# DECLARATION OF JUDGE *AD HOC* GUILLAUME

*[Translation]*

*Maritime boundary deriving from tacit agreement between Peru and Chile extending up to 80 nautical miles along parallel of latitude — Remaining boundary to be determined in accordance with customary international law — Starting-points of maritime and land boundaries not coinciding — Consequences.*

1. Peru filed an Application with the Court against Chile which had a dual objective: *(a)* determination of the line delimiting the Parties' maritime zones; *(b)* recognition of its exclusive sovereign rights over a "maritime area lying out to a distance of 200 nautical miles from its baselines" (the "outer triangle"). Chile requested the Court to dismiss the Application and to adjudge and declare that: *(a)* the respective maritime zone entitlements of Chile and Peru have been fully delimited by agreement; *(b)* Peru has no entitlement to the maritime area which it claims within the outer triangle.

2. Thus the first question to be decided by the Court was whether there was an agreed maritime boundary between the Parties. Several texts were cited to the Court in this regard.

3. First, Chile relied on the 1947 Proclamations under which both States had unilaterally claimed certain maritime rights extending 200 nautical miles from their respective coasts. The Court rightly found that these declarations had not established any maritime boundary between the Parties.

4. Chile relied secondly on the 1952 Santiago Declaration, whereby Ecuador, Chile and Peru "proclaim[ed] as a norm of their international maritime policy that they each possess 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" (Judgment, para. 49). The Court recognizes that this Declaration has the character of a treaty, but concludes,

> "contrary to Chile's submissions, that Chile and Peru 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" (*ibid.*, para. 70).

I agree also with that finding.

5. Thirdly, the three signatory States to the Santiago Declaration had in 1954 adopted various agreements aimed at reinforcing their solidarity in the face of opposition from third States to the 200-nautical-mile claim.

Those agreements included a Special Maritime Frontier Zone Agreement, whose Preamble reads as follows:

> "Experience has shown that innocent and inadvertent violations of the maritime frontier . . . between adjacent States occur frequently because small vessels manned by crews with insufficient knowledge of navigation or not equipped with the necessary instruments have difficulty in determining accurately their position on the high seas" (Judgment, para. 80).

Furthermore, continues the Preamble, "[t]he application of penalties in such cases always produces ill-feeling in the fishermen and friction between the countries concerned" *(ibid.)*.

As a result, the Agreement provided in its first articles:

> "1. 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.
>
> 2. The accidental presence in the said zone of a vessel of either of the adjacent countries, which is a vessel of the nature described in the paragraph beginning with the words 'Experience has shown' in the Preamble hereto, shall not be considered to be a violation of the waters of the maritime zone, though this provision shall not be construed as recognizing any right to engage, with deliberate intent, in hunting or fishing in the said special zone.
>
> 3. Fishing or hunting within the zone of 12 nautical miles from the coast shall be reserved exclusively to the nationals of each country." (*Ibid.*, para. 81.)

6. Moreover, in 1968-1969 Chile and Peru entered into arrangements to build two lighthouses close to their land border, in order to "materialise the parallel of the maritime frontier originating at Boundary Marker number one (No. 1)" (see the document signed by the representatives of the two Parties on 26 April 1968, quoted in the Judgment at paragraph 96). These lighthouses had a range of some 15 nautical miles, and were intended to enable the ships of each Party to determine their location in relation to the maritime boundary in areas close to the coasts.

7. The 1954 Agreement and the arrangements of 1968-1969 are not easy to interpret. It is clear, as the Court noted, that the 1954 Agreement had a "narrow and specific" purpose (Judgment, para. 103). The same applies to the arrangements of 1968-1969. But it is equally clear that they were referring to a "boundary". They were not establishing such a boundary, but noted its existence running along the line of latitude.

8. That boundary had not, moreover, been established either by the unilateral proclamations of 1947, or by the Santiago Declaration, or by any other treaty text. It could thus only derive from a tacit agreement reached between the Parties before 1954.

9. The Court has always recognized the possibility that States may enter into such agreements, but this is an area where the very greatest caution is required. Indeed, as the Court has stated: "[t]he establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed" (*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). "Evidence of a tacit legal agreement must be compelling." *(Ibid.)*

10. In the present case, the existence of a tacit agreement prior to 1954 is evidenced by the 1954 Agreement itself, and by the arrangements of 1968-1969. The boundary recognized in those texts follows the parallel of latitude passing through Boundary Marker No. 1. On the other hand, the texts give no indication as to how far that boundary extends out to sea, and the Parties disagree on this.

11. The 1954 Agreement and the 1968-1969 arrangements essentially concerned fishing by small vessels close to the coast, and Chile has failed to show that the boundary whose existence was recognized by the Parties in those texts extended along the parallel of latitude beyond the area in which those vessels operated. It was within that area that a boundary was recognized.

12. The Parties have provided few indications as to the extent of the area in question. However, it is apparent that

> "the principal maritime activity in the early 1950s was fishing undertaken by small vessels, such as those specifically mentioned in the 1954 Special Maritime Frontier Zone Agreement and which were also to benefit from the 1968-1969 arrangements relating to the lighthouses" (Judgment, para. 109).

Such activities were limited, and concentrated within the areas close to the coast (*ibid.*, paras. 107 and 108). It is also clear from the case file that "[u]ntil the mid-1980s, all the practice involving incidents between the two Parties was within about 60 nautical miles of the coasts and usually much closer" (*ibid.*, para. 128).

13. In these circumstances, it seems to me that Chile has failed to show that the boundary deriving from the tacit agreement between the Parties, as confirmed by the 1954 Agreement and the 1968-1969 arrangements, extended beyond 60 to 80 nautical miles from the coasts. This latter figure marks the furthest limit of the boundary deriving from the tacit agreement of the Parties, and it is in light of that fact that I have been able to agree with the solution adopted in paragraph 3 of the Judgment's operative part.

14. Beyond that point as thus determined by the Court, it was for the latter to determine the maritime boundary between the two States in accordance with the customary law of the sea as identified in its jurisprudence. In that regard, I agree fully with the method followed. I likewise agree with the Court's reasoning and with the result as regards the outer

triangle, over which Peru is entitled to exercise sovereign rights under the conditions laid down by international law.

15. Finally, I agree with the solution reached by the Court as regards the starting-point of the maritime boundary. This solution followed necessarily from the language of the arrangements of 1968-1969. However, it in no way prejudges "the location of the starting-point of the land boundary identified as 'Concordia' in Article 2 of the 1929 Treaty of Lima", which it was not for the Court to determine (Judgment, para. 163). The Parties disagree as to the location of that point, and for my part I tend to believe that it is located not at Boundary Marker No. 1, which is situated inland, but at "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" (see the Parties' "Joint Instructions" of April 1930, *ibid.*, para. 154). Accordingly, the coast between the starting-point of the maritime boundary and Point Concordia falls under the sovereignty of Peru, whilst the sea belongs to Chile. However, that situation is not unprecedented, as Chile pointed out at the hearings (CR 2012/31, pp. 35-38); it concerns just a few tens of metres of shoreline, and it may be hoped that it will not give rise to any difficulties.

*(Signed)* Gilbert GUILLAUME.