

DECLARATION
OF VICE-PRESIDENT SEPÚLVEDA-AMOR

By itself, the 1954 Special Maritime Frontier Zone Agreement does not support the existence of a tacit agreement on maritime delimitation between Peru and Chile — Evidence of the establishment of a permanent maritime boundary on the basis of tacit agreement must be compelling — The Court's findings would rest on stronger grounds if they had been based on a thorough analysis of State practice.

1. Although I have voted with the majority in respect of all the operative clauses of the Judgment, I have serious reservations with regard to the approach adopted by the Court in relation to the initial segment of the maritime boundary. My misgivings concern, in particular, the Court's reasoning in support of the existence of a tacit agreement on delimitation.

2. In my view, the record does not support the conclusion that, by the time the 1954 Special Maritime Frontier Zone Agreement (henceforth, the 1954 Agreement) was adopted, a maritime boundary was already in existence along a parallel of latitude between Peru and Chile.

3. As a matter of principle, I do not take issue with the proposition that, in appropriate circumstances, a maritime boundary may be grounded upon tacit agreement. Likewise, I acknowledge that the fact that Chile deliberately and expressly refrained from invoking tacit agreement as a basis for its claims is no bar to the Court founding its decision on such legal grounds, for, in reaching its conclusions, the Court is not bound by the legal arguments advanced by either Party.

4. The fact remains, however, that the establishment of a permanent maritime boundary on the basis of tacit agreement is subject to a stringent standard of proof. As the Court stated in *Nicaragua v. Honduras*:

“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.” (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, *I.C.J. Reports 2007 (II)*, p. 735, para. 253.)

5. In view of the above, I cannot subscribe to the conclusion that the 1954 Agreement alone “cements the tacit agreement” or that it otherwise decisively establishes its existence (Judgment, para. 91).

6. In assessing the scope and significance of the 1954 Agreement, one should keep in mind the narrow and specific purpose for which it was adopted, namely to establish a zone of tolerance for fishing activity operated by small vessels, not to confirm the existence of a maritime boundary or to effect a maritime delimitation between the contracting parties.

7. Admittedly, the wording of Articles 1 to 3 suggests the acknowledgement of a maritime boundary of some sort along an undetermined parallel running beyond a distance of 12 nautical miles from the coast. At the same time, however, the 1954 Agreement — which was not ratified by Chile until the year 1967 — contains no indication whatsoever of the extent and nature of the alleged maritime boundary, or when and by what means it came into existence.

8. In this regard, I find the Court’s inability to trace the origin of the Parties’ delimitation agreement particularly telling. By the Court’s own admission, the main official instruments dealing with maritime issues that preceded the 1954 Agreement, namely the 1947 Proclamations and the 1952 Santiago Declaration, did not effect a maritime delimitation between Peru and Chile (*ibid.*, paras. 43 and 62). However, the Court finds that a tacit agreement was in existence by the time that the 1954 Agreement was adopted. What specifically happened then, between 1952 and 1954, to warrant such a conclusion?

9. In connection with the circumstances surrounding the Santiago Declaration, the Court surmises that “there might have been some sort of shared understanding among the States parties of a more general nature concerning their maritime boundary” (*ibid.*, para. 69). And yet, nothing about the Parties’ conduct or practice in the relevant period indicates that they reached a common understanding on the limits of their respective maritime spaces. No such suggestion emerges from the meeting of the Permanent Commission of the Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific, held in October 1954, or from the Second Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific, held in December 1954. Nor does the domestic legislation of the Parties provide such evidence, be it prior or subsequent to the 1954 Agreement.

10. Although international law does not impose any particular form on the means and ways by which States may express their agreement on maritime delimitation, on such important a matter as the establishment of a maritime boundary one would expect to find additional evidence as to the Parties’ intentions outside of the isolated and limited reference contained in the 1954 Agreement, particularly at a time when Peru and Chile were so actively engaged with maritime matters at the international level.

11. In short, whilst the importance of the 1954 Agreement should not be denied or diminished, neither should its relevance as evidence of a tacit agreement be overstated. In my opinion, there are strong reasons to interpret its provisions with caution and circumspection so as to avoid unwarranted legal inferences.

12. Paramount amongst those reasons is the historical context in which the 1954 Agreement was adopted, namely at a time 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. As noted by the Court in paragraph 116 of the Judgment, in the context of the 1958 Conference on the Law of the Sea, the proposal that came nearest to general international acceptance was “for a 6-nautical-mile territorial sea with a further fishing zone of 6 nautical miles and some reservation of established fishing rights”.

13. This means that, in so far as it was supposed to extend beyond a distance of 12 nautical miles from the coast, the “maritime boundary” referred to in Article 1 of the 1954 Agreement largely concerned what at the time were considered the high seas, and thus not maritime zones over which the Parties had exclusive sovereign rights under international law or over which they could claim overlapping maritime entitlements. This circumstance alone casts a shadow of doubt on the true scope and significance of the “maritime boundary” acknowledged by the 1954 Agreement and limits the presumptions that can be reasonably drawn from that reference.

14. The inquiry into the possible existence of a tacit agreement on maritime delimitation should have led the Court to undertake a systematic and rigorous analysis of the Parties’ conduct well beyond the terms of the 1954 Agreement.

15. This instrument merely suggests a possible agreement between the Parties, but falls short of proving its existence in compelling terms. On its own, it cannot ground a finding of tacit agreement on maritime delimitation between Peru and Chile.

16. Tacit agreement did not manifest itself overnight in the year 1954, as the Judgment seems to imply. Given the evidence before the Court in this case, it is only through the scrutiny of years of relevant State practice that it is possible to discern the existence of an agreed maritime boundary of a specific nature and extent between the Parties. The Court approaches these legal inquiries as separate when, in fact, they are inextricably linked in law and in fact. Unfortunately, the analysis of State conduct remains underdeveloped and peripheral to the Court’s arguments when it should be at the centre of its reasoning.

17. The legal bar for establishing a permanent maritime boundary on the basis of tacit agreement has been set very high by the Court, and

rightly so. I fear the approach adopted by the Court in the present case may be interpreted as a retreat from the stringent standard of proof formulated in *Nicaragua v. Honduras*. This is not, however, how the present Judgment is to be read, as it is not predicated upon a departure from the Court's previous jurisprudence.

18. Maritime disputes count, without doubt, amongst the most sensitive issues submitted by States to international adjudication. I hope the present Judgment will contribute to the maintenance of peaceful and friendly relations between Peru and Chile and, thereby, strengthen the public order of the oceans in Latin America.

(Signed) Bernardo SEPÚLVEDA-AMOR.
