# SEPARATE, PARTLY CONCURRING AND PARTLY DISSENTING, OPINION OF JUDGE *AD HOC* ORREGO VICUÑA

*Starting-point of maritime delimitation — Recognition of the parallel — Single maritime boundary — "Maritime domain" governed by the 1982 United Nations Convention on the Law of the Sea — Freedom of navigation beyond 12 nautical miles — Misgivings about the maritime boundary following the parallel for only 80 nautical miles — Extensive practice of the Parties — Disproportionate effects of equidistance and the "outer triangle" — Negotiated access to fisheries — Role of equity in international law.*

1. Judges Xue, Gaja, Bhandari and this judge *ad hoc* have submitted a joint dissenting opinion concerning some legal aspects that are central to the Judgment of the Court in this case, with particular reference to the proper interpretation of the 1947 Presidential Proclamations (Memorial of Peru, Ann. 6 and 27), the 1952 Santiago Declaration (*ibid.*, Ann. 47) and the 1954 Special Maritime Frontier Zone Agreement (*ibid.*, Ann. 50), and to how these instruments lead to the conclusion that the Parties agreed that their maritime boundary delimitation follows the parallel of latitude up to a distance of 200 nautical miles from its starting-point.

2. In addition to that joint dissent, this judge believes that it is his duty to address some other questions relevant for the resolution of the dispute submitted to the Court. In respect of some of these questions, this judge agrees with the reasoning and conclusions of the Judgment, as will be noted below. In respect of some other questions, however, this judge has an opinion different from that of the majority of the Court. This opinion is submitted with the greatest respect for the Members of the Court and its President, all of whom have made a significant effort to reach a common position on many difficult issues, although regrettably, not always with success.

3. The first point on which this judge concurs with the Judgment is that concerning the starting-point of the maritime delimitation effected. The Court has rightly decided that this point is the intersection of the parallel of latitude passing through Boundary Marker No. 1 with the low-water line. As identified since 1930 in the Final Act concerning the demarcation and marking of the land boundary agreed in the 1929 Treaty

between Chile and Peru (Memorial of Peru, Ann. 55), the parallel corresponding to Marker No. 1 is at 18° 21′ 03″ S. In its submissions, as in its legislation concerning baselines, Peru had identified the starting-point of the maritime boundary at 18° 21′08″ S, 70° 22′ 39″ W. It follows from the Judgment of the Court that the endpoint of these baselines cannot now be located south of the intersection of the parallel of Boundary Marker No. 1 with the low-water line.

4. It is also important to note that the Court has concluded that because it is concerned only with the starting-point of the maritime delimitation, it is not called upon to take a position on the starting-point of the land boundary (Judgment, para. 175).

5. The Court has also rightly concluded that the maritime boundary follows the parallel of latitude passing through Boundary Marker No. 1 westward. This is an important consequence of the Court having decided that the 1954 Special Maritime Frontier Zone Agreement embodies the recognition of this parallel. This in turn relates to the acknowledgment of the legal significance of the 1952 Santiago Declaration as a treaty in force in the light of the Parties' common understanding in this respect. The Court also recognizes that the 1968-1969 lighthouse arrangements confirmed the prior existence of a maritime boundary following that parallel (*ibid.*, para. 130). As the joint dissent appropriately notes, the same holds true of the 1955 Protocol of Accession to the Santiago Declaration (Memorial of Peru, Ann. 52), although the Judgment takes a different view on this point.

6. This finding of the Court, however, is based on the understanding that the acceptance of the parallel by the Parties is the outcome of a tacit agreement. Rather, as also noted in the joint dissent, this is the outcome of the specific treaty commitments undertaken by the Parties in 1952 and 1954, which in turn are related to the meaning and extent of the 1947 Proclamations. As treaty provisions, their interpretation is governed by the 1969 Vienna Convention on the Law of Treaties, in the light of which the parallel reaching the 200-nautical-mile distance is the appropriate conclusion.

7. The Court has also reached the right conclusion in respect of the nature of the maritime boundary, deciding that it is a single all-purpose maritime boundary. Such a boundary shall thus be applicable not only to some limited fishing activities taking place in the superjacent waters but also to any activity related to the régime of the exclusive economic zone and the continental shelf and its subsoil.

8. The question of the nature of the maritime boundary also has important implications in respect of the kind of jurisdiction that Peru is entitled to exercise over its maritime areas. For a long time, Peru had been internally debating whether the "maritime domain" it claims over

the adjacent seas was in the nature of a territorial sea or of a functional jurisdictional area concerning its resources. Distinguished jurists and statesmen had a divided opinion in this respect. Legislation, including the Secret Law No. 13508 enacted on 6 February 1961 (Law No. 13508, "Secret Law", promulgated on 6 February 1961, Peruvian Navy, *Yearbook of Peruvian Legislation*, Vol. LII, Legislation of 1960, p. 89), and constitutional provisions were introduced in support of the territorial sea approach, but even then their interpretation was disputed in the light of the alternative jurisdictional approach. Due to these differing opinions, Peru did not become a signatory to the 1982 United Nations Convention on the Law of the Sea.

9. The International Court of Justice has now settled this Peruvian debate. The Judgment takes note of the formal declaration made on behalf of the Government of Peru by its Agent in this case to the effect that the term "maritime domain" used in its Constitution is "applied in a manner consistent with the maritime zones set out in the 1982 Convention" (CR 2012/27, p. 22, para. 26 (Wagner)). The Court, following a well-established jurisprudence, further notes that this declaration expresses a formal undertaking by Peru. It follows that Peru is entitled to exercise jurisdiction over its maritime areas up to 12 nautical miles for the territorial sea, 24 nautical miles for the contiguous zone and 200 nautical miles for the exclusive economic zone and the continental shelf.

10. The resolution of this question is not only important for the clarity of Peru's legislation and its corresponding amendments but also in terms of the proper implementation of the law of the sea by the Court. Had the "maritime domain" been considered a territorial sea claim, the Court would have had no alternative but to declare Peru's Application inadmissible, since it cannot proceed to delimitate maritime areas that are in breach of the contemporary law of the sea, as the delimitation of a 200-nautical-mile territorial sea clearly is.

11. A more important consequence of this finding is to the benefit of the international community as a whole. Vessels flying the flags of all nations, including Chile, whether merchant or military, can now have full freedom of navigation beyond the 12-nautical-mile territorial sea of Peru, just as submarines will be able to navigate submerged. Aircraft will also have the right of unrestricted overflight. Restrictions applied to such activities will now have to be lifted.

12. Notwithstanding this positive contribution of the Court to the law of the sea, there are, however, other aspects of the Judgment with which this judge regrettably cannot agree. As appropriately noted in the joint dissent, there is no support for the Judgment's conclusion that the boundary is composed of two segments, one running along the parallel up to Point A situated at the distance of 80 nautical miles from the starting-

point, and the other following a line of equidistance from Point A until meeting Point B and thereon to Point C.

13. It is apparent from the case record that the Parties did not plead for such a distance or, in fact, any other distance short of 200 nautical miles. More importantly, nothing in the record shows that any shorter distance was ever considered throughout the long process of establishing the 200-nautical-mile offshore zones. In fact, it would be surprising if the Parties had chosen such a restricted boundary in the context of their respective individual and collective endeavours to establish a 200-nautical-mile zone and to ensure its international recognition. Had this been the case, they would have made an express statement to that effect, which they did not.

14. The recognition of the parallel in the 1954 Special Maritime Frontier Zone Agreement was not so restricted and, although no endpoint is expressly established, its context clearly shows that it was envisaged to extend to the full 200-nautical-mile area that was subject to the Parties' claims. Distinguished jurists, including the former President of the Court, Judge Eduardo Jiménez de Aréchaga, as well as eminent geographers, have all so concluded, as the record indicates.

15. The conclusion of the Judgment is mainly related to the view that the 1954 Special Maritime Frontier Zone Agreement refers to its application to small fishing boats lacking sophisticated navigational equipment, and is premised upon the assumption that such boats could not operate beyond a rather limited distance. While this could well be true for some fishing vessels, it is not so for larger industrial vessels that have been operating in the area for some time. It is appropriate to recall that fishing activities in this area are inextricably related to the biological and nutritional characteristics of the Humboldt Current, which extends far beyond the 200-nautical-mile limit.

16. It must also be noted that, even if the Special Maritime Frontier Zone had been understood as extending to a limited distance, which was not the case, the maritime boundary would still have extended to 200 nautical miles as it was established independently of any special zone that could later be attached to it. Any interpretation to the contrary would have to rely on an express understanding between the Parties, which does not exist.

17. It is also appropriate to note that the Judgment has correctly explained that even smaller fishing boats departing from Ilo, the main Peruvian port in the area, in search of fishing grounds located some 60 nautical miles to the south-west would have crossed the parallel of the agreed boundary at a distance of approximately 100 nautical miles from its starting-point (Judgment, para. 108). If such fishing grounds were located at 80 nautical miles from Ilo, the crossing would take place at about 120 nautical miles from the parallel starting-point. While it is also

explained that the situation relating to Arica is different, this does not detract from the fact that fishing grounds are located where they are and the claimed fisheries interests of Ilo would have been equally protected at distances greater than 80 nautical miles.

18. Because the Judgment follows the reasoning that the maritime boundary was the outcome of a tacit agreement, the role of the various instruments in the genesis and materialization of a treaty commitment concerning the maritime boundary is somewhat lost. The relevance of the 1947 Presidential Proclamations is greater than that which the Judgment appears to acknowledge. While these Proclamations lacked in some respects the precise legal language of contemporary developments, they nonetheless evidence that a 200-nautical-mile maritime boundary between the two countries was not absent from their respective texts, as discussed in the joint dissent.

19. The 1952 Santiago Declaration was still more explicit on the establishment of the boundary. The joint dissent explains this aspect in detail. The reference in Article IV to a general maritime zone delimited by the parallel of latitude can be no other than the expression of an understanding that the boundary line separating the Parties' respective jurisdictions followed this parallel irrespective of the insular delimitation. Even if such a general maritime zone would have been of relevance only for islands, which was not the case, the use of the parallel in determining the boundary around the islands in the vicinity of the Chile-Peru maritime boundary would have been applicable, as it is around the Ecuadorean islands. The Declaration does not make a distinction between islands under the jurisdiction of Ecuador, Peru or Chile, or between smaller and bigger islands, and there is therefore no reason to exclude the relevance of some islands in connection with the role of the general maritime zone following the parallel.

20. The extensive legal practice and diplomatic exchanges that followed the 1954 Special Maritime Frontier Zone Agreement offer clear evidence of the Parties' understanding of the 1952 and 1954 instruments. Particularly relevant in this context is the resolution of the President of Peru in 1955 (Supreme Resolution No. 23 of 12 January 1955, the Peruvian 200-Mile Maritime Zone, Memorial of Peru, Ann. 9), which provided the technical criteria for drawing the maritime boundary with the express statement that it was not to "extend beyond that of the corresponding parallel at the point where the frontier of Peru reaches the sea", and which relied on both the Santiago Declaration and the 1954 Special Maritime Frontier Zone Agreement.

21. The abundant practice of the Parties also extends to enforcement activities in relation to the boundary, including fisheries, navigation, overflying, the laying of submarine cables and many other aspects that are well recorded. Such practice is enough to show that, even if the Court has considered a limited role for the agreements as the source of the boundary parallel, there is, at the very least, acquiescence by the Parties as to the existence and acceptance of such a parallel throughout its full extent.

22. Notwithstanding the significance of this practice, which extends for over six decades, the Judgment tends not to assign great importance to it, and to dismiss it altogether. This limited role accorded to the law and the practice of the Parties is the consequence of the fact that the Court started from the premise that the 1947 Proclamations and their aftermath through to 1954 were not in accordance with the law of the sea as understood at the time, and hence, that a maritime boundary could not then be drawn in relation to extended claims.

23. This judge regrets not to share such a limited understanding and, as the joint dissent indicates, the early instruments were in any event capable of agreeing on a maritime delimitation of the three States with regard to their potential entitlements. In fact, the Proclamations and the instruments that followed, like some that preceded them, were the triggering acts of a development that, after a systematic evolution, led to the concept of the exclusive economic zone and other key concepts of the present-day law of the sea as embodied in the 1982 United Nations Convention on the Law of the Sea, and recognized by the Court as a part of customary international law. The Third United Nations Conference on the Law of the Sea recognized as much in rendering, in plenary session, tribute to the memory of President González Videla on his passing in 1980 (Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Vol. XIV, United Nations doc. A/CONF.62/SR.137, 137th Plenary Meeting (Thursday, 26 August 1980, at 3:25 p.m.), at para. 67).

24. It is to be noted that the Judgment attaches particular significance to what came to be known as the Bákula Memorandum (Judgment, paras. 136-142). This judge had the privilege of working for many years with Ambassador Juan Miguel Bákula, a distinguished Peruvian diplomat and jurist, during the negotiations leading to the Convention on the Law of the Sea. In its origins, the Bákula Memorandum was not a diplomatic initiative of the Government of Peru. Rather, it was a proposal advanced on a personal basis by Ambassador Bákula to sound out the feasibility of certain thoughts on maritime delimitation.

25. This character is reflected in the Note accompanying the text of this Memorandum and sent by the Peruvian Embassy in Santiago de Chile to the Chilean Ministry of Foreign Affairs on 23 May 1986, which refers to the summary of the statements that the Ambassador "allowed himself to make" during the audience with the Minister (Memorial of Peru, Ann. 76). While it is true that the official communiqué issued by the Chilean Foreign Ministry on 13 June 1986 mistakenly considers that the initiative conveyed the "interest of the Peruvian Government" (*ibid.*, Ann. 109) in starting negotiations on maritime delimitation (Judgment, para. 138), the fact remains that if this had been its meaning, the Peruvian Ministry of Foreign Affairs would not have taken 15 years to follow up on this initiative. The importance of the practice following this Memorandum is further minimized by the Judgment, as if its text were capable of establishing some kind of critical date for the purposes of this case.

26. The boundary thus drawn until Point A follows in its second segment the equidistance line as measured from that point until reaching Point B, where the equidistance line ends, and then to Point C where it meets the Peruvian "outer triangle" claim that will be discussed below.

27. The Judgment has adopted an unprecedented solution for effecting maritime delimitation in the context of the complex circumstances of this case. It appears to give satisfaction to one Party in following the parallel to the distance noted and to the other Party in continuing along an equidistance line, which were of course the two main approaches to this dispute, albeit with a different meaning and extent.

28. While the Court concludes that no significant disproportion is evident in this approach, such as would call into question the equitable nature of the provisional equidistance line (*ibid.*, para. 194), the real situation seems to be different. In point of fact, considering the relevant area to be delimited as determined by a parallel extending to a distance of 80 nautical miles, Peru is assigned a significant number of square kilometres south of the 200-nautical-mile parallel, which are diminished from Chile's entitlement. True, this is less than what would have been the case with the pure equidistance line claimed by Peru, but still the number of square kilometres lost by Chile is sizeable. If this situation casts some doubt on the meaning of proportionality, it cannot be fully assessed without taking into account the effect of the "outer triangle" in the distribution of maritime areas, as will be discussed below.

29. In spite of the shortcomings noted above, the Judgment has appropriately held that in assessing the extent of the lateral maritime boundary, the Court "is aware of the importance that fishing has had for the coastal

populations of both Parties" (Judgment, para. 109), thereby evidencing a social and economic concern as to the effects the approach followed might have on those communities. A manifestation of this concern is that the maritime front of the port of Arica, while curtailed as a consequence of the equidistance line drawn, is nonetheless not enclosed and has access to the high seas. It is possible to find that this conclusion of the Court plays a role somewhat similar to that of the consideration of "special circumstances" in the correction of a maritime boundary, only that it is not explicitly stated as such.

30. More important still is that, in this light, the Parties are now entitled to negotiate access by the affected fishermen to the fishing areas brought under the jurisdiction of Peru in accordance with Article 62, paragraph 2, of the United Nations Convention on the Law of the Sea, which provides that the coastal State shall give other States access to the surplus of the allowable catch. The legal régime of the exclusive economic zone now applicable in Peru would thus be fully complied with. This compliance extends to the area of the "outer triangle" as its fishing resources have also been recognized of interest in the context of the South Pacific Regional Fisheries Management Organisation in which both Chile and Peru participate, the former as a State party and the latter as a signatory.

31. The discussion concerning the extent of claims and their effects is inseparable from the consideration of Peru's second claim concerning the "outer triangle", in which it requests the Court to adjudge and declare that Peru is entitled to exercise exclusive sovereign rights over the whole of the maritime area up to a 200-nautical-mile distance from its baselines. It is an accepted fact that Chile lays no jurisdictional claim to this area under the concept of a "Presential Sea" or otherwise, but it has fishing rights in an area which, until now, was part of the high seas. It must be pointed out that, as a matter of principle, States are entitled to claim all maritime areas as measured from their baselines up to the extent permissible under international law. Because the Judgment uses an equidistance line in its second segment, it concludes that it does not need to rule on Peru's second final submission concerning the "outer triangle".

32. This judge is unable to share the Judgment's conclusion in this respect because of the following two reasons. The first is that the "outer triangle" is the consequence of Peru having adopted the "arcs-of-circle" method of delimitation in conjunction with the Law on Maritime Domain Baselines of 3 November 2005 (Memorial of Peru, Ann. 23), which stands in contrast to the method of *"tracé parallèle"* used in the 1950s. Although it has been argued that the arcs-of-circle had been introduced earlier, this assertion is not clearly supported by the evidence in the record, as the

joint dissent has noted. In fact, the joint dissent shows that the enactments on which this argument is based prove rather the opposite, namely, that *tracé parallèle* was the method chosen at earlier periods.

33. The resort to the arcs-of-circle in 2005 is well beyond the critical date of 2000 and two decades after the Bákula Memorandum of 1986, following which the Judgment diminishes the influence of practice in the final outcome of the dispute. It would have been appropriate to apply the same criterion to the 2005 law and to the related implementation mechanisms on which the new method is based, and thus the influence of these factors in the maritime delimitation would have been equally diminished.

34. The second reason why this judge cannot support the Judgment's conclusion in this matter is that the area of the "outer triangle" needs to be considered in conjunction with the claim to an equidistance line. The addition of both sectors allocates to one Party a far greater proportion of the claimed maritime areas than that accorded to the other Party and therefore does not seem to adequately meet the test of not being disproportionate. There is no reason to consider the two claims as separate. They are simply two legs of the same maritime domain claim extending jurisdiction far into the Pacific Ocean and hence they should be considered as a whole for the purpose of deciding on the role of equity. In fact, the proportionality existing between the full parallel and the "outer triangle" would have allowed for a more reasonable role of equity, consistent with the governing law.

35. This leads to an additional concern in the light of this Judgment which relates to the overall role of equity under international law. While equity is generally accepted as a source of law under the Statute of the Court, the Court has always considered that the role of equity is bound by the law as a type of equity *infra legem*, that is, under the law and in accordance with it, as opposed to equity *preter legem* or equity *contra legem*.

36. Distinguished writers of international law have noted that, in its first attempts to use equity in the context of maritime delimitation, the Court did not clearly rely on this source in keeping within the bounds of the law, which was largely left undetermined. Following the evolution of its jurisprudence, the Court then turned to a more precisely bound form of equity. This is the very understanding of Article 74, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea in considering equitable results of maritime delimitation, not in isolation from, but in conjunction with agreements between the parties, all of it effected on the

basis of international law. This judge had the honour of proposing the final text of the above-mentioned Article when acting as the delegate for Chile at the Third Conference, and can attest that this meaning was the fundamental basis of the consensus that was finally reached on its content.

37. This judge is certainly in favour of solutions that might result in the accommodation of the essential interests of the parties to a case, and thus be met with greater acceptance, on the understanding that such exercise is strictly bound by the governing law, which in this case is embodied in treaties and other legal instruments. In the context of this Judgment, however, this limitation placed on the role of equity appears blurred, as if it were called to influence the outcome on its own standing. Consistency with the meaning of the United Nations Convention on the Law of the Sea could thus be compromised.

38. None of these considerations in any way detract from the respect that this judge has for the role of the Court in ensuring effective dispute settlement and its outstanding contribution to the prevalence of the rule of law in the international community, a task that can always be perfected.

*(Signed)* Francisco ORREGO VICUÑA.