International Court of Justice— maritime territorial dispute— boundary delimitation—tacit agreement— equidistance line— equitable apportionment

MARITIME DISPUTE (Peru v. Chile). 53 ILM 430 (2014).
International Court of Justice, January 27, 2014.

On January 27, 2014, the International Court of Justice (Court) rendered its judgment in a dispute between Peru and Chile concerning the maritime boundary between them.[1] The Court held that a partial maritime boundary already existed between the parties, and it proceeded to analyze both its nature and its extent on the basis of agreements between the parties, their practice, and other evidence. For the remainder of the boundary extending up to 200 nautical miles, the Court applied the rule of equitable delimitation found in Article 74 of the United Nations Convention on the Law of the Sea (UNCLOS).[2]

Peru initiated proceedings before the Court on January 16, 2008, seeking delimitation of its maritime boundary with Chile in the Pacific Ocean and invoking the Court's jurisdiction on the basis of Article XXXI of the 1948 American Treaty on Pacific Settlement (para. 1).[3] Both parties exercised their right to appoint judges *ad hoc* to sit on the bench for the case; Gilbert Guillaume was chosen by Peru, and Francisco Orrego Vicuña by Chile. Chile has signed and ratified UNCLOS, but Peru is not a party to it. Neither country claimed an extended continental shelf in the area under dispute. Chile's claims encompassed a 12-nautical-mile territorial sea and a 200-nautical-mile exclusive economic zone and continental shelf. Peru's claims comprised a 200-nautical-mile "maritime domain," which the agent of Peru officially characterized, on behalf of the Peruvian government, as referring to the maritime zones set out in UNCLOS. The Court took note of this statement as a formal undertaking by Peru (para. 178).

The historical background to the dispute can be traced to the War of the Pacific between the parties in 1879. The land boundary between them was ultimately settled in 1930 pursuant to the 1929 Treaty of Lima, but the maritime boundary was not discussed at the time. In 1947, both Chile and Peru issued proclamations claiming maritime rights extending 200 nautical miles from their coasts. In 1952, 1954, and 1967, the parties, together with Ecuador, negotiated and concluded several agreements that pertained to maritime rights and were relied on by the parties in their arguments before the Court (paras. 17–20). The area in question is located in the Humboldt Current Large Marine Ecosystem, which supports roughly 20 percent of the world's fishing,[4] and encompasses fisheries resources of interest to both parties.[5]

The parties' written and oral submissions to the Court revealed four major points of contention: first, whether the respective maritime entitlements of the parties in the Pacific Ocean

[1] Maritime Dispute (Peru v. Chile) (Int'l Ct. Justice Jan. 27, 2014), 53 ILM 430 (2014) [hereinafter Judgment]. Decisions and documents of the Court cited herein are available at its website, http://www.icj-cij.org. The declarations and separate opinions attached to the present judgment are not included in *International Legal Materials*.

[2] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 3, *available at* http://www.un.org/Depts/los/.

[3] American Treaty on Pacific Settlement (Pact of Bogotá), Apr. 30, 1948, OASTS Nos. 17 & 61, 30 UNTS 55.

[4] Don Anton, *The Maritime Dispute Between Peru and Chile*, E-INTERNATIONAL RELATIONS (Mar. 18, 2014), *at* http://www.e-ir.info/2014/03/18/the-maritime-dispute-between-peru-and-chile/.

[5] *Chile, Peru and the ICJ: A Line in the Sea*, ECONOMIST, Feb. 1, 2014, at 3, *available at* http://www.economist.com/news/americas/21595481-heres-grown-up-way-settle-long-standing-border-dispute-line-sea [hereinafter *Chile, Peru and the ICJ*].

had already been delimited; second, whether, as argued by Peru, the maritime boundary between them should be determined through the equidistance method, or whether, as argued by Chile, the already-established boundary tracked the parallel of latitude passing through the most seaward point of the land boundary between the parties; third, whether the parties had agreed on the starting point of the maritime boundary; and, fourth, whether Peru enjoyed sovereign rights over the maritime area that lay within 200 nautical miles of the baseline from which its territorial sea is measured but beyond 200 nautical miles of Chile's baseline (paras. 22–23). The maritime entitlements sought by the parties are illustrated in the Court's Sketch-map No. 2 (see p. 381).

First, the Court addressed the first and second issues raised by the parties and considered whether a boundary had been agreed to by them. Its analysis on this front rested on a reading of several treaties relied on by the parties in their arguments. One such instrument was the 1952 Declaration on the Maritime Zone signed by Chile, Ecuador, and Peru (the Santiago Declaration). Paragraph IV of the declaration provides:

> 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.[6]

The Santiago Declaration was widely understood to have settled the question of maritime delimitation between Peru and Chile: various eminent publicists and several states believed the maritime boundary between Peru and Chile had been completely delimited by the Santiago Declaration along a parallel of latitude. These authorities include former Court presidents Eduardo Jiménez de Aréchaga and Sir Humphrey Waldock, and former vice president Shigeru Oda; the governments of Canada, China, Denmark, Germany, Libya, Malta, the Netherlands, and the United States; and publications by the United Nations Division of Ocean Affairs and the Law of the Sea.[7]

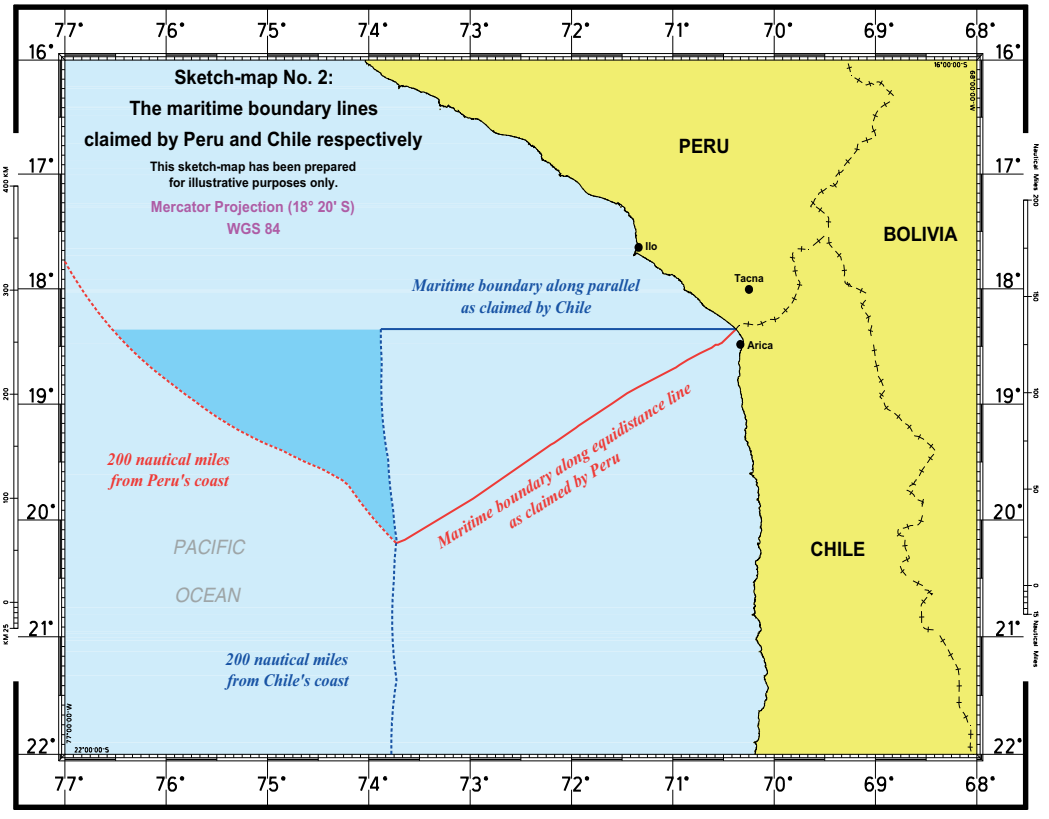
Although this widely held view was raised in Chile's arguments,[8] it was not addressed in the Court's judgment, which instead proceeded to interpret paragraph IV of the Santiago Declaration by reference to the customary international law principles of treaty interpretation set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (para. 57).[9] Analyzing the ordinary meaning of the provision in its context, the Court concluded that neither paragraph IV nor any other provision of the Santiago Declaration referred to the lateral delimitation of maritime entitlements between the parties. Thus, the effect of paragraph IV was limited to the lateral delimitation of insular maritime zones, rather than the larger maritime entitlements of the parties. This interpretation of paragraph IV and the Santiago Declaration was reinforced by reference to the objects and purposes of the treaty, which the Court found

[6] Declaration on the Maritime Zone, Chile-Ecuador-Peru, para. IV, Aug. 18, 1952, 1006 UNTS 323, *quoted in* Judgment, para. 49.

[7] 1 Rejoinder of Chile, Maritime Dispute (Peru v. Chile) (July 11, 2011); David P. Riesenberg, *Introductory Note to* Maritime Dispute (Peru v. Chile) *(I.C.J.)*, 53 ILM 425, 426 & nn.16–18 (2014).

[8] This view is addressed at length in 1 Rejoinder of Chile, *supra* note 7, at 15–17.

[9] Vienna Convention on the Law of Treaties, Arts. 31, 32, *opened for signature* May 23, 1969, 1155 UNTS 331, 8 ILM 679 (1969).



to relate to the preservation of natural resources in the maritime zones claimed by the parties, rather than to the delimitation of the maritime boundary between them. Moreover, the Court observed that paragraph IV in particular concerned the effect of the maritime entitlements generated by the Galápagos Islands on the maritime boundary between Peru and Ecuador, not that of the small islands off the coast near the land border between Peru and Chile (para. 64). Noting that it was not required to refer to supplementary means of interpretation in this instance, the Court nonetheless reviewed the *travaux préparatoires* of the Santiago Declaration and found confirmation for its conclusion that the Santiago Declaration did not effect a general maritime delimitation (paras. 65–70).

Another treaty source considered by the Court was a series of agreements concluded between the parties in 1954. It found no evidence of a maritime boundary in any of these agreements save for one, the Agreement Relating to a Special Maritime Frontier Zone (Special Maritime Frontier Zone Agreement) (paras. 80–95). Article 1 provides that "[a] special zone is hereby established, at a distance of 12 nautical miles from the coast, extending to a breadth of 10 nautical miles on either side of the parallel which constitutes the maritime boundary between the two countries."[10] According to Article 2, this special zone was intended to create an area within which innocent and inadvertent violations of the maritime frontier by small vessels would not

[10] Agreement Relating to a Special Maritime Frontier Zone, Chile-Ecuador-Peru, Art. 1, Dec. 4, 1954, 2274 UNTS 527, *quoted in* Judgment, para. 81.

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be actionable. The Court considered that, though Article 1 did not establish a maritime boundary or reference its creation, it explicitly referred to an existing maritime boundary along the parallel that extended beyond 12 nautical miles from the coast, and thus evidenced a tacit legal agreement as to a maritime boundary. The previous jurisprudence of the Court had established that evidence of a tacit legal agreement on a permanent maritime boundary "must be compelling,"[11] and the Court considered that this provision satisfied that test (paras. 90–92).

A third treaty source relied on by the Court as evidence for agreement on a maritime boundary was the series of "Lighthouse Arrangements" reached in 1968–69, pursuant to which the parties were to carry out "an on-site study for the installation of leading marks visible from the sea to materialise the parallel of the maritime frontier originating at Boundary Marker number one (No. 1)."[12] Boundary Marker No. 1 was the most seaward of eighty markers the parties had agreed to place on the ground in 1929–30 to demarcate the land boundary between them. The Court concluded that the language of the Lighthouse Arrangements, like that of the Special Maritime Frontier Zone Agreement, reflected and confirmed the existence of an agreed maritime boundary proceeding along the parallel and extending beyond 12 nautical miles (paras. 97–99).

Continuing its discussion of the first and second issues, the Court turned to the nature of this boundary—whether it was an all-purpose boundary or related only to the policing of fishing and other small vessels. The Court reasoned that the tacit acknowledgment of the boundary in the Special Maritime Frontier Zone Agreement and the Lighthouse Arrangements must be understood in the context of other relevant instruments, such as the Santiago Declaration and the 1947 proclamations on maritime rights up to 200 nautical miles, and the broader practice of the parties. Those instruments and practice embraced more extensive assertions of jurisdiction going beyond fishing activities to include the seabed and the waters above the seabed and their resources. Consequently, the Court concluded that the boundary tacitly acknowledged in the Special Maritime Frontier Zone Agreement and the Lighthouse Arrangements was an all-purpose boundary (paras. 100–02).

The Court then considered the extent of the agreed boundary by examining a wide range of evidence from the parties on this point, including their fishing and enforcement activities, diplomatic exchanges, and legislative practice; the fishing potential of the area; contemporaneous developments in the law of the sea; treaties including the Special Maritime Frontier Zone Agreement and the Lighthouse Arrangements; and negotiations between Chile and Bolivia regarding Bolivian access to the coast. The gist of the Court's reasoning here was that since the Special Maritime Frontier Zone Agreement recognized the existence of the maritime boundary for a specific purpose, that is, to create a zone of tolerance for fishing vessels, the maritime boundary would extend at least up to the distance at which fishing occurred. In the Court's view, even though the parties had repeatedly asserted sovereignty over 200-nautical-mile-maritime zones, their primary concern in making those claims had been to protect and conserve biological marine resources, especially from exploitation by foreign fishing fleets. This activity was conducted within a 60-nautical-mile zone from the main ports in the region, and it was

[11] Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), 2007 ICJ REP. 659, 735, para. 253 (Oct. 8) [hereinafter *Nicaragua v. Honduras*].

[12] Lighthouse Arrangements, Chile-Peru, Apr. 26, 1968, *quoted in* Judgment, para. 96.

this practical range of enforcement ability and activity that should determine the extent of the agreed boundary, rather than the claims asserted by the parties. Moreover, at the time, their competing claims to a broader 200-nautical-mile zone, as admitted by the parties themselves, would not have been recognized under contemporaneous international legal standards (paras. 109–10, 116–17).

On this basis, the Court found that the maritime boundary acknowledged under the Maritime Frontier Zone Agreement and the Lighthouse Arrangements could not have been expected to extend for 200 nautical miles from the coast. By itself the recognition of the boundary in those instruments "is too weak a basis for holding that it extended far beyond the Parties' extractive and enforcement capacity at that time" (para. 149). Yet the material before the Court specifically on long-distance fisheries did not define the exact extent of the boundary (para. 151). Invoking the entirety of the relevant evidence before it, the Court ruled that the maritime boundary follows the parallel of latitude passing through Boundary Marker No. 1 for a distance of 80 nautical miles to Point A (para. 149) (see the Court's Sketch-map No. 4, p. 384).

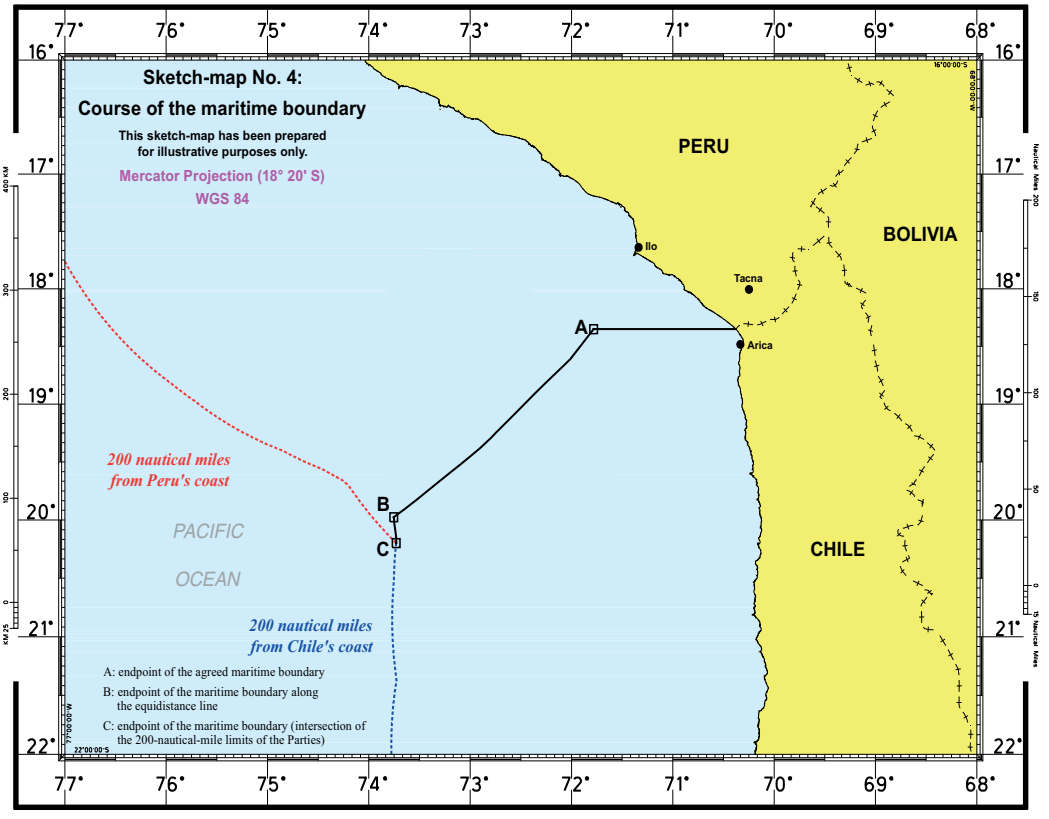
To conclude its discussion of the first and second issues, the Court relied on Article 74 of UNCLOS, which it recognized as a rule of customary international law,[13] to determine the rest of the maritime boundary. It made use of its usual three-step procedure to achieve the requisite equitable solution, by (1) constructing a provisional equidistance line unless compelling countervailing reasons dictated otherwise; (2) assessing whether any relevant circumstances might require adjusting the line to achieve an equitable result; and (3) assessing whether the delimited areas were markedly disproportionate to their respective coastlines.[14]

From Point A, the endpoint of the existing maritime boundary, the Court constructed a provisional equidistance line running in a general southwest direction, until a point 200 nautical miles from Chile's baseline, Point B. In the prior practice of the Court, several instances of delimitation have commenced seaward of the low-water line, but Point A in this case is unusually far from the coast.[15] Moreover, because Point A is not equidistant from the nearest points on the coasts of the parties, the Court extended the boundary from Point A by referring to points on the Peruvian coast which are further than 80 nautical miles from Point A, and matching them with equivalent points on the Chilean coast. Beyond Point B, the 200-nautical-mile projections of the parties do not overlap; rather, the outer limit of the Chilean maritime entitlement proceeds in a southern direction until the point of intersection of the 200-nautical-mile limits measured from the parties' baselines, Point C. Moving to the second step, the Court considered that there were no circumstances requiring adjustment of this provisional line (para. 191). As for the third step, the proportionality test, the Court did not engage in any detailed analysis owing to difficulties of calculation created by the unusual circumstance of the

[13] Judgment, para. 179 (citing Territorial and Maritime Dispute (Nicar. v. Colom.), 2012 ICJ REP. 624, 674, para. 139 (Nov. 19) [hereinafter *Nicaragua v. Colombia*]; Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), 2001 ICJ REP. 40, 91, para. 167 (Mar. 16)).

[14] Judgment, para. 180 (citing Nicaragua v. Colombia, *supra* note 13, at 695–96, paras. 190–93; Maritime Delimitation in the Black Sea (Rom. v. Ukr.), 2009 ICJ REP. 61, 101–03, paras. 115–22 (Feb. 3) [hereinafter *Romania v. Ukraine*]).

[15] *Id.*, para. 183 (citing Romania v. Ukraine, *supra* note 14, at 130, para. 218; Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria; Eq. Guinea intervening), 2002 ICJ REP. 303, 431–32, paras. 268–69 (Oct. 10); Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), 1984 ICJ REP. 246, 332–33, para. 212 (Oct. 12)).



partial 80-nautical-mile maritime boundary, but it concluded that its prior practice permitted a broad assessment of proportionality, and that such an assessment revealed no significant disproportion in this case (paras. 192–94). The Court then left it to the parties to negotiate the exact boundary coordinates between themselves (para. 197).

On the third issue—that of the starting point of the maritime boundary—the Court noted that several agreements between the parties, including the 1968–69 Lighthouse Arrangements, referred to the maritime boundary between them as lying along the parallel of latitude that passes through Boundary Marker No. 1. Although Peru argued that the markers were designed to deal with "practical problems arising from coastal fishing incidents" and not to draw a definitive boundary (para. 98), the Court concluded, on the basis of the above-mentioned agreements, that the starting point of the maritime boundary is the intersection of the parallel passing through Boundary Marker No. 1 and the low-water mark on the coast (paras. 162–76).

On the fourth issue—that of the jurisdiction of Peru over maritime areas within 200 nautical miles of its own baseline but beyond a distance of 200 nautical miles from Chile's baseline—the Court held that it was no longer required to make a ruling given its conclusion regarding the extension of the maritime boundary between Points B and C.

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Although the Court's decision to restrict the extent of the agreed boundary to 80 nautical miles is unusual in its practice, this approach and the eventual maritime boundary allowed both parties to walk away with something in hand: Chile reserved control over lucrative fishing grounds, whereas Peru gained substantial areas of the high seas.[16]

Two aspects of the Court's analysis stand out as demanding further scrutiny. The first is the Court's finding of a tacit agreement between the parties concerning the initial segment of the boundary. The second is the conclusion that this initial segment extended only for 80 nautical miles. Both of these conclusions are questionable.

As regards the finding of a tacit agreement, the Court arguably did not satisfy the burden of proof for establishing such an agreement. As noted above, it quoted its decision in *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea* to the effect that evidence in favor of such an agreement "must be compelling" in keeping with the "grave importance" of the determination of a permanent maritime boundary (para. 91).[17] In that case, the Court was presented with evidence of the practice of the parties in granting oil concessions, coordinating their fishing activities, and conducting naval enforcement activities; evidence of the recognition of a tacit boundary by third states and international organizations; and evidence of regional practice in the form of bilateral treaties.[18] Nevertheless, the Court rejected the notion of a tacit agreement, dismissing the proffered evidence either on the grounds of its origin in coordination and caution rather than acceptance of an unexpressed delimitation, or on the grounds of Nicaragua's objections to that evidence or its limited persuasive value, especially in light of the short time period covered.[19]

In contrast to that relatively elaborate discussion, the holding in the instant case simply stated that the Special Maritime Frontier Zone Agreement and the Lighthouse Arrangements referenced an existing boundary and therefore cemented a tacit agreement. The Court did not inquire into how the parties arrived at that tacit agreement. Arguably, the section of the judgment that discusses the extent of the agreed maritime boundary provides further evidence for this tacit agreement, but this aspect is not marked as such, and it is problematic to dismantle and reassemble distinct parts of the Court's reasoning. In context, the Court's holding seems to stand for the proposition that reference in a subsequent, uncontested instrument serves as adequate proof of the existence of a tacit agreement. In itself, this proposition would not, perhaps, be entirely unreasonable. But the affirming instruments in this case deal exclusively (by the Court's own admission (paras. 90, 99)) with fishing rights. Consequently, one may reasonably maintain that this line is a limited-purpose boundary for fishing activities, and thus could not discharge the "compelling" burden of proof required to cement a tacit agreement on an all-purpose maritime boundary.[20]

As for the conclusion that the agreed maritime boundary terminates after 80 nautical miles, at least two flaws can be discerned in the Court's reasoning. First, the Court's judgment is premised on the finding that the Special Maritime Frontier Zone Agreement—an agreement concerned with fishing—did not create a maritime boundary but acknowledged an existing one.

[16] *Chile, Peru and the ICJ*, *supra* note 5.

[17] Quoting Nicaragua v. Honduras, *supra* note 11, at 735, para. 253; *see also* text at note 11 *supra*.

[18] Nicaragua v. Honduras, *supra* note 11, at 729–33, paras. 237–46.

[19] *Id.* at 735–37, paras. 254–57.

[20] On this point, see, for instance, Judgment, Declaration of Judge Sepúlveda-Amor, paras. 4–8; *id.*, Separate Opinion of Judge Owada, paras. 7–20 [hereinafter sep. op. Owada, J.]; *id.*, Dissenting Opinion of Judge Sebutinde, paras. 6–7 [hereinafter diss. op. Sebutinde, J.].

In the absence of any proof that the boundary was created by an instrument concerned with fishing activities, the Court's conclusion that the boundary acknowledged in a fishing agreement must be interpreted in the context of the fishing agreement seems unreasonable, especially in the face of contemporaneous assertions of sovereignty over 200-nautical-mile areas. A persistent circularity characterizes the Court's reasoning: in affirming a boundary acknowledged in instruments relating to fishing rights, it held that the boundary should be construed as an all-purpose boundary in light of the 200-nautical-mile claims of the parties; but it limited the extent of that boundary because the treaties in question deal with fishing rights, to the exclusion of the significantly broader rights asserted by the parties. The tacitly agreed boundary between the parties that was affirmed by the Special Maritime Frontier Zone Agreement and the Lighthouse Arrangements is either a fishing boundary limited by the range of the fishing activities of the parties or an all-purpose boundary capable of extending to the outer limit of the claims of the parties. Criticism of the Court's reasoning along these lines forms a prominent part of President Tomka's declaration and Judge Owada's separate opinion.[21]

Second, members of the Court itself found fault with the conclusion that the outer range of the parties' fishing activities at the time was 80 nautical miles. Judge Skotnikov's declaration notes references to fishing activities at a range of 100 nautical miles, and concludes that the choice of an 80-nautical-mile figure by the Court was arbitrary.[22] The declaration of President Tomka and the dissenting opinion of Judge Sebutinde focus on the same point.[23] Judge Sebutinde argues that the 80-nautical-mile figure is arbitrary given that until 1996, all the fishing activities of the parties took place within a 60-nautical-mile range.[24]

These aspects of the Court's reasoning on the first two issues—the existence of an agreed boundary and the length of that boundary—cast doubt on the holdings in question. Yet, as noted by Judge Donoghue in her declaration, this was a case in which neither party's stated positions convinced the Court, and its conclusions on the existence and extent of a tacitly agreed border were not informed by the parties' views and arguments, largely because such evidence was not submitted or requested.[25] This lack of argumentation and evidence might explain, to some extent, the questionable aspects of the Court's reasoning and the disagreement with it of several members of the Court, as elaborated above.

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[21] Judgment, Declaration of President Tomka, paras. 2–4 [hereinafter decl. Tomka, J.]; sep. op. Owada, J., paras. 24–25.

[22] Judgment, Declaration of Judge Skotnikov, para. 6.

[23] *E.g.*, decl. Tomka, J., para. 24; diss. op. Sebutinde, J., para. 2.

[24] Diss. op. Sebutinde, J., paras. 13–14.

[25] Judgment, Declaration of Judge Donoghue *passim*.

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