

Report on the Judgment of the International Court of Justice of 27 January 2014 in the case concerning the *Maritime Dispute (Peru v. Chile)*¹

Introduction

The aim of this report is to summarize the judgment and highlight its relevant public international law aspects, specifically the theory of “tacit agreements” and its use in solving this case. The first part will explain in general terms the legal and historical background of the case. The second part will highlight the main controversial points of the case: the existence of an agreement concerning the maritime boundary between Peru and Chile and, if this agreement existed, the extension of such a boundary; the starting-point of the purported maritime boundary; and the course of the maritime boundary determined by the International Court of Justice (ICJ). Finally, the third part will discuss how the theory of “tacit agreements” is applied. In this regard, this report analyses the approach taken by the ICJ in its judgment of 27 January 2014 in the case concerning the Maritime Dispute between Peru and Chile, which declared that the maritime boundary between these two countries was defined through a “tacit agreement”. In other words, such a boundary was not determined by a typical treaty, following the definition of the Vienna Convention on the Law of Treaties (VCLT) or customary international law.

¹ The views expressed in this report are solely those of the authors and in no way compromise their institutions of affiliation.

1. Background of the case

This section will detail the legal and historical background of the case in order to present the legal reasoning of the ICJ judgment.

1.1. Legal petition and position of the parties

On 16 January 2008 Peru instituted proceedings against Chile before the International Court of Justice in regards to their maritime boundary delimitation². Peru requested that the ICJ should decide on “[...] the course of the boundary between the maritime zones of the two States in accordance with international law [...] and to adjudge and declare that Peru possesses exclusive sovereign rights in the maritime area situated within the limit of 200 nautical miles from its coast but outside Chile’s exclusive economic zone or continental shelf [...]”³.

Peru argued that the maritime boundary is a line that lies from the last point of the land boundary (Point Concordia, which was set and recognized by both parties under a land boundary treaty – the 1929 Treaty of Lima) and which is “[...] equidistant from the baselines of both Parties [...]”⁴ towards 200 nautical miles from those baselines. This also implies the recognition of a maritime zone of exclusive sovereign rights of Peru situated “[b]eyond the point where the common maritime border ends [...]”⁵, which Chile considered as high seas⁶. According to Peru, the ICJ has jurisdiction pursuant to Art. XXXI of the 1948 American Treaty on Pacific Settlement (“Pact of Bogotá”)⁷.

On the other side, Chile claimed that the maritime boundary between the two states is delimited by a line that follows “[...] the parallel of latitude passing through the most seaward boundary marker of the land boundary between Chile and Peru, known as Hito N° 1, having a latitude of 18° 21’ 00” S under WGS 84 Datum [...]”⁸.

² *Maritime Dispute (Peru v. Chile)*, International Court of Justice (ICJ), Judgment of 27 I 2014, p. 8, para. 1, <http://www.icj-cij.org/docket/files/137/17930.pdf> (accessed: 4 VIII 2014), hereinafter “*Maritime Dispute Judgment*”.

³ *Maritime Dispute Judgment*, para. 13.

⁴ *Maritime Dispute Judgment*, para. 14.

⁵ *Maritime Dispute Judgment*, para. 14.

⁶ *Maritime Dispute Judgment*, para. 1.

⁷ *Maritime Dispute Judgment*, para. 1.

⁸ *Maritime Dispute Judgment*, para. 14.

Both positions substantially differed in the main point of the petition. While Peru affirmed that there is no agreed maritime boundary and requested that the ICJ should apply the equidistance method to determine it, Chile responded that the 1952 Santiago Declaration had established a boundary "[...] along the parallel of latitude passing through the starting-point of the Peru-Chile land boundary and extending to a minimum of 200 nautical miles [...]"⁹ which, in Chile's opinion, has been confirmed through different other agreements and subsequent practice that constitutes customary law¹⁰.

It is important to note that, as the ICJ pointed out in its judgment, the coast in the area under dispute has no special geographical characteristics or features that might require any additional examination¹¹. In other words, in this case there are no special circumstances and thus it will not be necessary to apply the method of delimitation for circumstances that have been set out by the ICJ in previous judgments.

1.2. Historical background

Chile and Peru gained their independence from Spain in 1818 and 1821 respectively. At that time they did not share a common border; between them lay the territory of Bolivia. In 1879, Chile, Peru and Bolivia were involved in an armed conflict (the "War of the Pacific"), which ended with the signature of the Treaty of *Ancón* in 1883. The terms of this treaty included the Chilean annexation of part of Peru's land territory (the provinces of Tacna and Arica) subject to a plebiscite that never took place¹². This impasse was finally solved in 1929 with the signature of the "Treaty for the Settlement of the Dispute regarding Tacna and Arica and its Additional Protocol" ("Treaty of Lima").

The Treaty of Lima, which ultimately determined the land boundary between Peru and Chile, constituted a Mixed Commission of Limits that fully established 80 land markers or "*hitos*" in a Final Act in 1930, including the "Point Concordia" as the starting land boundary marker (or the terminal point of the land boundary close to the ocean)¹³

⁹ Maritime Dispute Judgment, para. 22.

¹⁰ Maritime Dispute Judgment, para. 22.

¹¹ Maritime Dispute Judgment, para. 16.

¹² Maritime Dispute Judgment, para. 17.

¹³ Maritime Dispute Judgment, paras. 18, 153.

"[...] defined as the intersection with the low-water mark of a 10-kilometre radius arc, having as its centre the first bridge over the River Lluta of the Arica-La Paz railway [...]"¹⁴.

Almost 20 years later, Peru and Chile passed unilateral acts known as the 1947 Proclamations by which they declared maritime rights from their coasts towards 200 nautical miles. In Peru, it was expressed through the Supreme Decree N° 781 (Peru's 1947 Decree), whereas Chile made a Presidential Declaration (Chile's 1947 Declaration)¹⁵.

Furthermore, during 1952, 1954 and 1967, together with Ecuador, both states negotiated twelve international instruments concerning the protection and regulation of their maritime sovereign rights extending to 200 nautical miles¹⁶. Among these instruments, of particular importance is the 1952 Santiago Declaration, as it declares a maritime zone of Ecuador, Peru and Chile from their coastlines out into the South Pacific Ocean to a distance of 200 nautical miles. All three States consider the 200 nautical miles as the extension of their western maritime boundary¹⁷.

2. Legal analysis of the controversial points of the demand

This section will address the legal analysis of the ICJ judgment concerning the existence of a maritime boundary agreement.

The ICJ first addressed the issue of the existence of an agreed maritime boundary between the two parties. If determined, the Peruvian case as a whole would be dismissed, because that agreement would prevail

¹⁴ Maritime Dispute Judgment, para. 14.

¹⁵ Maritime Dispute Judgment, para. 19.

¹⁶ These twelve instruments are: a) the Regulations for Maritime Hunting Operations in the Waters of the South Pacific; b) the Joint Declaration concerning Fishing Problems in the South Pacific; c) the Santiago Declaration; d) the Agreement Relating to the Organization of the Permanent Commission of the Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific; e) the Complementary Convention to the Declaration of Sovereignty on the Two-Hundred-Mile Maritime Zone; f) the Convention on the System of Sanctions; g) the Agreement relating to Measures of Supervision and Control in the Maritime Zones of the Signatory Countries; h) the Convention on the Granting of Permits for the Exploitation of the Resources of the South Pacific; i) the Convention on the Ordinary Annual Meeting of the Permanent Commission for the South Pacific; j) and the Agreement Relating to a Special Maritime Frontier Zone; and two more instruments related to the administration of the Permanent Commission for the South Pacific. From a) to d) were adopted in Santiago in 1952; from e) to j) were adopted in Lima in 1954; the last two instruments were signed in Quito in 1967.

¹⁷ Maritime Dispute Judgment, para. 20.

in the configuration of their maritime boundary. For that reason, the ICJ examined: a) the 1947 Proclamations (the Peru's 1947 Decree and the Chile's 1947 Declaration); b) the 1952 Santiago Declaration; c) the 1954 Agreements related to the Santiago Declaration; and d) the practice of Peru and Chile subsequent to the Santiago Declaration in order to find if there were any maritime boundary agreement between the parties¹⁸.

2.1. The 1947 Proclamations

These are unilateral acts of Peru and Chile, where both States declared maritime rights to the extension of 200 nautical miles from their coasts, the aim of which was to prevent commercial exploitation of natural resources, particularly large scale fishery of third States. These proclamations were inspired by the unilateral acts of the United States, Mexico and Argentina in regards to their maritime sovereignties¹⁹.

In Peru's view, the 1947 Proclamations constitute the initial phase of the maritime jurisdiction claims of Peru, Chile and Ecuador up to 200 nautical miles from their shores in the South Pacific Ocean. Chile's 1947 Declaration is the first step towards this recognition of sovereignty. For Peru, this Declaration did not assert, neither literally nor through interpretation of the text, any delimitation between the two states, but proclaims the extension of their own maritime area of protection from their coast up to 200 nautical miles.

Peru also affirms that its Decree and the Chilean Declaration have the same object and purpose, which is to declare maritime rights over 200 nautical miles from their coasts²⁰. In this regard, Peru's 1947 Decree states:

- [...] 1. To declare that national sovereignty and jurisdiction are extended to the submerged continental or insular shelf adjacent to the continental or insular shores of national territory [...];
- 2. National sovereignty and jurisdiction are exercised as well over the sea adjoining the shores of national territory whatever its depth and in the extension necessary to reserve, protect, maintain and utilize natural resources and wealth of any kind [...];

¹⁸ Maritime Dispute Judgment, para. 24.

¹⁹ Maritime Dispute Judgment, para. 26.

²⁰ Maritime Dispute Judgment, para. 28.

3. [...] the State reserves the right to establish the limits of the zones of control and protection of natural resources in continental or insular seas [...] and to modify such limits in accordance with supervening circumstances which may originate as a result of further discoveries, studies or national interests [...] and at the same time declares that it 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 [...].

Whereas the Chile's 1947 Declaration affirms that:

[...] (1) The Government of Chile confirms and proclaims its national sovereignty over all the continental shelf adjacent to the continental and island coasts of its national territory [...] and claims by consequence all the natural riches which exist on the said shelf, both in and under it, known or to be discovered. (2) The Government of Chile confirms and proclaims its national sovereignty over the seas adjacent to its coasts [...] and within those limits necessary in order to reserve, protect, preserve and exploit the natural resources [...] placing within the control of the government especially all fisheries and whaling activities with the object of preventing the exploitation of natural riches of this kind to the detriment of the inhabitants of Chile and to prevent the spoiling or destruction of the said riches to the detriment of the country and the American continent. (3) The demarcation of the protection zones for whaling and deep sea fishery in the continental and island seas under the control of the Government of Chile will be made in accordance with this declaration of sovereignty at any moment which the Government may consider convenient, such demarcation to be ratified, amplified, or modified in any way to conform with the knowledge, discoveries, studies and interests of Chile as required in the future. Protection and control is hereby declared immediately over all the seas contained within 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 [...].

Peru found that the mention to geographical parallels of latitude in its Decree could not be interpreted as a determination of an international maritime boundary²¹. It was issued therein to recognize a protected maritime area from the Peruvian seaboard. It is not a reference to any boundary with Chile, but the assertion of rights over maritime resources in that area to Peru²². By contrast, for Chile, the use of the terminology "geographical parallels" in Peru's 1947 Decree probed the existence of a conscious expression of will to set that parallel line as the course

²¹ Maritime Dispute Judgment, para. 32.

²² Maritime Dispute Judgment, para. 28.

of their boundary employing a *tracé parallèle* delimitation method²³, which was common practice at that time on the American continent²⁴. For Chile, the use of such a method “[...] rendered the boundary delimitation uncontroversial in 1952 [...]”²⁵.

Peru affirmed that the latter was difficult to admit, because the fact that other states on the American continent established their boundaries specifying parallels of latitude could not imply that every time this terminology is mentioned in international instruments it must be understood as an agreement establishing a boundary²⁶.

Chile's position stressed that the 1947 Proclamations were the expression of the will of both states that equal to “[...] concordant unilateral proclamations, each claiming sovereignty to a distance of 200 nautical miles [...]”²⁷ or manifestations with the effect of founding an international agreement that recognizes their rights over maritime resources²⁸ to a distance of 200 nautical miles²⁹.

Initially, it seems that Chile is of the opinion that the 1947 Proclamations ended up constituting a treaty. This idea is reinforced by the fact that both states exchanged formal notifications of the Declaration and the Decree to which neither of them made any objection³⁰. In this sense, there are three legal aspects to develop in this argument of Chile.

First, Section I of the Part II of the 1969 Vienna Convention on the Law of Treaties (VCLT) concerning the conclusion of treaties emphasizes in Art. 11 the different means by which a state could express its consent to be bound by a treaty³¹:

[...] by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

The VCLT explains in detail each of these means of expressing consent. In particular, in Art. 16 it emphasizes that the instruments

²³ Maritime Dispute Judgment, para. 31.

²⁴ Maritime Dispute Judgment, para. 32.

²⁵ Maritime Dispute Judgment, para. 33.

²⁶ Maritime Dispute Judgment, para. 32.

²⁷ Maritime Dispute Judgment, para. 29.

²⁸ In Peru's view, which was not contested by Chile, the terminology of that time refers to “sovereign rights” or “sovereignty” to what is understood nowadays as rights over resources. See Maritime Dispute Judgment, para. 28.

²⁹ Maritime Dispute Judgment, para. 29.

³⁰ Maritime Dispute Judgment, para. 36.

³¹ United Nations Treaty Collection (UNTS), vol. 1155, p. 331 et seq., 335.

of ratification, acceptance, approval or accession are bound if they are delivered whether by exchange, deposit or notification³². Consequently, a notification is a legal instrument by which one of the parties (e.g. in a bilateral agreement) or a depositary (usually an international organization) communicates to the other party or parties of a treaty that this party consents to be bound therein. In the case in question, the exchange of notifications of the 1947 Proclamations do not have the nature described in the VCLT. From the context in which it happened, it might simply have been an informative note.

Second the notification of unilateral acts is unusual in international law as they are exact, clear and publicly pronounced and acknowledged expressions of an international obligation that a subject of international law imposes on itself; therefore, there is no need to communicate an action that is publicly declared and generally known³³.

Third, in spite of affirming that the 1947 Proclamations are “concordant unilateral proclamations”³⁴, Chile understood that they did not establish for themselves a maritime boundary between the parties. In Chile’s view, they reflect a mutual agreement recognizing maritime rights and zones that functions as antecedents or circumstances of the 1952 Santiago Declaration and the 1954 Special Maritime Frontier Zone Agreement, which are part of the twelve international instruments negotiated between both states and Ecuador³⁵.

On this point, Peru agreed that these Proclamations do not constitute a maritime boundary agreement, nor can they be classified as “concordant”, mainly because of the lack of coordination or agreement behind these unilateral acts³⁶. It is better interpreted, in the Peruvian position, as acts that mirrored the circumstances of that time with the purpose of protection of their own maritime resources.

The ICJ remarked that both parties acknowledge the non-treaty nature of the 1947 Proclamations; however, it examined them in a search for evidence of a compromise therein to establish a maritime boundary³⁷. Therefore, the ICJ analyzed whether they can constitute instruments

³² UNTS, vol. 1155, p. 336.

³³ M. Díez de Velasco, *Instituciones de Derecho Internacional Público*, 16 ed., Tecnos, Madrid 2008, pp. 147–148, quoting the Judgment of the ICJ of 22 XII 1986 in the case concerning the *Frontier Dispute (Burkina Faso v. Republic of Mali)*, paras. 39–40.

³⁴ Maritime Dispute Judgment, para. 29.

³⁵ Maritime Dispute Judgment, para. 33.

³⁶ Maritime Dispute Judgment, para. 30.

³⁷ Maritime Dispute Judgment, para. 39.

that can be used as supplementary means of interpretation pursuant to Art. 32 of the VCLT³⁸.

Article 32 of the VCLT³⁹ has a subsidiary function with respect to Art. 31. The latter develops the general rules for the interpretation of Art. 31 which adjudicators should prioritise in their analysis of a case, because they are concrete tools assisting to solve the dispute before them⁴⁰. Therefore, if the text of the treaty is sufficiently clear to arrive at a valid meaning⁴¹; then, adjudicators should not dissent from it⁴².

The ICJ, however, has encouraged reading the text of a treaty in conjunction with the circumstances of its adoption⁴³, due to its importance in extracting out the desire of the negotiators. These circumstances are normally expressed in its *travaux préparatoires*⁴⁴ and even when they are not as authentic as a text-based approach and could be misleading⁴⁵,

³⁸ Maritime Dispute Judgment, para. 33.

³⁹ Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Art. 31, or to determine the meaning when according to Art. 32 the interpretation:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Supra footnote 31.

⁴⁰ ICJ Rep. 1994, *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment of 3 II 1994, paras. 21–22, hereinafter “*Territorial Dispute case*”.

⁴¹ PCIJ Publ. 1927, Series A. – No. 10, S.S. “*Lotus*”, Judgment of 7 IX 1927, paras. 16–17.

⁴² ICJ Rep. 1948, *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion of 28 V 1948, para. 63, hereinafter “*Conditions of Admission to UN Membership Opinion*”. “The Court considers that the text is sufficiently clear; consequently, it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself”. ICJ Rep. 1952, *Ambatielos (Greece v. United Kingdom)*, Preliminary Objection, Judgment of 1 VII 1952, para. 45, hereinafter “*Ambatielos case*”. “In any case where [...] the text to be interpreted is clear, there is no occasion to resort to preparatory work”. ICJ Rep. 1992, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 IV 1992, para. 196. See also N. Quoc Dinh, P. Daillier, A. Pellet, *Droit International Public*, 7e éd., *Librairie générale de droit et de jurisprudence*, Paris 2002, p. 262; A. Aust, *Handbook of International Law*, 2nd ed., Cambridge University Press, Cambridge 2010, p. 87.

⁴³ *Conditions of Admission to UN Membership Opinion*, para. 63; *Ambatielos case*, para. 45.

⁴⁴ ICJ Rep. 1988, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment of 20 XII 1988, para. 37; ICJ Rep. 1992, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment of 26 VI 1992, para. 247 et seq. ICJ Rep. 1999, *Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment of 13 XII 1999, para. 46.

⁴⁵ A. Aust, *op. cit.*, p. 87.

"[...] if it is evident from the *travaux* that the ordinary meaning does not represent the intention of the parties, a court may «correct» the ordinary meaning [...]"⁴⁶.

The *travaux préparatoires* are usually a group of different documents such as drafts, articles for discussion, official records from conferences, experts' reports and *memoranda* to a negotiating or drafting group, statements made by the rapporteur or chairman in charge of a discussion or drafting group. The greater their authenticity, the more attention they will receive from adjudicators⁴⁷.

As the wording of Art. 32 of the VCLT suggests, the recourse to supplementary means of interpretation is meant to confirm the meaning resulting from the application of the general rules of interpretation or to generate an effective interpretation of the legal provision when it is not possible to confirm that meaning by the application of general rules alone. Ultimately, adjudicators could always take into account supplementary means of interpretation as they are objective instruments to identify the common will of the parties⁴⁸ in order to confirm a text-based interpretation⁴⁹.

In the present case, Chile proposed to the ICJ to take the 1947 Proclamations as circumstances of the adoption of the 1952 Santiago Declaration, among others, in the sense that they tacitly set maritime rights and zones through the *tracé parallèle* method that was later adopted in the Santiago Declaration.

The ICJ searched for any reference to lateral delimitation between the parties and concluded that the reference to a geographical or

⁴⁶ See S. Schwebel, *May Preparatory Work Be Used to Correct rather than Confirm the "Clear" Meaning of a Treaty Provision?*, in: *Theory of International Law at the threshold of the 21st century*, ed. by J. Makarczyk, Springer 1996, p. 541–547.

⁴⁷ A. Aust, op. cit., p. 88.

⁴⁸ *Territorial Dispute case*, para. 22. "[...] As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion". See also N. Quoc Dinh, P. Daillier, A. Pellet, op. cit., p. 261.

⁴⁹ ICJ Rep. 1995, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment of 15 II 1995, para. 40. "[...] the Court does not consider it necessary to resort to supplementary means of interpretation in order to determine the meaning of the Doha Minutes [...] however, as in other cases [...] it considers that it can have recourse to such supplementary means in order to seek a possible confirmation of its interpretation of the text [...]". See *Territorial Dispute case*, para. 55: "The Court considers that it is not necessary to refer to the *travaux préparatoires* to elucidate the content of the 1955 Treaty; but, as in previous cases, it finds it possible by reference to the *travaux* to confirm its reading of the text [...]". See also N. Quoc Dinh, P. Daillier, A. Pellet, op. cit., p. 262.

mathematical parallel in the Proclamations was circumscribed only to the 200 miles extension from the seaboard, but did not establish any lateral boundary. Instead, the Proclamations made reference to maritime areas such as the continental shelf and adjacent seas, which would be understood as “[...] the need to fix, in the future, the lateral limits of the jurisdiction that it was seeking to establish within a specified perimeter”⁵⁰.

It seems that the 1947 Proclamations employed the *tracé parallèle* method to make reference to maritime areas, but this does not show the intention of the parties to use that method in their future delimitation⁵¹. To probe the latter, the ICJ identified that the sense of Chile’s 1947 Declaration pursuant to its para. 3, as well as para. 3 of Peru’s 1947 Decree, is to establish zones of protection and control of fisheries rather than to set a special method of delimitation. Furthermore, both clearly stated that these zones could be modified in the future according to their interests⁵².

Consequently, the ICJ adjudged that from the text of the 1947 Proclamations, they did not establish any maritime boundary between the parties, but they do recognise “[...] rights and jurisdiction in the maritime zones, giving rise to the necessity of establishing the lateral limits of these zones in the future”⁵³.

2.2. The 1952 Santiago Declaration

According to the ICJ, the Santiago Declaration is a treaty in force since 18 August 1952⁵⁴. Although Peru maintained that this was initially deemed to be “[...] a proclamation of the international maritime policy of [...]”⁵⁵ Chile, Ecuador and Peru with a plain declarative nature, it became a binding agreement after its ratification in 1954–1955⁵⁶. This agreement was adopted during the 1952 Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific in Chile⁵⁷.

⁵⁰ Maritime Dispute Judgment, para. 40.

⁵¹ Maritime Dispute Judgment, para. 40.

⁵² Maritime Dispute Judgment, paras. 41–42.

⁵³ Maritime Dispute Judgment, para. 43.

⁵⁴ Maritime Dispute Judgment, paras. 46, 48.

⁵⁵ Maritime Dispute Judgment, para. 47.

⁵⁶ Maritime Dispute Judgment, para. 47.

⁵⁷ Maritime Dispute Judgment, para. 45.

Therefore, the ICJ focused on the role of the Santiago Declaration in establishing a maritime boundary.

From the outset, Peru affirmed that the Santiago Declaration is not a maritime boundary treaty, because it did not lay down the characteristics common in such agreements, especially the proper description of the boundary (regularly through cartographic material) and the procedure for its ratification⁵⁸. However, Chile argued that international law does not mandate a particular formality or certain essential elements in boundary agreements⁵⁹.

In Chile's position, para. IV of the Santiago Declaration is a core provision as it delineates the practice of the parties concerning a maritime boundary following the parallel of latitude. This is evidence enough, in Chile's view, to state that the Santiago Declaration is a maritime boundary treaty⁶⁰. Paragraph IV states that:

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 sea⁶¹.

To further prove that the Santiago Declaration is a maritime boundary treaty, Chile recalled the clarification requested by the delegation of Ecuador during negotiations. Ecuador was concerned whether in para. IV the parties had a previous consensus that the boundary line is "[...] the parallel from the point at which the border of the countries touches or reaches the sea [...]" in order to tackle the specific issue of islands⁶².

In this regard, for Chile "[...] the delimitation of insular zones along a line of parallel is only coherent and effective if there is also a general maritime delimitation along such parallel [...]"⁶³. Such a general maritime delimitation, pursuant to Chile, was implicitly recognized along the debates of the parties during the 1952 Conference. Based on

⁵⁸ Maritime Dispute Judgment, para. 50.

⁵⁹ Maritime Dispute Judgment, para. 50.

⁶⁰ Maritime Dispute Judgment, para. 51.

⁶¹ Maritime Dispute Judgment, para. 49.

⁶² Maritime Dispute Judgment, para. 51.

⁶³ Maritime Dispute Judgment, para. 52.

Art. 31 para. 2 of the VCLT, this alleged implicit agreement would be an instrument related to the conclusion of the Santiago Declaration⁶⁴.

This reasoning is difficult to accept as the records or minutes of any international conference are commonly taken as constituting the *travaux préparatoires* of the negotiated treaty. They have never been considered to be “implicit” agreements. Consequently, in this case the minutes of the 1952 Conference could not possibly be equivalent to an agreement or any implicit understanding of the parties recognizing a general maritime delimitation⁶⁵.

Clearly, for Peru, para. IV of the Santiago Declaration addresses the issue of maritime rights in the parties’ island territories. This matter is of concern predominantly to Peru and Ecuador because of their geography. Nothing in the wording of the Declaration refers to continental coast maritime entitlements⁶⁶. Peru claimed that the object and purpose of this paragraph “[...] is to provide a protective zone for insular maritime entitlements so that even if an eventual maritime delimitation occurred in a manner otherwise detrimental to such insular entitlements, it could only do so as far as the line of parallel referred to therein”⁶⁷.

Accordingly, the ICJ noticed that the ordinary meaning of the provisions of the Santiago Declaration does not correspond to a “[...] delimitation of maritime boundaries of the zones generated by the continental coasts of its States parties [...]”⁶⁸. The only reference to limits is extracted from para. IV. However, even in this provision, there is no mention of lateral boundaries between neighbouring countries or continental coast maritime entitlements. Only the maritime zones of the parties are mentioned⁶⁹. As para. II states:

[i]n the light of these circumstances, the Governments of Chile, Ecuador and Peru proclaim 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.

The ICJ considered that “[t]his provision establishes only a seaward claim and makes no reference to the need to distinguish the lateral limits

⁶⁴ Maritime Dispute Judgment, para. 51.

⁶⁵ Maritime Dispute Judgment, paras. 54–65.

⁶⁶ Maritime Dispute Judgment, para. 53.

⁶⁷ Maritime Dispute Judgment, para. 54.

⁶⁸ Maritime Dispute Judgment, para. 58.

⁶⁹ Maritime Dispute Judgment, paras. 58–60.

of the maritime zones of each State party [...]”⁷⁰. Moreover, para. III declares “[...] exclusive jurisdiction and sovereignty over this maritime zone [...]” as well as “[...] the seabed and the subsoil thereof”. Such exclusivity does not necessarily imply that the parties had any previous agreement on their lateral maritime boundaries or any continental coast delimitation whatsoever⁷¹.

Therefore, based on the ordinary meaning of the text of the provisions, the ICJ adjudged that the Santiago Declaration sets maritime zones with the addition of para. IV, which denotes the maritime zone in the case of island territories, particularly due to the geographical circumstances between Peru and Ecuador⁷².

Before leaving this matter, the ICJ evaluated the various agreements adopted in 1954, in particular the Complementary Convention to the 1952 Santiago Declaration and the Special Maritime Frontier Zone Agreement in such a way as to seek any kind of agreement after the Santiago Declaration⁷³.

2.3. The existence of a maritime boundary – the agreements of 1954 related to the Santiago Declaration

Among the six documents adopted in Lima in 1954⁷⁴, the ICJ focused on the Complementary Convention and the Special Maritime Frontier Zone Agreement as both could shed light on whether the Santiago Declaration is a maritime boundary treaty.

First, the ICJ considered that the Complementary Convention’s purpose was to confront the different critics and strong opposition to the Santiago Declaration from the powerful private enterprises lobbying their governments in the maritime resources extraction sector. By adopting the Complementary Convention, Ecuador, Peru and Chile reasserted their sovereignty and jurisdiction over their 200 nautical miles from their coasts as stated in 1952 in the Santiago Declaration⁷⁵. However, for the ICJ the unity of the three parties as a block against other countries was

⁷⁰ Maritime Dispute Judgment, para. 57.

⁷¹ Maritime Dispute Judgment, para. 59.

⁷² Maritime Dispute Judgment, paras. 51–62.

⁷³ Maritime Dispute Judgment, para. 69.

⁷⁴ See footnote 16.

⁷⁵ Maritime Dispute Judgment, paras. 74–77.

not the only purpose of their meeting in Lima in 1954, as demonstrated by the Special Maritime Frontier Zone Agreement.

For the ICJ, this Agreement is an attempt to address the main issue in dispute, which is whether there is a maritime boundary agreement between Peru and Chile. In this sense, the Preamble and Art. 1 of the Special Maritime Frontier Zone Agreement expresses the following:

[e]xperience 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; [...] (emphasis added).

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** (emphasis added).

From these provisions, read in conjunction and within the ordinary meaning of the terms, the ICJ declared that the parties of the Special Maritime Frontier Zone Agreement recognized "[...] in a binding international agreement that a maritime boundary already exists [...]"⁷⁶. For the ICJ, this treaty "[...] makes clear that the maritime boundary along a parallel already existed between the Parties [...]"⁷⁷. Although there is no reference therein to the date of such an agreement or the nature of the maritime boundary, it expressly shows that there was a previous tacit agreement between the parties that has evolved over time with its paramount references being the 1947 Proclamations and the 1952 Santiago Declaration⁷⁸.

Consequently, in the ICJ's view, proof of this tacit agreement can be found taking together the 1954 Special Maritime Frontier Zone Agreement with the 1947 proclamations and the 1952 Santiago Declaration. As none of these agreements or the subsequent practice made distinctions concerning maritime zones, the ICJ considered this tacit agreement an all-purpose boundary agreement⁷⁹.

The ICJ mentioned the existence of tacit agreements constituting permanent maritime boundaries in the case *Territorial and Maritime*

⁷⁶ Maritime Dispute Judgment, para. 90.

⁷⁷ Maritime Dispute Judgment, para. 91.

⁷⁸ Maritime Dispute Judgment, para. 92.

⁷⁹ Maritime Dispute Judgment, para. 102.

Dispute between Nicaragua and Honduras in the Caribbean Sea in 2007. In this case, the ICJ stated the importance of strong evidence to prove a tacit agreement, especially if it is a boundary agreement, as in no way should a tacit agreement of such a nature be presumed:

[...] The Court must now determine whether there was a tacit agreement sufficient to establish a boundary. **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 (emphasis added)⁸⁰.

In this case, after reviewing internal acts (oil concessions), persistent objections by one of the parties to the other's boundary treaties, the conduct of the parties relating to oil concessions and fishing in the zone and the exchange of notes, the Court concluded that "there was no tacit agreement in effect between the Parties in 1982 – nor *a fortiori* at any subsequent date – of a nature to establish a legally binding maritime boundary"⁸¹.

The ICJ also analysed the "tacit agreement" theory in the 2008 case concerning the *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* in which it stated that:

[a]ny passing of sovereignty might be by way of agreement between the two States in question. Such an agreement might take the form of a treaty, as with the 1824 Crawford Treaty and the 1927 Agreement [...]. The agreement might instead be tacit and arise from the conduct of the Parties. International law does not, in this matter, impose any particular form. Rather, it places its emphasis on the parties' intentions [...]⁸².

[...] any passing of sovereignty over territory on the basis of the conduct of the Parties [...] must be manifested clearly and without any doubt by that conduct and the relevant facts. That is especially so if what may be involved, in the case of one of the Parties, is in effect the abandonment of sovereignty over part of its territory.

⁸⁰ ICJ Rep. 2007, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, Judgment of 8 X 2007, para. 253, hereinafter "Territorial and Maritime Dispute in the Caribbean Sea".

⁸¹ Territorial and Maritime Dispute in the Caribbean Sea, paras. 254–258.

⁸² ICJ Rep. 2008, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment of 23 V 2008, para. 120.

Finally, in the *Territorial and Maritime Dispute*, the Court recalled its statement in the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* case, quoted *supra*, to dismiss Colombian arguments and stated that the sole conduct of the parties is not sufficient to establish the existence of a tacit agreement⁸³.

From the jurisprudence of the ICJ, it is clear that tacit agreements are exceptional and require stronger proof of their existence. The ICJ has always examined this theory to deny the existence of an alleged treaty. This brings us to the case under analysis, in which the evidence of a tacit agreement for the Court is the preamble and Art. 1 of the Special Maritime Frontier Zone Agreement. As stated below, for the ICJ “[i]n this case, the Court has before it an Agreement which makes clear that the maritime boundary along a parallel already existed between the Parties. The 1954 Agreement is decisive in this respect. That Agreement cements the tacit agreement”⁸⁴.

2.4. The determination of the maritime boundary

So far, the methodology used by the ICJ to determine the nature of the declaration and agreements between Peru and Chile has been examined. The ICJ concludes that a maritime boundary agreement exists; however, there is no certainty of the extension of this boundary, but that it covers 200 nautical miles from their coasts.

In order to determine such an extension, the ICJ made use of the relevant subsequent practice of the parties of the tacit agreement in 1954. Among other aspects, the ICJ examined: 1) fishing potential and activities, 2) contemporaneous developments in the law of the sea, 3) legislative practice, 4) the 1955 Protocol of Accession to the 1952 Santiago Declaration, 5) enforcement activities, 6) the 1968–1969 lighthouse agreements, 7) negotiations with Bolivia (1975–1976), 8) positions of the parties at the Third United Nations Conference on the Law of the Sea, 9) the 1986 Bákula Memorandum, and 10) practice after 1986.

After reviewing this, the ICJ concluded that the maritime boundary did not extend beyond 80 nautical miles along the parallel from its

⁸³ ICJ Rep. 2012, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment of 19 XI 2012, para. 219.

⁸⁴ Maritime Dispute Judgment, para. 91.

starting-point⁸⁵. The reasoning of the Court is that the enforcement and extractive capacities of the parties could not have gone beyond that limit in 1954. According to the ICJ:

[t]he Court has also had regard to the consideration that the acknowledgement, 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 time⁸⁶.

Consequently, it was important to determine the starting-point from which to count the 80 nautical miles and, from there, to decide on the rest of the course of the maritime boundary until the 200 nautical miles point.

The starting-point, according to the ICJ, was the intersection of the parallel of latitude passing through the Boundary Marker No. 1 (Hito No. 1) with the low-water line⁸⁷. It has to be noted that the starting-point determined by the ICJ is only for the maritime boundary and not for the land one. This is not only because the ICJ was not asked by the parties to determine the land boundary, but also because the land boundary was already determined by the Parties, as recalled by the Court⁸⁸. This point is known as “Point Concordia”, which was mentioned previously, and is located south of the maritime boundary starting-point, leaving Peru with 300 meters of “dry coast”, a coast without territorial waters.

The reason the Court assigned the Hito No. 1 boundary marker the status of starting-point was the evidence provided by the Lighthouse Agreements of 1968 and 1969, followed by its implementation. This evidence is compelling for the Court as these agreements showed that the delegates of both parties understood that they were designing a maritime frontier running through the parallel of the Hito No. 1⁸⁹.

Finally, the Court determined the course of the maritime boundary after 80 nautical miles of the parallel using Art. 74 para. 1 and Art. 83 para. 1 of the United Nations Convention on the Law of the Sea, because this boundary was meant to delimit the exclusive economic zone and the continental shelf⁹⁰.

⁸⁵ Maritime Dispute Judgment, para. 149.

⁸⁶ Maritime Dispute Judgment, para. 149.

⁸⁷ Maritime Dispute Judgment, para. 176.

⁸⁸ “The Court is not called upon to take a position as to the location of Point Concordia, where the land frontier between the Parties starts”. Maritime Dispute Judgment, para. 175.

⁸⁹ Maritime Dispute Judgment, para. 164.

⁹⁰ United Nations Convention on the Law of the Sea, Montego Bay, 12 X 1982, International Legal Materials 1982, vol. 21, p. 1261 et seq.

The ICJ also called on its three-stage methodology in order to achieve an equitable solution⁹¹ and, as the first step, constructed an equidistant line and a straight line contouring the end of the Chilean exclusive economic zone (see figure 1 at page 188). The ICJ did not set the precise geographical co-ordinates, leaving this work to the parties in order to be performed “in the spirit of good neighbourliness”⁹². The second step was to determine whether there were any relevant circumstances calling to adjust the equidistant line. Finally, the third step was to determine whether this line produced a significantly disproportionate result. In this case, there was no need to make any changes following the two last steps.

3. Discussion on the application of the “tacit agreements” theory

The case under analysis provides rich material for discussing many topics, among them the extension of the Exclusive Economic Zone in the mid-1900 and its relation to the international customary law codified in the United Nations Convention on the Law of the Sea, considering that the proclamations of Peru, Chile and Ecuador were made at a moment in time in which the customary law was not yet defined.

Taking into account that this report was intended to summarize the case and highlight the most relevant arguments of the judgment, for reasons of space, only one argument has been chosen for discussion in this regard: the tacit agreement and its application to solve the dispute.

Customary law and doctrine defines a treaty as an agreement concluded between two or more subjects of international law, which produces legal effects under international law⁹³. Article 2 of the VCLT, which reflects customary international law on the law of treaties, lays down a narrower definition of a treaty as “[...] an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”⁹⁴.

⁹¹ Maritime Dispute Judgment, paras. 183–192.

⁹² Maritime Dispute Judgment, para. 197.

⁹³ N. Quoc Dinh, P. Daillier, A. Pellet, op. cit., p. 132.

⁹⁴ *Supra* footnote 31.

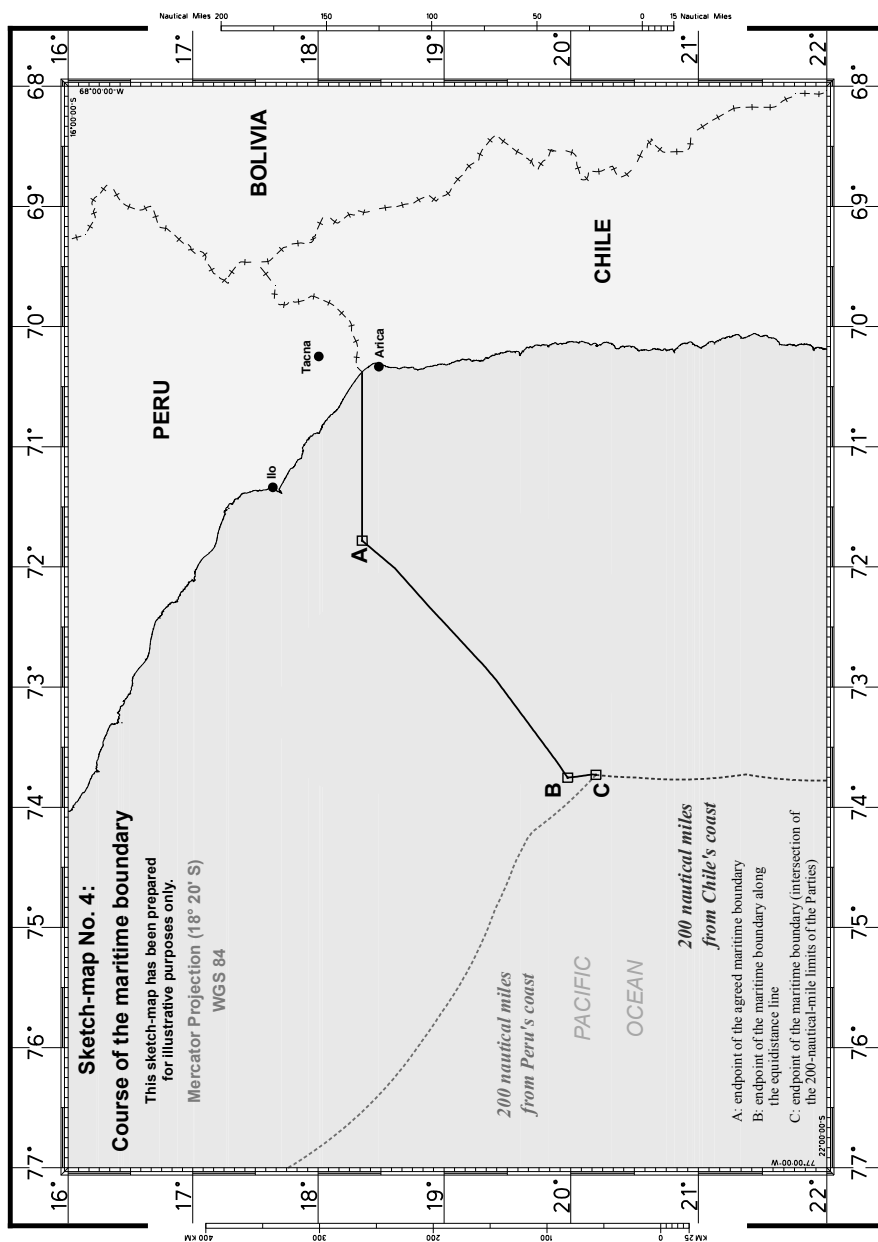


Figure 1. Sketch-map: Course of the maritime boundary

Source: Maritime Dispute (Peru v. Chile), International Court of Justice, Judgment of 27 I 2014, p. 66, <http://www.icj-cij.org/docket/files/137/17930.pdf> (accessed: 4 VIII 2014).

Certainly, the VCLT limits its scope to only one subject of international law (States) and to written agreements. However, it is also possible that treaties could be concluded orally. The ICJ considered that the consultations between two Ministers of Foreign Affairs, as expressed in the minutes of these meetings, constitute a binding agreement⁹⁵. Similarly, joint communiqués are also deemed to be treaties⁹⁶.

Whether the consent of a party to be bound by a treaty was given in written or oral form, a treaty requires the concurrency of the consent from the parties involved, which does not necessarily have to be given simultaneously. In this sense, a treaty could be valid, for instance, from two unilateral declarations given at different times⁹⁷.

With regard to boundary treaties, the ICJ did not impose any higher standard on the way consent should be expressed. According to the ICJ, this means that a boundary treaty could be adopted by the written or oral consent of the parties and that this consent might be given at different times. However, the ICJ stated clearly that the decision to establish a boundary depends only on the States concerned⁹⁸. For instance, country A and B can decide to determine their own boundary, which can even be made orally and not simultaneously, but their decision cannot interfere in the determination of the boundaries of countries B and C.

As explained above, the solution of the Court in this case was based on the analysis of international instruments between the parties, evidence and its previous jurisprudence on the tacit agreement theory. Nevertheless, in the present case the ICJ did not develop this theory, leaving the concept of tacit agreement rather vague, and some issues remain open from the rationale of the Court. The first issue is the relation between tacit agreements and treaties. If tacit agreements are treaties, their consent must be given orally and not in a written form. For instance, in this case there was neither a written nor an express treaty that binds the parties on a maritime boundary; however, the Court concludes that an agreement existed based on a preamble and one article of a related written agreement (the 1954 Agreement).

⁹⁵ ICJ Rep. 1994, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment of 1 VII 1994, paras. 23–27.

⁹⁶ ICJ Rep. 1978, *Aegean Sea Continental Shelf (Greece v. Turkey)*, Jurisdiction of the Court, Judgment of 19 XII 1978, para. 96

⁹⁷ N. Quoc Dinh, P. Daillier, A. Pellet, op. cit., p. 132.

⁹⁸ ICJ Rep. 1994, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment of 3 II 1994, para. 45, hereinafter “*Territorial Dispute case*”.

The previous standard of the ICJ in the *Territorial and Maritime Dispute* case was that the “[e]vidence of a tacit legal agreement must be compelling” in the case under analysis, the compelling evidence was that the Parties of the 1954 Agreement refer to a “parallel which constitutes the maritime boundary between the two countries”, but there is no proof of the existence of that single agreement or of the consent of the Parties to it⁹⁹.

Tacit agreements can be interpreted as setting a different proof standard in comparison to written treaties, where the acceptance of the former is done by an “act [...] whereby a State establishes on the international plane its consent to be bound by a treaty”¹⁰⁰. In the case of tacit agreements, consent is not only unwritten but also not expressed. This makes tacit agreements difficult to prove. In the case under revision, the Court had at least found some written evidence after interpreting the text of the 1954 Agreement, through the ordinary meaning of its terms. However, in other cases it will not be so simple to define the agreement.

The tacit agreement doctrine also poses a challenge for the proof of consent, because, as explained previously, such consent can be given at the same time or in different moments, but must exist, as an agreement by definition implies consent¹⁰¹. This also raises the burden of carefulness to the Parties when drafting a treaty.

It would have been interesting if the ICJ had elaborated more on the tacit agreement doctrine, in order to solve some of the questions just raised. On this point, the ICJ’s analysis is disappointing from the academic point of view. This is especially true because, as mentioned before, in a previous case concerning *Territorial and Maritime Dispute*, the ICJ conducted a more detailed analysis of the evidence and decided that such a “type” of agreement was not evident.

Conclusions

In the Maritime Dispute case, the ICJ had to deal once more with the issue of maritime boundary delimitation. However, in this instance it had to combine the existence of a boundary treaty, a tacit one, with non-delimited maritime spaces.

⁹⁹ *Territorial and Maritime Dispute in the Caribbean Sea*, p. 735, para. 253.

¹⁰⁰ Cf. art. 2 of the VCLT, *supra* footnote 31.

¹⁰¹ Oxford Dictionaries, <http://www.oxforddictionaries.com/es/definicion/ingles/agreement> (accessed: 9 XII 2014).

The starting point for determining the boundary and its delimitation was the issue of the existence or not of a previous agreement between the parties. The Court's solution was based on the analysis of evidence and its previous jurisprudence was to use the tacit agreement theory. Nevertheless, the ICJ neither develops nor extends the concept of tacit agreement. Its ruling regarding the existence of a tacit agreement is based on a preamble and one article of the 1954 Agreement. The theory of tacit agreements developed by the ICJ, as has been shown, can be challenged in its concept and in terms of the difficulty to prove it. It is a flexible theory, but also needs further development in order to fulfil academic expectations.

Finally, the Court reaffirmed the three-tier methodology of delimitation to conclude the delimitation process. By doing so, the ICJ confirmed that the application of this methodology in maritime disputes is customary international law; therefore, it shall be applied in every future case with such characteristics.

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