



ORIGINAL RESEARCH ARTICLE

The Decision on the Maritime Boundary between Chile and Perú: International Law Revisited

María Teresa Infante Caffi
University of Chile

Abstract: *In 2014, the International Court of Justice rendered its judgment on matters submitted to it by Peru against Chile in 2008. Peru contended that there was a bilateral legal controversy over the delimitation of the maritime spaces between both countries. Chile argued for the validity of long-standing treaties between the parties, which had been enforced and implemented in law and in practice. Was it a classical delimitation controversy from one part, or a reinterpretation of existing agreements from another perspective? The judgment acknowledged the existing maritime delimitation, while jointly declaring that the extent of the parallel line reaches 80 nautical miles.*

Keywords: Maritime Delimitation, Treaties, Practice, Interpretation, 200 Nautical Miles

PERU V CHILE: A DIFFERENT NARRATIVE

On the 27th of January 2014, the International Court of Justice rendered its decision on the 'Maritime Dispute (Peru v. Chile)'¹, opening a vast array of questions about the operation of international law in judicial settings when dealing with the evolution of norms in a global ambit while the practice of the States had already been developed at a different pace on the regional stage. The case was also about treaties, the law of the

sea and methods of maritime delimitation, but for analysts it was most and foremost about relationships between diplomacy and law whereas the status quo favored Chile.²

From a foreign policy perspective, the question for Chile was either to open a wide controversy on the whole range of elements encompassing the bilateral relations with Peru or, to confine the claim to an area where contests could be assessed according to their own merits and international law could provide a common ground for agreement. The decision to test Peru's argument according to international law was then an alternative aimed to extracting Chile's responses and counterarguments from the formal diplomatic sphere.

On its part, Peru's Memorial picked up some particulars of the history of the bilateral relations, conveying the message of a conflictive relationship spotted with uneven good neighbor practices. Alien to the question of the maritime boundary, the execution of the 1929 Treaty that put an end to the question of sovereignty over Tacna and Arica was introduced according to that perspective. The Law of the Sea was to repair wounds of the past. Chile's comment on this reading of the bilateral history was given by the Agent in his opening speech at the public sitting of 6 December 2014³. Thus, it was apparent since the beginning that the narrative of each State would differ on various accounts. For Chile, to reopen what had been agreed was not reasonable and history should not be brought into consideration.

In 2000, Peru's disagreement with the status of the parallel passing through Hito No 1⁴ of the border with Chile was made official and public; Peru alleged that a map published by the Chile was not in conformity with the existing situation, whereas no treaty had settled the maritime boundary.

THE ICJ DECISION AND THE HISTORY OF THE MARITIME ZONE OF 200-NAUTICAL MILES

As the subject matter of the case, the ICJ's decision had to address facts and matters that apparently looked simple: whether or not a maritime boundary extended to 200-nautical miles had been set and which was the legal foundation for that assertion. In addition, analysts may have been tempted with the idea that the maintenance of peaceful and friendly relations between the parties would have been strengthened by the

decision of the Court, as anticipated by a member of the Court.⁵ It is worth noticing that neither Peru nor Chile advanced before the tribunal the idea that the existing delimitation under dispute might entail a breach of their relations or that peace was being threatened.

In this case, Peru's application of 2008 contended that there was a bilateral legal controversy over 'the delimitation of the maritime spaces between both countries, starting from the point where the land frontier between Peru and Chile meets the sea pursuant to the 1929 Treaty on Boundaries'.

Then, it went on to request that the Court determine the maritime boundary on the basis of principles and norms of international custom; and that the Court recognize its exclusive sovereign rights over an area extending beyond 200 nautical miles of Chilean territory, considered high seas at that time.

Chile responded that the maritime delimitation with Peru had been established by valid long-standing treaties between the parties, which had been enforced and implemented in law and in practice. These treaties were of a tripartite character and were adopted at a very earlier stage of the establishment of extended maritime zones up to 200-nautical miles. It was not indifferent to Chile that the legal literature⁶ and even publications by the United Nations⁷, among others, together with the mentioning of the parallel as the existing limit in the South East Pacific in cases before the International Court of Justice⁸, although non-binding as a direct source of the delimitation in the current case, did not show variations as to the existence of a full maritime boundary in place between Chile and Peru.

The story of the case had to be traced back to 1947, when Chile and Peru issued concordant unilateral Declarations concerning an exclusive maritime zone over a maximum distance of up to 200 miles, reserving the right to extend it even further. The exclusiveness of the new zone derived from the sovereign nature of the rights which had been embedded into the political and legal strategy of the two coastal states. Moreover, Peru's Proclamation of 1947 (Supreme Decree No. 781), established that its maritime zone should be measured 'following the line of the geographic parallels'. This concept was recalled again in Supreme Resolution No 23 of 1955.

Chile had already used the word 'perimeter' which, read in conjunction with the former reference to parallels gave a sense

of a delimited area to be possessed by a State. Chile affirmed that it [the area] should therefore be limited in the south by a line following the parallel of latitude corresponding to the point where the land boundary reached the sea.

In the same vein, Chile asserted that articles III and IV of the Declaration of Santiago of 1952 on the Maritime Zone, had to be read in conjunction as applicable to the whole maritime zone and not only to islands projecting 200-nautical miles over a neighboring maritime zone. According to said articles, exclusive jurisdiction and sovereignty over each maritime zone was to encompass exclusive sovereignty and jurisdiction over the seabed and the subsoil thereof. Then, the Declaration remarked 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 sea'.

The interpretation of that provision proved to be a difficult issue before the Court as the tribunal had to strike a balance between an explicit and an implicit agreement applicable to the delimitation without making clear what elements made the difference between the two concepts. The explicit reference to a delimitation line and the implicit delimitation character of the agreements was settled in favor of an implicit agreement enshrined in the explicit terms of the 1954 Agreement. A more in depth recourse to the proceedings of the 1952 Santiago Conference and the immediate diplomatic and domestic practice of the two States might have helped to shed light in this respect. It is noticeable that in this case the Court did not have to deal with allegations on the part of Chile that fishing, research and patrolling activities had given effect to a tacit agreement. There was no sign that Chile relied on a tacit agreement.⁹

The contextual approach on this matter could also be found in the Permanent Commission for the South Pacific setting, that was specifically created as an international organization by the Convention on the Organization of the Permanent Commission of the Conference on the Exploitation and Conservation of the Maritime Resources for the South Pacific signed by Chile, Ecuador and Peru, in Santiago, on 18 August 1952.¹⁰ The

background of the Permanent Commission was directly related to the Declaration on the Maritime Zone of 1952, signed in Santiago on 18 August 1952 [known as the Santiago Declaration].¹¹ A number of agreements and resolutions of the Commission clearly indicated that there was no dispute as to the delimitation between the three parties.

The Decision of the Court in 2014 followed a literal interpretation, thus giving a narrow delimiting effect to these articles while ignoring the problems that a limited effect underscored. Among others, the unsettled situation of the remaining area abutting the maritime zone of the neighboring country, and the rationale behind a line related to the point at which the land boundary reaches the sea, whichever the distance of said point with the targeted islands.¹²

Nevertheless, the conclusions of the Court show that judges of the majority were not indifferent to this framework. It is said in the decision that 'What is important in the Court's view, however, is that the arrangements proceed on the basis that a maritime boundary extending along the parallel beyond 12 nautical miles already exists. Along with the 1954 Special Maritime Frontier Zone Agreement, the arrangements acknowledge that fact'.¹³

Further narrowing the scope of what has been agreed by the parties and striking a distinct point about the existence of a maritime delimitation, judge Sepúlveda¹⁴ was the one to allude to the historical context in which the 1954 Agreement was adopted, 'when the concept of a 12-nautical-mile territorial sea entitlement had not attained general recognition and the very notion of an exclusive economic zone as later defined by the 1982 United Nations Convention on the Law of the Sea was foreign to international law'. This argument twists the focus from the existence of a delimitation emerging jointly with the process of creation of extended maritime zones, to a more complex idea, which is the alleged lack of ground of the process of creation of new maritime zones. This approach would put the burden on the recognition or non-recognition status of said zones.

In fact, none of the parties denied the evolution of the Law of the Sea; on the contrary, both stated highlighted the struggle to obtain support for the 200-nautical miles doctrine covering both, water column and the continental shelf; on the other hand, what they contended was the delimitation line and the

methodology to which assign priority for its establishment, not the validity of said line at the time of adoption.

It is also worth underscoring that Peru contested the scope and status of the arrangements embodied in documents officially signed in 1968 and 1969 by delegates of the parties, and approved by the respective Governments, to materialize the maritime boundary and build alignment towers to that purpose. Contrary to this, the Court admitted that the maritime boundary which the Parties intended to signal with the lighthouses' arrangements was the parallel passing through Boundary Marker No. 1. It was noticed by the decision that both Parties implemented the recommendations of the 1969 Act and built the lighthouses as agreed, thus signaling the parallel passing through Boundary Marker No. 1. 'The 1968-1969 lighthouse arrangements therefore, serve as compelling evidence that the agreed maritime boundary follows the parallel that passes through Boundary Marker No. 1', says the judgment.¹⁵

POINTS ON THE LEGAL BACKGROUND OF THE CASE: HISTORY AND THE LAW OF SEA ON DELIMITATION

In this respect, two subjects shall be addressed in this comment:

- Historical issues in the creation of a 200M maritime zone by Chile and Peru, Ecuador joining later, and the evolution of the Law the Sea and its bearing on the proclamations on extended maritime zones. These issues are highlighted by the judgment although they are not specifically singularized by it.
- Equitable delimitation seen from the perspective of the existing agreements, as well as the potential consequences of rules governing maritime delimitation and their application in the case.

This is the background against which the ICJ's decision is susceptible to analysis, while providing little information about the reasoning behind certain substantive paragraphs. This is the case of the limited extent of the parallel line and its relationship with the existing 200M maritime zone which the line is meant to delimit. There is then interest in examining certain issues raised by the decision which entail crucial points of international law.

A first subject matter is the historical underpinning of the creation of a 200M maritime zone by Chile and Peru, to which Ecuador joined in 1952, and its bearing on the delimitation. In the current case, the contentions of the parties could not have been more separate from each other. In fact, while Peru sustained that the initial proclamations of 200M were nothing but a policy oriented doctrine to protect natural resources, Chile contended that the intention of the two States was to establish an extended maritime zone gifted with legal status.

In the view of the Court:

According to Chile, the 1952 Santiago Declaration has been a treaty from its inception and was always intended by its signatories to be legally binding. Chile further notes that the United Nations *Treaty Series* indicates that the 1952 Santiago Declaration entered into force upon signature on 18 August 1952, with there being no record of any objection by Peru to such indication.¹⁶

The Court also noted that Peru considered that the 1952 Santiago Declaration was not conceived as a treaty, but rather as a proclamation of the international maritime policy of the three States.¹⁷ Peru claimed that it was thus 'declarative' in character, but accepted 'that it later acquired the status of a treaty after being ratified by each signatory (Chile in 1954, Ecuador and Peru in 1955) and registered as such with the United Nations Secretariat on 12 May 1976, pursuant to Article 102, paragraph 1, of the Charter of the United Nations'. Actually, the Court affirmed that it was no longer contested that the Declaration had a treaty character.¹⁸

Whether the maritime zones proclaimed in 1947 and referred to in the treaties of 1952 and further agreements were in accordance with international law, a matter that was much discussed by maritime powers in the late 1940s and early 1950s, was not the real issue in this case.¹⁹ The central issue was that Chile and Peru, together with Ecuador did establish a valid maritime zone among them and fought for its international recognition, both at the regional and at the world level. This was reflected in their respective legislations and invoked before third powers.

The question at stake had more to do with the validity of the assertion made by Ambassador Bakula of Peru in 1986, about 40 years after the beginning of the process, written as a

memorandum presented to the Ministry of Foreign Affairs of Chile, as part of a personal *démarche*. In his view:

The current “200-mile maritime zone” as defined at the Meeting of the Permanent Commission for the South Pacific in 1954 is, without doubt, a space which is different from any of the abovementioned ones in respect of which domestic legislation is practically non-existent as regards international delimitation. The one exception might be, in the case of Peru, the Petroleum Law (No. 11780 of 12 March 1952), which established as an external limit for the exercise of the competences of the State over the continental shelf “an imaginary line drawn seaward at a constant distance of 200 miles”. This law is in force and it should be noted that it was issued five months prior to the Declaration of Santiago.

The Ambassador’s memorandum admitted that the maritime zone extended up to 200-nautical miles while postulating that it was something different from the one that had been agreed by the Third United Nations Conference on the Law of the Sea. It also postulated that the documents adopted by the parties did not address the delimitation of the zones. Bakula preached for an express and formal delimitation, a definitive one.

Accordingly, should the maritime boundary as existed at the time have been harmed or weakened by the emergence of the maritime spaces as shaped in the process of the Third United Nations Conference on the Law of the Sea? This is something that the Court’s judgment does not address, but it leaves ground to question whether or not views of the majority was not to think as if this initiative had introduced doubts about the topics raised therein. It may have appeared that Chile did not take a clear stand towards differentiating between the politics dictated by the circumstances and the juridical content of Bakula’s words.

The question raised by judge Bennouna at the end of the first round of the oral hearings focused on a different point, as he raised the question of the validity of the proclamations and related delimitations rather than on the issue of the continuity in time of the maritime zone proclaimed in 1947–1952 in the light of developments that took place some years later.²⁰ While Peru stressed the point of a *lege ferenda* phenomenon arising from the 1947-1952 instruments, Chile approached the subject as having a regional effect and struggling to reach the global support which it finally obtained. Again, the context of the

approval of the Santiago Declaration sheds light when we read Ecuador's clarification about 'the dividing line of the jurisdictional waters' as the parallel identified in the Santiago Declaration. Joint Dissenting Opinion sustains that this may be taken as a further confirmation that the maritime boundary would run up to 200 nautical miles along that parallel.²¹

This leads to the point about the relationship between the evolution of the Law of the Sea and the proclamations of extended maritime zones already in place. This issue is certainly another aspect of the same coin. That is, did the law of the sea emerging from the major transformations of the 1960s and 1970s as globally accepted, produced a change in the legality of existing agreements which had already been adopted some years before and that the parties considered as still in force?

While Peru invoked geography and Chile focused on the law of treaties, the discussion on delimitation was not centered on the role of *effectivités* and possession of the maritime area. This contrasts with the decision to take a stand for attributing importance to activities conducted during certain amount of time in the maritime zone. It is not the classic formula applied in territorial cases around 'title *v effectivités*' factors²², but a more practical intellectual exercise. In this respect, how much Chile's control over the maritime area at the time of the adoption of the Declaration of Santiago and the 1954 Agreement, attracted the attention of the doctrine and of third States? The answer to this question appears related to the historical origin of the 200-nautical miles and its relationship with the emerging Law of the Sea in the context of the Third United Nations Conference. The influential Latin American doctrine never raised this point as a controversial one, but rather as a matter for harmonization.²³

The ICJ's decision quotes a declaration made by Chile, Peru, Ecuador and Colombia in 1982, in the context of the final stage of the Third United Nations Conference on the Law of the Sea, recalling

...the universal recognition of the rights of sovereignty and jurisdiction of the coastal State within the 200-mile limit provided for in the draft Convention is a fundamental achievement of the countries members of the Permanent Commission of the South Pacific, in accordance with its basic objectives stated in the Santiago Declaration of 1952.²⁴

This declaration still provides a logical answer to the question as to the legal continuity of the maritime zone at the time of conclusion of the Third Conference in 1982.²⁵ How could it be possible that State parties acknowledge that the Santiago Declaration of 1952 had objectives based on the existence of rights of sovereignty and jurisdiction, praising that the outcome of said Conference was driven by the same principles, without conceding that its validity was not in jeopardy because of the imminent adoption of the United Nations Convention on the Law of the Sea?

Another element to be highlighted from the ICJ's decision is that, while it refers to the differentiated maritime spaces emerging from the new Law of the Sea, that is, the distinction between a territorial sea, an exclusive economic zone and the continental shelf, consequences of said nomenclature do not seem to have had an important bearing on delimitation. Nevertheless, the Court does seem to have paid some attention to the approaches that the parties had towards the status of the 200-nautical miles as a single maritime space or as a space composed of distinct zones. The maritime dominion as set out in Peru's Constitution was one of the elements in this equation.²⁶

Paragraph 178 of the Judgment is indicative of this understanding. The Court says that

While Chile has signed and ratified UNCLOS, Peru is not a party to this instrument. Both Parties claim 200-nautical-mile maritime entitlements. Neither Party claims an extended continental shelf in the area with which this case is concerned. Chile's claim consists of a 12-nautical-mile territorial sea and an exclusive economic zone and continental shelf extending to 200 nautical miles from the coast. Peru claims a 200-nautical-mile 'maritime domain'. Peru's Agent formally declared on behalf of his Government that '[t]he term 'maritime domain' used in [Peru's] Constitution is applied in a manner consistent with the maritime zones set out in the 1982 Convention'. The Court takes note of this declaration which expresses a formal undertaking by Peru.

This meaningful assertion has had a direct connection with the aftermath of the decision of the Court when questions related to the scope and limits of the execution and implementation were raised in both countries.

THE LINE: CONFIRMATION AND REVISION

Together with the above-referred focus, the Court's judgment poses a question that goes to the heart of the discussion embedded in this case. That is, whether the delimitation in application between Chile and Peru was revisable in the light of the concept of an equitable solution. Or, as reflected in the dispositive of the decision, the extent of 80M of the parallel of Hito No 1, followed by an equidistance line drawn from a point at 80M from the low water line on said parallel, was a result of a composed formula made up of nature, law and occupation of the seas.

This issue contrasts with the Court's acceptance of the point made by Chile in the sense that the maritime limit based on the parallel line was an all-purpose one, that is, that whichever the extent of the parallel, it divided the whole set of rights and jurisdictions appertaining to the maritime spaces in force.

Albeit, the Court's breaking of the parallel at the end of 80M from the base point is followed by an assertion mentioning the introduction of provisions contained in Articles 74, paragraph 1, and 83, paragraph 1, of the United Nations Convention on the Law of the Sea, 'which, as the Court has recognized, reflect customary international law'.²⁷ Then the judgment quotes the decisions rendered in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, p. 91, para. 167, and in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012 (II), p. 674, para. 139). The Court highlights that the texts of those provisions are identical, the only difference being that Article 74 refers to the exclusive economic zone and Article 83 to the continental shelf.

The judgment goes on to recall the introduction of the methodology of the three steps to seek an equitable solution, enunciated by the Court in previous cases.²⁸ This methodology - according to the Court - had to apply at the endpoint of the 80M parallel line to draw an equidistance line. The Court itself acknowledges that this is an unusual situation.

The Court decided by majority that a parallel, which was already respected and accepted by Peru, was effective for the first 80M from the base point located on the low-water line of the latitude of Hito No1. In practical terms, the Court rejected the pretension that there had to be a different base point to

draw the maritime boundary separate from said latitude. Subsequently, the ICJ decided a new equidistant boundary to the south-west, and for doing so, the Court established different parameters to measure the relevant area. In this process, the Court restrained the area which Peru presented as the relevant for delimitation from 164,925 km² to 80,092 km².

AN IMPLICIT LIMIT AND AN EXPLICIT TEXT: THE ABSENCE OF PRACTICE IN THE EQUATION

The outcome of this decision is that Peru is able to extend its waters in areas that were subject to the exclusive economic zone of Chile or to the high seas regime. Most of the fish in the disputed waters - mainly Pacific pilchard and mackerel - will stay in Chilean waters.

A first reading of the decision brings to our minds the question of treaty interpretation and the wide range of possible answers that a tribunal can give. The interpretation of the will of the parties: shall it be more regulated or not? This is not a case from which lessons on such matter can be easily obtained.

Another point is the relationship established by the judgment between the 1986 Bakula memorandum and the effect and validity of the practice. It is evident that the ICJ decision poses the question as to the relevance of the State practice to test the effectiveness of an existing delimitation line. This was in fact one of the core issues raised by the Bakula memorandum of 1986 consisting of the invitation to revise the prevailing situation. Despite its limited character it was considered by the Court as reducing 'in a major way the significance of the practice of the Parties after that date'.²⁹

Then, the Decision poses the question of the evidence needed to prove the existence of an agreement to which a party attaches legal force. Although the Court has had to deal with the theory of tacit agreements, this time the problem was not about a non-written agreement, but about the interpretation of existing agreements where the word 'frontera' was explicit and the practice of the two parties was publicly available.

The temporal issue, which is not clearly treated as an inter-temporal one, is well reflected on the situation of the Agreement relating to a Special Maritime Frontier Zone, of 1954.³⁰ It was not an isolated instrument, although it became famous due to its

direct connection with the idea of exclusive areas of sovereignty and jurisdiction for each coastal participant State:

79. The Court considers that at this early stage there were at least in practice distinct maritime zones in which each of the three States might, in terms of the 1952 Santiago Declaration, take action as indeed was exemplified by the action taken by Peru against the Onassis whaling fleet shortly before the Lima Conference.

On the matter of boundaries of the zones, as the Court observes, the 1954 Special Maritime Frontier Zone Agreement was at the forefront.³¹

The operative paragraph where the Court sees the opportunity to grasp the delimiting agreement is the following:

1. A special zone is hereby established, at a distance of ['a partir de'] 12 nautical miles from the coast, extending to a breadth of 10 nautical miles on either side of the parallel which constitutes the maritime boundary ['el límite marítimo'] between the two countries.

Moreover, the Court accepted that:

On that issue, the terms of the 1954 Special Maritime Frontier Zone Agreement, especially Article 1, read with the preamble paragraphs, were clear. They acknowledge in a binding international agreement that a maritime boundary already exists. The Parties did not see any difference in this context between the expression 'límite marítimo' in Article 1 and the expression 'frontera marítima' in the Preamble, nor does the Court.³²

Moreover, it is of significance that the Court opined that 'In the view of the Court, there is nothing at all in the terms of the 1954 Special Maritime Frontier Zone Agreement which would limit it only to the Ecuador-Peru maritime boundary'.³³

This Decision will be a classic for students of international law about the definition of a 'tacit agreement' versus a cemented expression of a boundary as contained in the 1954 Agreement on a Special Maritime Zone. And the Declaration by Judge Skotnikov will remain an important reference to this point:

...the Court could have dealt with this in the same manner that it resolved the issue of whether the maritime boundary is all-purpose in nature, namely, 'that [t]he tacit agreement, acknowledged in the 1954 Agreement, must be understood in the context of the 1947 Proclamations and the 1952 Santiago Declaration'.³⁴

The extension of the parallel – which is based on discretionary assessments as to the area of fisheries and enforcement activities in earlier periods after the 1952-1954 treaties – is poorly supported by the evidence submitted before the Court. It could at least have been taken into consideration the fact that none of the enforcement measures adopted by Chile had been followed by protests on the part of Peru. Reservations as to the existence of an agreed boundary were only made since 2004.

The fact that the majority of the Court agreed with the application of the current formulae to measure the maritime zone by arc-of-circles does not fully respond to the questions raised by the judgment regarding the correct interpretation of the parallel of latitude as indicated in the Declaration of Santiago in 1952. In this respect, the fact that Peru never argued about a potential or actual overlap with Chile due to the projection of its coast by means of the method of arcs-of-circles, may not have been unnoticed in The Hague. This element – raised by the joint Dissenting Opinion³⁵ – was not taken into consideration by the opinion of the majority.

At the end, after Chile and Peru expressly declared its commitment to comply with the decision, the analysis of its paragraphs and those of the Declarations and Opinions may appear more academic than realistic.

Nonetheless, the aftermath shows that complying with an international judgment meant not only diplomatic exchanges but also highly substantive legal and technical issues, comprising technical aspects such as coordinates, basepoints, baselines, adaptation of domestic norms, etc. Although not related to the limit itself, whether the Law of the Sea will be a framework for cooperation or an arena to disagree, remains in the hands of the Parties.

NOTES ON CONTRIBUTOR

María Teresa Infante Caffi studied at the University of Chile and the Graduate Institute of International Studies in Geneva. She has also been

a *stagiaire* in the The Hague Academy of International Law. She is currently Professor at the University of Chile and she also teaches at the Diplomatic Academy of Chile. She was Director of the Institute of International Studies of the University of Chile until 1995 and Director of its Graduate Programme, as well as Co-director of the Master's Programme in International Law that is jointly offered by the University of Heidelberg and the University of Chile. Professor Infante Caffé is a Member of the Institute of International Law. She was appointed Director of Frontiers and Limits of the Ministry of Foreign Affairs in 1997, and co-agent to the International Court of Chile in the case submitted by Peru against Chile in 2007.

NOTES

- ¹ See the following document: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=88&case=137&code=pch&p3=4>
- ² See: <http://www.economist.com/news/americas/21595481-heres-grown-up-way-settle-long-standing-border-dispute-line-sea>
- ³ He said: 'Chile and Peru have lived together in peace for 130 years. We have worked together on innumerable occasions to further economic integration and development and to improve the lives of our peoples. Chile conducts its relations with Peru based on principles of good faith, mutual respect and observance of international agreements'. Available at: <http://www.icj-cij.org/docket/files/137/17210.pdf>
- ⁴ The Joint Report of the Delegations of the parties in 1969, subscribed an Act stating that 'The undersigned Heads of Delegations of Chile and of Peru submit to their respective Governments the present Report on the state of repair of the boundary markers in the section of the Chile-Peru frontier which they have had the opportunity to inspect on the occasion of the works which they have been instructed to conduct in order to verify the location of Boundary Marker number one and to signal the maritime boundary'. The Hito is located at the 'orilla del mar' as the successive *Actas* signed in 1930 by delegates and plenipotentiaries of Chile and Peru indicated.
- ⁵ Paragraph 18 of the Declaration of Judge Sepúlveda-Amor appended to the Judgment of 27th January 2014.
- ⁶ R. R. Bundy, 'State Practice in Maritime Delimitation', in G. Blake (ed.), *World Boundaries volume 5: Maritime Boundaries*, 1994, p. 31.
- ⁷ United Nations, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, *Handbook on the Delimitation of Maritime Boundaries*, 2000.
- ⁸ So it was affirmed by the Federal Republic of Germany in the Continental Shelf case before the ICJ, in 1969.
- ⁹ On tacit agreements: Hugh Thirlway, *The Law and Procedure of the International Court of Justice. Fifty Years of Jurisprudence*, Vol. II, Oxford University Press, 2013, pp. 1223-1225.
- ¹⁰ See Article 1 of the Convention on the Organization of the Permanent Commission of Conference on the Exploitation and Conservation of the Maritime Resources of the South Pacific signed in Santiago, on 18 August 1952.
- ¹¹ No 14758, Treaties and international agreements registered or filed with the Secretariat of the United Nations, UNTS Volume Number 1006-I. <https://treaties.un.org/doc/Publication/UNTS/Volume%201006/v1006.pdf>

¹² 'The process of interpretation, rightly conceived, cannot be regarded as a mere mechanical one of drawing inevitable meanings from the words in a text, or of searching for and discovering some preexisting specific intention of the parties with respect to every situation arising under a treaty...In most instances interpretation involves *giving* a meaning to a text not just any meaning which appeals to the interpreter, to be sure, but a meaning which, in the light of the text under consideration and of all the concomitant circumstances of the particular case at hand, appears in his considered judgment to be one which is logical, reasonable, and most likely to accord with and to effectuate the larger general purpose which the parties desired the treaty to serve'. Sir Humphrey Waldock, Special Rapporteur of the International Law Commission, 1964 Yearbook of the ILC, Vol. II, p. 53. He cites Part III of the Harvard Law School, Research in International Law, Law of Treaties, p. 946.

¹³ Paragraph 99.

¹⁴ See: <http://www.icj-cij.org/docket/files/137/17940.pdf>

¹⁵ Paragraph 174.

¹⁶ Paragraph 46.

¹⁷ Paragraph 47.

¹⁸ Paragraph 48.

¹⁹ As early as in 1952, the Interamerican Juridical Committee had acknowledged that Chile and Peru had proclaimed national sovereignty over the seas adjacent to its coasts. Statement of Reasons accompanying the Draft Convention on Territorial Waters and Related Questions, 30 July 1952, pp. 5-6.

²⁰ 'Do you consider that, as signatories of the Santiago Declaration in 1952, you could at that date, in conformity with general international law, proclaim and delimit a maritime zone of sovereignty and exclusive jurisdiction over the sea that washes upon the coasts of your respective countries up to a minimum distance of 200 miles from those coasts?' To the surprise of many, answers by the two States were different. Professor Tullio Treves speaking for Peru, stated that 'Chile, Peru and Ecuador could make such a 'proclamation', but it would not have been in conformity with general international law at that time and, for the same reason, would not have been opposable to third States. Clearly, their claims were *de lege ferenda*. What the three signatories had in mind was to have the law in force at the time changed'. Hearings of 11 December 2012.

Taking a different view, Professor Dupuy, speaking for Chile replied that: '10. Being aware that this was the state of the law, the three States therefore had recourse to an agreement, the one constituted by the Declaration but also by the agreements which accompanied it, in 1952, and followed it, in 1954. The Declaration solemnly proclaimed the objective of protecting natural resources and assigned each party its own area of jurisdiction, on the basis of the preliminary delimitations already asserted by Chile and Peru in 1947, and in keeping with the regional tradition of relying on geographic parallels. Hearings of 14 December 2012.

11. Given the constraints on the international positive law of the time, which stood in opposition to the protective and forward-looking aims of the three States concerned, it is necessary to draw a distinction between two aspects of the effect of the treaties which were concluded in Santiago in 1952 and then in Lima in 1954.

12. Inter se, inter partes, as Professor Condorelli said in one of his pleadings, that is to say between the parties, these treaties, beginning with the Declaration, are quite clearly a source of mutual obligations, whose régime is governed by the *pacta sunt servanda* principle.

13. With regard to third parties, however, the question arises as to whether they are enforceable, despite the fact that they can in principle be categorized as so-called objective treaties since they fix territorial – albeit maritime – boundaries'. Hearings of 14 December 2014.

²¹ Paragraph 23.

²² M. Kohen, 'La relation titres/effectivités dans la jurisprudence récente de la Cour Internationale de Justice (2004-2012) », *Unité et diversité du droit international. Ecrits en l'honneur du Professeur Pierre-Marie Dupuy*, édité par Denis Alland, Vincent Chetail, Olivier de Frouville & Jorge E. Viñuales, Leiden, Martinus Nijhoff Publishers, 2014, pp. 599-614.

²³ Hugo Caminos, 'Harmonization of pre-existing 200-mile claims in the Latin American region with the United Nations Convention on the Law of the Sea and its exclusive economic zone', *Inter American Law Review*, 1998-1999, pp.9-30.

²⁴ Letter of 28 April 1982 from the representatives of Chile, Colombia, Ecuador and Peru to the President of the Conference, translated by the United Nations, document A/CONF.62/L.143.

²⁵ References to correlates between the regional and global process may be found in *The Exclusive Economic Zone. A Latin American Perspective* edited by F. Orrego Vicuña, Boulder, Westview Press, Inc., 1984.

²⁶ The 1993 Peruvian Constitution, in its Title II, The State and the Nation, Chapter I, The State, the Nation and the Territory, reads:
Art. 54: The territory of the Republic is inviolable. It includes the soil, the subsoil, the maritime dominion and the superjacent airspace.
The maritime dominion of the State includes the sea adjacent to its coasts, as well as the bed and subsoil thereof, up to the distance of two hundred nautical miles measured from the baselines determined by the law. In its maritime dominion, Peru exercises sovereignty and jurisdiction, without prejudice to the freedoms of international communication, in accordance with the law and the treaties ratified by the State.
The State exercises sovereignty and jurisdiction on the airspace over its territory and its adjacent sea up to the limit of two hundred miles, without prejudice to the freedoms of international communication, in conformity with the law and the treaties ratified by the State'.

²⁷ Paragraph 179.

²⁸ These are the cases of the *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *Judgment*, *I.C.J. Reports 2009*, pp. 101-103, paras. 115-122; and *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Judgment*, *I.C.J. Reports 2012 (II)*, pp. 695-696, paras. 190-193.

²⁹ Paragraph 142.

³⁰ This dimension appears whenever a rule refers to a notion whose scope or meaning has changed over time. *The Intertemporal Problem in Public International Law*, Institute of International Law, Session of Wiesbaden, 1975. http://www.idi-iil.org/idiE/resolutionsE/1975_wies_01_en.pdf

³¹ This characteristic was well appreciated by Frida M. Pfirter de Armas in a study devoted to Peru's maritime policies. Pfirter mentions both the Declaration of Santiago of 1952 and the 1954 Agreement as sources of the lateral delimitation of Peru with Ecuador and Chile. 'Perú: la marcha al oeste',

in *El Derecho del Mar en Evolución: La Contribución de los Países Americanos*, in (ed) Ralph Zacklin, México, Fondo de Cultura Económica, 1975, p. 303.

³² Paragraph 90.

³³ Paragraph 85.

³⁴ Paragraph 102.

³⁵ Paragraph 14. The joint dissenting opinion was authored by Judges Xue, Gaja, Bhandari and Judge ad hoc Orrego Vicuña.