

## DECLARATION OF PRESIDENT TOMKA

*The single maritime boundary between the Parties starts at the intersection of the parallel of latitude passing through Boundary Marker No. 1 with the low-water line, and follows that parallel of latitude — Such boundary did not stop at a distance of 80 nautical miles — The 1954 Agreement relating to a Special Maritime Frontier Zone unquestionably recognizes the existence of a maritime boundary between the Parties along that parallel, without establishing it — Rather, the boundary was intended to extend to a distance corresponding to the maritime zones claimed by the Parties at the time, that is to say, at least 200 nautical miles — The Court's Judgment will have the effect of closing the zone of tolerance established by the 1954 Agreement at a distance of just 80 nautical miles from the coast, which seems to run counter to the intention of the Parties — The Parties specified the eastern, southern and northern limits of this zone of tolerance, without fixing its western limit — The negotiating history of the 1952 Santiago Declaration and domestic acts by which the Parties formulated their maritime claims support the view that the boundary extended to 200 nautical miles — The travaux préparatoires surrounding the Lima Conference of 1954, and the resulting texts, further support this construction and must be taken into account when interpreting the Santiago Declaration — Paragraph IV of the Santiago Declaration did not effect a general maritime delimitation of the Parties' respective maritime zones — The Santiago Declaration assumes that the delimitation had been settled by way of a general maritime boundary along the parallel, thereby serving as evidence of the Parties' recognition of a settlement but not as its legal source — Some of the evidence referred to by the Court, particularly that pertaining to the Humboldt Current, points to a distance much longer than 80 nautical miles — Disagreement with the insufficient extent of the agreed maritime boundary on the parallel in the Court's decision, rather than the methodology the Court employed in drawing the continuation of the boundary — The Court need not rule on Peru's submission regarding the "outer triangle", as a result of the way in which the Court has drawn the maritime boundary — Peru has an entitlement to an exclusive economic zone and continental shelf in the outer triangle area.*

1. To my regret, I have not been able to support two of the conclusions reached by the Court in this case. While concurring with the findings 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, and that the single maritime boundary follows that parallel of latitude, I parted company with my ten colleagues when they decided that such agreed boundary stops at a distance of 80 nautical miles from the starting-point at the coast. Consequently, I was not able to support the Court's position on the drawing of the maritime boundary from that point *de novo*. This declaration thus constitutes a partly concurring and partly dissenting opinion.

2. In the 1954 Special Maritime Frontier Zone Agreement, the Parties acknowledged the existence of the maritime boundary between them (*United Nations Treaty Series (UNTS)*, Vol. 2274, p. 527). The text of Article 1 of that Agreement leaves no doubt on this point when it states 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” (emphasis added). As the Court concluded, “[t]he 1954 Agreement is decisive in this respect” (Judgment, para. 91).

The 1954 Special Maritime Frontier Zone Agreement does not establish the maritime boundary but recognizes its existence. I do not consider as relevant the practice of the Parties under that Agreement in determining the extent of that maritime boundary. Boundaries are not established just for fishermen conducting their activities from small boats. Boundaries serve more general purposes. Rather, in my view, the maritime boundary between Peru and Chile extends to a distance corresponding to that which the Parties have been maintaining in their claims to exclusive sovereignty and jurisdiction over the sea and sea-bed along the coasts of their respective mainland territories.

3. In its Judgment, the Court has determined, by specifying the westernmost point on the parallel, which according to it, constitutes the endpoint of the agreed maritime boundary, the western limit of the special maritime zone, while the Parties in their 1954 Agreement refrained from setting such a limit. By contrast, they specified the eastern limit of the special maritime zone (at a distance of 12 nautical miles from the coast), the northern and southern limits (at 10 nautical miles from the parallel), leaving the zone open on its western side. In my view, this deliberate choice by the Parties can only lead to the conclusion that the special maritime zone was meant to extend seaward along the parallel up until the limit of the Parties’ maritime entitlements, for a distance which also corresponded to their claimed maritime zones at that time. By its Judgment, the Court closes the special maritime zone at a distance of just 80 nautical miles from the coast.

In my view, there is insufficient evidence to conclude that the agreed maritime boundary extends only to 80 nautical miles. The evidence rather points to a different conclusion.

4. The fundamental issue is whether an agreement concluded for a particular purpose, namely the Agreement establishing a special maritime zone, that is to say, a zone of tolerance for small fishing vessels with insufficient navigation equipment, could have implicitly determined the outer limit of the pre-existing maritime boundary at a distance of 80 nautical miles when the Parties openly and publicly claimed maritime zones extending at least to 200 nautical miles. Such an interpretation seems to run counter to the intention of the Parties when the evidence is appreciated as a whole.

5. It is now common ground between the Parties that the Santiago Declaration (hereinafter “Declaration”) is a treaty (*UNTS*, Vol. 1006,

p. 323). The Declaration was adopted because the Governments of Chile, Peru and Ecuador were “determined to conserve and safeguard for their respective peoples the natural resources of the maritime zones adjacent to their coasts” as “the former extension of the territorial sea and the contiguous zone [were] inadequate for the purposes of the conservation, development and exploitation of these resources” (paragraph I of the Declaration). Therefore, the three Governments proclaimed “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” (paragraph II of the Declaration). As further specified in that instrument, “[t]he exclusive jurisdiction and sovereignty over this maritime zone shall also encompass exclusive sovereignty and jurisdiction over the seabed and the subsoil thereof” (paragraph III of the Declaration). By adopting these two provisions, the three States laid their claim to 200-nautical-mile territorial seas as they claimed therein not only jurisdiction but also sovereignty. These claims were certainly “novel” and it took almost three decades for international law to develop and recognize 200-nautical-mile jurisdictional rights for the coastal State in the form of the exclusive economic zone and the continental shelf. As for sovereignty, the present-day law of the sea allows the coastal State to exercise it only up to 12 nautical miles from its coast; that distance represents the outer limit of the territorial sea.

6. Although at the moment of its adoption, the Declaration was not in conformity with general international law of that epoch, and still remains so in relation to extant general international law as regards the claim to sovereignty up to 200 nautical miles from the coast, this does not mean that the Declaration has been void *ab initio*. It has produced legal effects between the Parties to it.

7. According to Chile, it is paragraph IV of the Declaration which is relevant for the establishment of the maritime boundary between the two Parties. This provision reads as follows:

*“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.”* (Emphasis added.)

8. This provision, as its introductory part clearly states, concerns the delimitation of the maritime zones generated by islands; either the boundaries around the islands, or the boundaries in areas where the claims generated by the islands overlap with the claims generated by the mainland coast of another country. It is only in the latter scenario that the concept of “the parallel” is referred to.

9. The *travaux préparatoires* of the Declaration<sup>1</sup> reveal that the original draft of this text did not limit an overlapping insular maritime zone by reference to the parallel; rather, the insular maritime zone would be limited, “in the corresponding part, to the distance that separates it from the maritime zone of the other State or country”. It was the Ecuadorian delegate, Mr. Fernández, who “observed that it would be advisable to provide more clarity to Article 3 [which later became paragraph IV], in order to avoid any error in the interpretation of the interference zone in the case of islands”, and suggested “that the declaration be drafted on the basis that the boundary line of the jurisdictional zone of each country be the respective parallel from the point at which the frontier of the countries touches or reaches the sea” (*ibid.*, see footnote 1). All delegates were in agreement with that proposal (*ibid.*, p. 319).

10. Draft Article 3 also provided that “[t]he zone . . . comprises all waters within the perimeter formed by the coasts of each country and a mathematical parallel projected into the sea to 200 nautical miles away from the mainland, along the coastal fringe” (*ibid.*, p. 318).

11. The text is almost identical to that contained in the Presidential Declaration of Chile concerning Continental Shelf of 23 June 1947 (Memorial of Peru, Vol. II, Ann. 27). The contemporaneous Peruvian act contained a similar text. The Supreme Decree No. 781 of 1 August 1947, in its relevant part, reads as follows:

“[Peru] will exercise the same control and protection on the seas adjacent to the Peruvian coast over the area covered between the coast and an imaginary parallel line to it at a distance of two hundred (200) nautical miles measured following the line of the geographical parallels” (*ibid.*, Ann. 6, pp. 26-27).

12. The concept of parallels is thus used in both domestic acts by which Peru and Chile formulated their maritime claims in 1947. It is true that the parallel is used to describe the outer limit of the claimed maritime zones, following a line which is parallel with the lines of the coast. What is of interest to note is the Chilean Presidential Declaration’s reference to “*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” (emphasis added).

The word “perimeter” clearly implies that the zone would have limits on all its sides. The word “perimeter” is defined as “the continuous line or lines forming the boundary of a closed geometrical figure or of any area or surface”<sup>2</sup>.

<sup>1</sup> Act of the First Session of the Juridical Affairs Commission of the First Conference of the Exploitation and Conservation of the Marine Resources of the South Pacific, held 11 August 1952 (Memorial of Peru, Vol. II, Annex 56, p. 320, agreed revised translation).

<sup>2</sup> *Shorter Oxford English Dictionary*, 5th Edition, Vol. 2, 2002, p. 2159; in the original Spanish text of the Declaration the word used is “perímetro”. Similarly, a Spanish language

Therefore, it seems that when the Parties originally formulated their maritime claims in a unilateral way, they envisaged that their resulting maritime zones would have limits, not just on their western side, for the determination of which they used a *tracé parallèle* methodology.

13. It would be, however, a step too far to assert that the 1952 Declaration expressly established the parallel as the boundary between the zones of Chile and Peru, respectively. Paragraph IV of that Declaration is limited to “the case of island territories”. On the other side, the question can be asked whether the boundary separating the zone generated by an island and the zone generated by the mainland coast of another State would continue once the parallel used for separating them reaches its endpoint, the point where it will be 200 nautical miles from the island. Does it mean that there would be a boundary solely between the maritime zone generated by the island and the zone generated by the mainland coast of another State, but there would not be a boundary separating the two zones generated by the adjacent mainland coasts of the two neighbouring States?

14. What happened in the Second Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific, held in December 1954, sheds a little bit more light on the issue. During discussions regarding the Complementary Convention to the Declaration of Sovereignty on the Two-Hundred-Mile Maritime Zone (hereinafter “Complementary Convention”), the Ecuadorian delegate proposed including an article “clarifying the concept of the dividing line of the jurisdictional sea”. He added that the concept “ha[d] already been expounded at the Conference of Santiago, but which would not be redundant to *repeat* herein” (Counter-Memorial of Chile, Vol. II, Ann. 38, p. 341, revised translation; emphasis added).

15. The Peruvian and Chilean delegates believed that “Article 4 [i.e., paragraph IV in the Court’s language] of the Declaration of Santiago [was] already sufficiently clear and [did] not require a new exposition” (*ibid.*).

Since the Ecuadorian delegate insisted that “a declaration to that effect should be included in the Convention, because Article 4 of the Declaration of Santiago [was] aimed at establishing the principle of delimitation of waters regarding the islands”, the President of the Conference asked him whether “he would accept, instead of a new article, that a record [be] kept in the minutes” (*ibid.*).

The minutes further show that

“[t]he delegate of Ecuador state[d] that if the other *countries* consider[ed] that no explicit record [was] necessary in the Convention, he agree[d] to record in the minutes that *the three countries consider[ed] the matter on the dividing line of the jurisdictional waters resolved* and

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dictionary defines “perímetro” as “[el c]ontorno de una superficie”, or as “[el c]ontorno de una figura” (*Diccionario de la Lengua Española*, 22nd Edition, 2001, p. 1732).

that *said line [was] the parallel* starting at the point at which the land frontier between both countries reaches the sea” (Counter-Memorial of Chile, Vol. II, Ann. 38, p. 341; emphasis added).

The delegate of *Peru* expressed “his agreement with doing that, but clarify[d] that this *agreement was already established* in the Conference of Santiago” (*ibid.*, p. 342; emphasis added).

16. On the basis of the above, one can conclude that the Parties agreed in 1954 to confirm that their 1952 Santiago Declaration was adopted on the understanding that the parallel starting at the point where their land frontier reaches the sea constituted the line dividing the zones they respectively claimed.

17. Moreover, the Complementary Convention expressly states that “[a]ll the provisions of this Convention shall be deemed to be an integral and complementary part of, and shall not abrogate in any way, the resolutions and agreements adopted at the Conference . . . held at Santiago de Chile in August 1952”.

18. The 1954 Lima Conference also adopted the Agreement relating to a Special Maritime Frontier Zone. According to Article 1 of that instrument, “[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*”<sup>3</sup>. Similarly, the Preamble of this Agreement also references the existence of the maritime boundary by highlighting that “[e]xperience has shown that innocent and inadvertent *violations of the maritime frontier between adjacent States* occur frequently” by small vessels (emphasis added).

19. The *travaux préparatoires* reveal that the Agreement on a Special Maritime Frontier Zone was negotiated following the adoption of the minutes described above, and that the current text incorporated a proposal by the Ecuadorian delegate to include in this provision “the concept already declared in Santiago that the parallel starting at the boundary point on the coast constitutes the maritime boundary between the neighbouring signatory countries” (Counter-Memorial of Chile, Vol. II, Ann. 39, p. 356).

20. The Agreement also stipulates that all its provisions “shall be deemed to be an *integral and complementary part of*, and not in any way to abrogate, the resolutions and *agreements* adopted at the Conference . . . held in Santiago de Chile in August 1952” (emphasis added; revised translation, see footnote 3). Thus, on the basis of this provision, “the parallel which constitutes the maritime boundary between the two

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<sup>3</sup> Emphasis added, revised translation. The authentic text in Spanish reads as follows: “Establécese una Zona Especial, a partir de las 12 millas marinas de la costa, de 10 millas marinas de ancho a cada lado del paralelo que constituye el límite marítimo entre los dos países.” (Memorial of Peru, Vol. II, Ann. 50, p. 274.)

countries”, contained in Article 1 of the Agreement, “shall be deemed to be an integral and complementary part of” the Santiago Declaration.

21. In January 1955, Peru adopted a Supreme Resolution, which had as its purpose “to specify in cartographic and geodesic work the manner of determining the Peruvian maritime zone of 200 [nautical] miles referred to in the Supreme Decree of 1 August 1947 and the Joint Declaration signed in Santiago on 18 August 1952 by Peru, Chile and Ecuador” (Memorial of Peru, Vol. II, Ann. 9, p. 39). That zone is defined as follows:

- “1. The said zone shall be limited at sea by a line parallel to the Peruvian coast and at a constant distance of 200 nautical miles from it;
2. In accordance with clause IV of the Declaration of Santiago, the said *line may not extend beyond that of the corresponding parallel at the point where the frontier of Peru reaches the sea.*” (*Ibid.*; emphasis added.)

Although the text of the resolution does not expressly determine the boundary line of the two adjacent zones, it again implies that the boundary line would follow the parallel, otherwise it would not be possible for the western “line parallel to the Peruvian coast” to meet “the corresponding parallel at the point where the frontier of Peru reaches the sea”.

22. In light of all the above, my view is that the Parties considered the Santiago Declaration to have settled issues relating to the delimitation of their general maritime zones. While it is true that a look at the text of the Santiago Declaration reveals that the general maritime frontier is not expressly determined in any of its provisions, the 1954 minutes and the Agreement on a Special Zone have to be taken into account and are relevant for the interpretation of the Santiago Declaration. Its paragraph IV makes an assumption about the general maritime frontier when establishing the Parties’ agreement on another matter, namely limiting the entitlements of islands situated less than 200 nautical miles from the general maritime zone of the other State. Apparently, in 1952 the Parties thought the issue of their general maritime frontiers, separating their general maritime zones adjacent to their mainland coasts, was so clear that there was no need for an explicit agreement in that regard, and just moved on to deal with a logically subsequent matter, namely the delimitation of insular zones in special cases. The Santiago Declaration should serve as *evidence* of the Parties’ recognition of a settlement, and not as the actual *legal source* of that settlement.

23. In my view, it was well established by 1955 that Peru and Chile considered the Santiago Declaration to have legally settled the issue of the lateral delimitation of their 200-nautical-mile zones of exclusive “sovereignty” and jurisdiction, as declared separately by each of them in 1947 and jointly in 1952. Whether paragraph IV of the Santiago Declaration, viewed in isolation, is capable of sustaining this interpretation is less relevant. The important point is that officials who represented the Parties in

their international relations agreed and declared that the issue was settled. And the fundamental point is that the 1954 Agreement on a Special Zone, which is deemed to be an integral and complementary part of the Santiago Declaration, confirms the existence of the maritime boundary between the two countries, along the parallel of latitude.

24. Some of the evidence, referred to by the Court in determining the extent of the agreed maritime boundary along the parallel, points in my view to a distance much longer than 80 nautical miles from the coast. Both Chilean and Peruvian delegates emphasized in relevant United Nations fora in 1956 and 1958, when the first codification of the law of the sea was on their agenda, the need to protect “all the marine flora and fauna living in the Humboldt Current” (Judgment, para. 106). That current, according to the information mentioned in the Judgment (*ibid.*, para. 105), “was to be found at a distance of 80 to 100 nautical miles from the shore in the summer, and 200 to 250 nautical miles in the winter”.

25. Not having been able to support the conclusion of the majority that the agreed maritime boundary, which follows the parallel of latitude passing through Boundary Marker No. 1, extends only to a distance of 80 nautical miles from its starting-point, I was not in a position to support the Court’s consequential conclusion on the way the boundary then continues. I wish to make clear that I do not take issue with the methodology employed by the Court for the construction of that continuation of the maritime boundary line, but rather with the distance at which the maritime boundary departs from the parallel.

26. Now that the maritime boundary between the Parties has been determined by the Court, and its decisions are to be respected, I agree with the Court’s conclusion that it need not rule on Peru’s submission concerning the so-called “outer triangle”. The rights of Peru to that maritime space have been recognized in the Judgment by the way in which the Court has drawn the maritime boundary. The outer triangle is part of Peru’s exclusive economic zone and continental shelf.

That would have been the result even if the Court had concluded that the agreed maritime boundary extended to 200 nautical miles from the coast. The outer triangle area lies beyond 200 nautical miles from the Chilean coast. That area, on the other hand, is within 200 nautical miles of Peru’s coast. There is no evidence that Peru has relinquished any entitlements under customary international law in areas beyond the 200-nautical-mile lateral boundary but still within 200 nautical miles of its coast. Thus, in my view, Peru has an entitlement under general international law to an exclusive economic zone and continental shelf in the outer triangle.

(Signed) Peter TOMKA.

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