* v. *Honduras* has not been met in the present case.

(Signed) Julia Sebutinde.