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THE HAGUE

Cour internationale de Justice

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YEAR 2012

Public sitting

held on Tuesday 4 December 2012, at 10 a.m., at the Peace Palace,

President Tomka presiding,

***in the case concerning the* Maritime Dispute**
(Peru *v.* Chile)

VERBATIM RECORD

ANNÉE 2012

Audience publique

tenue le mardi 4 décembre 2012, à 10 heures, au Palais de la Paix,

sous la présidence de M. Tomka, président,

***en l'affaire du* Différend maritime**
(Pérou c. Chili)

COMPTE RENDU

Present:	President	Tomka
	Vice-President	Sepúlveda-Amor
	Judges	Owada
		Abraham
		Keith
		Bennouna
		Skotnikov
		Cançado Trindade
		Xue
		Donoghue
		Gaja
		Sebutinde
		Bhandari
	Judges *ad hoc*	Guillaume
		Orrego Vicuña
	Registrar	Couvreur

Présents : M. Tomka, président
M. Sepúlveda-Amor, vice-président
MM. Owada
Abraham
Keith
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Mmes Xue
Donoghue
M. Gaja
Mme Sebutinde
M. Bhandari, juges
MM. Guillaume
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The PRESIDENT: Please be seated. The sitting is now open. This morning the Court will hear the continuation of the first round of oral argument of Peru. I give the floor first to Professor Vaughan Lowe. You have the floor, Sir.

Mr. LOWE:

NO AGREEMENT ON MARITIME DELIMITATION IN 1952

Introduction

1. Thank you, Mr. President, Members of the Court. It is an honour to appear before you and a privilege to have been entrusted with the presentation of this part of Peru's submissions. ~~Now,~~ Peru's submissions today cover four broad points. First, we complete the historical survey. I shall deal with the 1952 Santiago Declaration; Sir Michael Wood will deal with subsequent events up to the 1970s; Professor Treves will cover Peru's position during and following UNCLOS III; and Mr. Bundy will deal with the recent conduct of the Parties. I shall round off this section ~~off~~ by considering the historical record in the light of the requirements of international law for the establishment of a maritime boundary. Professor Pellet will then explain the inequity of Chile's claimed line. He will be followed by Mr. Bundy, who will address the starting-point of the maritime boundary; and Professor Pellet will then return to close our first round submissions by presenting our case on what we call the "outer triangle" — the area that is within 200 miles of Peru but more than 200 miles from every other State.

2. So, let me begin with the 1952 Declaration of Santiago. In all the detailed discussion of that document, it is important not to lose sight of the one fact that is both indisputable and crucial in this case. The Santiago Declaration does not contain *any* provision that delimits the lateral maritime boundaries of its signatory States.

What the Santiago Declaration says

3. The Declaration is set out in tab 22 of your bundle. [Graphic of whole of Declaration, to zoom in on each paragraph as I mention it] You will see that its preamble asserts the responsibility of governments for their people and for the protection of their natural resources. Nothing there has any bearing on maritime delimitation.

4. Point I of the Declaration asserts that geological and biological factors render the former extent of the territorial sea and contiguous zone inadequate for the conservation, development and exploitation of the marine resources of the signatories. Nothing on delimitation.

5. Point II proclaims "as a norm of . . . international maritime policy" that each signatory has exclusive sovereignty and jurisdiction out to a minimum of 200 miles from the coasts. You will note that this is a declaration of maritime *policy*, and that 200 miles is a *minimum* distance. In 1952 it was envisaged that the distance could be extended beyond 200 miles; but that did not happen.

6. And note also that as a matter of basic cartography, a minimum of 200 miles cannot be obtained by using the *tracé parallèle,* which had been used in Peru's 1947 Supreme Decree, it can only be gained by using the arcs-of-circles method, which had been used in Peru's Petroleum Law of 1952. But there is nothing in point II on delimitation.

7. Point III says that the exclusive jurisdiction and sovereignty extend to the sea-bed and subsoil, as well as to the water column. Nothing here on delimitation.

8. Point IV consists of two sentences, both of which concern the maritime entitlements of islands. There is nothing here on delimitation — and I shall come back to point IV shortly.

9. Point V says that the Declaration does not prejudice the right of inoffensive passage — innocent passage. Nothing there on delimitation.

10. Point VI says that the principles contained in the Declaration will be applied in subsequent agreements or conventions. Nothing there on delimitation.

11. So, it is only points II and IV that touch even on maritime entitlements. But neither of them says anything that bears upon the maritime boundaries between States. And point IV is concerned solely with the maritime zones of islands.

Point IV of the Santiago Declaration

12. [Bring point IV back on to screen] The two sentences of point IV form separate paragraphs in the Spanish text. The first stipulates that islands generate 200-mile zones around their entire coastal circumference. It is not only the west-facing coasts, facing away from the mainland, that generate such zones. That point was important, particularly to Ecuador. But it has no relevance to the delimitation of maritime boundaries.

13. The second sentence does not apply to all islands. It applies only to those islands that are "situated less than 200 nautical miles from the general maritime zone" of another State. If that situation occurs, this second sentence stipulates that the "maritime zone of the island or group of islands shall be limited by the parallel". So, islands are not in all circumstances entitled to a full 200-mile reach, as the Court noted recently in its *Nicaragua* v. *Colombia* decision[1].

14. So point IV is concerned with the maritime entitlement of *islands*. And no matter how many times you read it, it is impossible to find in it anything more.

15. The Santiago Declaration, as the signatories expressly said in point II, was conceived as a collective declaration of maritime policy addressed to third States, and not as a treaty — let alone as a maritime delimitation treaty. It was concerned with rights over marine resources, not with lateral maritime boundaries. Chile cannot escape the fact that it contains no agreement on the course of the international maritime boundaries between the signatory States.

What the participants in the Santiago Conference aimed to do

16. Please let me try to bring into focus the kind of exercise that the drafters of the Santiago Declaration were engaged in. The background is described in Chapter IV of our Memorial and Chapter III of our Reply.

17. The temptation to view the work of the 1952 Santiago Conference in an anachronistic manner must be avoided. What is relevant here is not the later developments whose origins might be traced back to the conference, but what the States participating in the conference thought that they were doing.

18. Professor Treves has explained the background in the Truman Proclamations — which were also policy declarations that had to be implemented by legislation. He also recalled the particular problems concerning whale and fish stocks in the south-east Pacific, and the concern over the impact of the 1946 International Convention for the Regulation of Whaling.

19. Sir Michael Wood has taken you through the early Peruvian and Chilean assertions of jurisdiction over the waters contiguous to the coasts of the South American States and their resources, and has mentioned the hostility of the rest of the world towards those claims — in

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[1] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Judgment of 19 November 2012, para. 202.

striking contrast to the general acquiescence in the United States claims which were, of course, no less innovative at the time.

20. So, we have the threats to the whaling and fishing industries of the south-east Pacific States arising from the diversion of foreign fishing effort away from waters contiguous to the United States and towards the waters contiguous to Ecuador, Peru and Chile, and arising also from the move towards the imposition of catch limits on whaling; and we have the hostile international reactions to the Latin American claims. If the Latin American States were not to abandon those claims, they had to decide upon a strategy to defend them.

21. The connection between this background and the convening of the Santiago Conference in 1952 is evident. Consider the very terms of the instructions of the Foreign Minister of Chile concerning the convening of the Conference: as set out in Annex 111, in Volume III of Chile's Counter-Memorial — tab 23 in your bundle:

> "The Government of Chile, convinced of the necessity of protecting its industry and the existence of whales in our maritime zones, considers that the time has come to call a conference in which Ecuador, Peru and Chile would take part, in order to study the measures deemed necessary to modify the prohibitions that threaten the economy of the aforementioned countries, while at the same time maintaining in force the regulations concerning the protection of whales in order to avoid their decrease or extinction in this part of the Continent."

22. Then there are the explicit terms of the invitations to the conference sent out by Chile, which the Court may wish to re-read. At Annex 64 to our Memorial [tab 24 in your bundle] you will see Chile's invitation to Peru, dated 10 July 1952. The first three paragraphs say that Chile has the honour to invite Peru

> "to attend the celebration of a Conference oriented to conclude agreements regarding the problems caused by whaling in the waters of the South Pacific and the industrialization of whale products.
>
> The Governments of Peru, Ecuador and Chile will participate in it.
>
> Everything seems to point out the need for our countries to study the measures that should be adopted in defence of their fishing industry in the face of the well-founded claims by businessmen of the three countries as well as the restrictive dispositions of the 1946 Washington Convention, modified later in the Congresses of London, Oslo and Cape Town."

23. The invitation is to "a Conference oriented to conclude agreements regarding the problems caused by whaling in the waters of the South Pacific and the industrialization of whale

products". No other purpose is stated for the conference. There is no suggestion whatever that the conference would consider the question of maritime boundaries between the participating States. There is no hint that the Peruvian delegation might, in the 25 days before the conference, consider or consult within its own government on the question of international maritime boundaries and come to Santiago with a mandate to agree on Peru's maritime boundaries. On 11 July 1952, Peru accepted this invitation to "the tripartite Whaling Conference": see our Reply, Annex PR3, tab 25 in your bundle.

Chile's distortion of history

24. Peru made these and similar points in its Memorial[2] and in its Reply[3]. What is Chile's response? In its Counter-Memorial, at paragraph 2.52, it says that Chile and Peru had decided to act in concert in defence of their 200-mile claims and that they invited Ecuador to join them. It says that all three States decided to agree upon their maritime boundaries at the Santiago Conference.

25. That is not what appears from the evidence. In fact, as you can see from Chapter III of our Reply, at page 140 and following, it was Chile alone that invited Ecuador to the conference; and it did so before it sent a separate invitation, framed in different terms, to Peru. Chile does not explain why its invitations to Ecuador and to Peru were framed in different terms — a fact that Peru only discovered more than half a century later, when Chile revealed the letter to Ecuador in its Counter-Memorial.

26. Before I move on, I invite you to read that invitation to Ecuador. Chile has given you a copy of it in Annex 59 to its Counter-Memorial, with a translation of three of its six paragraphs. The Court's translation service will no doubt provide the Court with a full translation, but we have provided our own together with the text, in tab 26 in your bundle.

27. Paragraph 1 says that Chile "convinced on the need to protect the industry and existence of whales in our maritime zones, considers that the moment has arrived to summon a conference in which Ecuador, Peru and Chile would participate".

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[2]MP, Chap. IV, Sec. II.B.7.

[3]RP, Chap. III, Secs. II.D-H.

28. Paragraph 2 sets out the purpose of the meeting. Let me read it in full. It says that:

> "In consequence, this meeting would have the purpose of studying such measures it deems necessary in order to consider the prohibitions that threaten the economy of the named countries, established by the 1946 Washington Convention, and its modifications adopted at the London, Oslo, Cape Town and London Congresses; this, however, whilst maintaining always the provisions referred to the protection of such cetaceans as a means to avoid their extermination in this part of the Continent."

It is crystal clear what the purpose of the meeting is: consideration of measures to protect the interests of the participating States in the whaling industry.

29. That point is reinforced in paragraph 3, which says that:

> "The participation of Ecuador in this conference is of great importance, since the significant quantity of sperm whales existing in its maritime zone, particularly in the region of the Galapagos Islands and [since] the provisional agenda states that the determination of the Territorial Sea is set out as one of the objectives of the meeting."

30. ~~[Switch to next slide]~~The matter was put beyond any doubt in the following paragraph, paragraph 4, which set out the agenda for the meeting. It made no reference whatsoever to the question of maritime boundaries. It referred to — and I quote the relevant passage in full —

> "1. Territorial Sea. The legalization of the declarations of the Presidents of Chile and Peru with respect to sovereignty over 200 miles of continental waters;
>
> 2. International Whaling Convention. Regulation concerning coastal hunting:
>
> *(a)* Ongoing hunting of Baleen Whales;
>
> *(b)* Minimum size, and
>
> *(c)* Minimum distance between land stations, and
>
> 3. Fishing Confederation of the South Pacific."

31. The Court will see that what Chile said in 1952, when it sent its invitations, is not what it says now. It is perfectly clear that when Peru and Ecuador were invited by Chile to a conference on South Pacific whaling, that is what the invitation was limited to. International boundaries were not on the agenda; and it is a blatant attempt to rewrite history to suggest that they were. We wait for our friends on the other side to explain why they now say that Peru was being invited to a conference to settle maritime boundaries.

What happened at the Santiago Conference

32. Let me move on. The organization of the 1952 Conference similarly evidences the limited, scientific purpose of the Santiago meeting. This is clear from the Minutes of the Inaugural Session, which are published on the official website of the Permanent Commission for the South Pacific[4], and are tab 27 in your bundle. The Minutes refer to the "Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific", which was "convened by the Government of Chile" — no suggestion here, you notice, of a joint approach from Chile and Peru. The Minutes list the one Peruvian delegate, who was the Peruvian Ambassador to Chile, and his four advisers, and the two Ecuadorean delegates, the chargé d'affaires and his colleague, along with their Chilean counterparts.

33. The Minutes record the Chilean Foreign Minister's opening speech, in which he said that the Government of Chile had convened the meeting at the initiative of the President of Chile "for the purpose of considering the problems related to the natural production of their seas, specially, to whale protection, hunting and industrialization, which are fundamentally connected to the feeding situation of not only our peoples but also of a large part of humanity". He said that: "It is, thus, normal that in order to preserve their common treasures the concerned Governments carry out a joint action."[5]

34. The emphasis is upon joint action, upon the common resource. It was an affirmation of regional solidarity in the face of hostility to the 200-mile Latin American claims. Nowhere in his speech is there the slightest suggestion that the conference would even consider carving up the resources between individual States, let alone address the question of establishing all-purpose, permanent, international maritime boundaries.

35. It was the Peruvian Ambassador who responded to the Chilean Foreign Minister's speech, applauding the good sense of the President of Chile in convening a meeting to consider problems related to natural production of the South Pacific seas, and, especially, the protection, hunting and industrialization of whales. He said

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[4]Act of the Inaugural Session, available at <http://cpps.dyndns.info/joomla/index.php?option=com_content&view=article&id=134:acuerdo-santiago-1952&catid=84:conferencias&Itemid=16 > accessed 22 November 2012.

[5]*Ibid.*, pp. 258-259.

> "our meeting is regional, because within the more and more collective general state of international interests, the regional solidarity of countries, especially interested in a definite aspect of economical cohabitation, has taken a new force. Their co-operation and solidarity, in the protection of what constitutes biologically a common heritage, strengthens the defence of their rights and ensures a fair development of their resources."[6]

There is not the faintest hint of any concern with international maritime boundaries between the three States.

36. But we need not rely upon inferences in order to determine the purpose of the Santiago Conference. The conference adopted, as part of the same Minutes of the Inaugural Session, a set of Rules of Procedure. Chapter 1, Article 1, of those Regulations — it is tab 28 ~~[on the screen now]~~ — reads as follows:

"Purpose of the Congress

> Art. 1. In accordance with the invitation extended by the Government of Chile to the Governments of Ecuador and Peru, it was agreed to hold a conference in Santiago de Chile as from the 11th to the 16th of August in order to study and solve the problems related to the exploitation and conservation of the marine resources of the South Pacific."[7]

37. There then follows a set of Articles whose detail and precision in setting out the powers, rights and duties of the committees, officers, delegates, and advisers — all 17 of them — would have satisfied the most exacting functionaries of Byzantium. But there is absolutely nothing about maritime boundaries, and nothing to indicate the possibility that the conference might consider the question of maritime boundaries.

38. The conference benefitted from the establishment of two Commissions: the Juridical Commission, and the Technical Commission. But there was nothing on cartography, nothing on boundaries. Indeed, the draft of what was called the "declaration on continental shelf and the waters which cover it" was not drawn up by either Commission: it was presented by Chile, to the delegates whom it had invited to this conference on whaling. It is in the Annex 56 to our Memorial.

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[6] Act of the Inaugural Session, pp. 260-261.

[7] *Ibid.*, p. 261.

The drafting of point IV

39. The Ecuadorean chargé d'affaires in Santiago, Mr. Fernandez, was concerned by the lack of clarity in part of Chile's draft declaration[8]. The Minutes of the First Session of the Juridical Commission, Annex 56 to our Memorial, tab 29 ~~[and on the screen now]~~ record him as saying in relation to draft paragraph 3, which became point IV of the final declaration, that

> "it would be advisable to clarify more article 3, in order to prevent any misinterpretation of the interference zone in the case of islands, and suggested that the declaration be drawn on the basis that the boundary line of the jurisdictional zone of each country be the respective parallel from the point at which the borders of the countries touches or reaches the sea".

40. The purpose behind the redrafted point IV was "to prevent any misinterpretation of the interference zone in the case of islands". Full stop! Indeed, a more general reference to the waters off the coasts of the countries which had appeared in Chile's first draft was actually *removed* from the text: point IV was amended so as to make explicit that it applied only to the case of island territories.

41. How can Chile answer that? How can it explain the amendment of point IV, which it says established the maritime boundary, so as to omit any reference to mainland coasts? How can it explain the absence of even a single sentence in the records of the Santiago Conference indicating that the participating States thought that they were negotiating their maritime boundaries? And, the lame plea that it was too obvious to need to be stated is as self-serving as it is absurd.

42. It is simply not credible that, if the parties had thought that they had settled the mainland maritime boundaries between them, they would have left no trace of it in the records of the Santiago Conference.

43. Well, a drafting committee was formed composed of the Peruvian and the Chilean delegates, who, after considering the Ecuadorian observation, prepared the final draft of point IV of the Santiago Declaration. The final text is in tab 30. ~~[Graphic of point IV]~~ It is plain and unequivocal. It applies "in the case of island territories". According to its own terms, it does not apply anywhere else.

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[8]MP, Ann. 56. Chile has submitted a revised translation of this document.

44. And it applies to the maritime entitlements of islands, saying that those entitlements are confined by — do not extend beyond — the parallel of the coastal terminus of the land boundary. The distinction between maritime entitlements and maritime delimitation is well established in the Court's jurisprudence — for example, in the *Black Sea* case the Court distinguished between the *entitlement* of Serpents' Island to a maritime zone and the effect of the island upon maritime delimitation[9], and the Court followed the same approach more recently in its *Nicaragua* v. *Colombia* Judgment[10]. Point IV is concerned with the entitlements of islands.

45. There is documentary evidence that, at that time, Peru and Chile regarded point IV of the Santiago Declaration as applicable only to the case of islands. The 1955 Report of the Foreign Affairs Committee of Peru's Congress, Memorial, Annex 96, tab 31, evidences a common understanding in the parliament that point IV applied only to islands. It refers to the Declaration as a document defining the international maritime policy of the three signatory countries and says that paragraph 4 of the Declaration extends the 200-mile zone to their insular territory. And Peru's Ambassador to Chile recorded in a letter dated 11 July 1955, Reply, Annex PR 8, tab 32 in your bundle, that "The Chilean Government thinks it is not convenient to expressly reserve paragraph 4 of said Declaration — Santiago Declaration — which in fact only applies the delimitation between the maritime zones of the signatories to the case of islands."

46. The clarificatory text of point IV was the result of Ecuador's initiative. Ecuador has islands in the vicinity of the land boundary with Peru, and has the group of islands in the Galapagos archipelago. You can see them in tab 33 in your bundle. ~~[Graphic]~~. Their combined area is somewhere over 9,500 sq km and their combined population is somewhere over 25,000 people; and the potential 200-mile maritime zone around the Galapagos had three times the area of the maritime zone generated by the mainland coast of Ecuador. One can see why Ecuador was concerned with the question of islands.

47. Chile mentions in its Rejoinder (paragraph 2.71) two small Peruvian rocks, and the Chilean feature of Alacrán, which is around a third the size of Serpents' Island. All of these are

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[9] *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 61, paras. 76, 100, 114, 184-185, 188.

[10] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Judgment of 19 November 2012, paras. 114-130, 139, 163.

immediately adjacent to the coast (Alacrán has, in fact, been joined to the mainland by a short causeway since 1967). The significance of all of these, and of the other small rocks located a few metres from the coast, in terms of maritime entitlements and delimitation, is utterly negligible. There is no mention of them in the record of the 1952 Conference, and there is no reason to suppose that point IV was in any way concerned with them.

48. The fact that Chile now brings up this point highlights its desperate position. In its Counter-Memorial, Chile admitted that "[i]n a factual sense the only islands affected by Article IV of the Santiago Declaration are Ecuadorean" and it added, apparently without irony, "[b]ut that is a purely factual matter. It is irrelevant to the proper legal interpretation of Article IV."[11] It seems that sometime after it had submitted its Counter-Memorial Chile realized just how unpersuasive its attempt to portray point IV as the principle governing — indeed, establishing — the maritime boundary between Peru and Chile is; and so it now seeks to suggest that point IV should be applied to some minuscule coastal features in Chile and Peru that had never been even mentioned in connection with point IV during the six decades following the Santiago Declaration.

49. But the purpose of point IV is plain. It contains two provisions, adopted in view of islands whose maritime projections would have an effect distinct from that of the continental coast off which they lie. Small coastal features have no such effects; the small Peruvian rocks and the former coastal island of Alacrán have no significant effects distinct from the effect produced by the mainland coasts of the two States. Point IV is a provision concerned with the entitlement of islands, and nothing more.

The Santiago Conference in summary

50. Let me summarize. In 1952 Chile, acting alone and on its own initiative, invites first Ecuador, then Peru, to a conference "to conclude agreements regarding the problems caused by whaling in the waters of the South Pacific and the industrialization of whale products"[12].

51. The hastily-convened conference is attended by small delegations — two people from Ecuador, five from Peru, ten from the host, Chile — and a draft declaration prepared by Chile is

[11]CMC, para. 4.16.

[12]Note No. 86 of 10 July 1952 from the Ambassador of Chile to the Minister for Foreign Affairs of Peru, MP, Ann. 64.

tabled at 4 o'clock on the afternoon of Monday 11 August. This is revised, and adopted unanimously by the seven people present — (or more accurately, by those of them who had voting rights there, the three States) — at a meeting held 24 hours later, at 4 o'clock on Tuesday 12 August.

52. References to "Articles" are stripped out of the text, which refers — in point VI -- to "the principles contained in this Declaration". The Declaration says that it is a declaration of international maritime policy. The three States declare their sovereignty and jurisdiction over the resources of adjacent waters, emulating the approach taken by the United States in the Truman Proclamations.

53. Nothing in the Declaration refers to maritime boundaries.

54. On Wednesday 13 August, the Technical Commission met. The following day, the conference moved into plenary sessions, and what we now refer to as *the* Santiago Declaration was among the texts adopted at the closing session on 18 August. The other instruments adopted along with the *Declaration On The Maritime Zone* were the *Agreement On The Organization Of The Permanent Commission Of The Conference On The Exploitation And Conservation Of The Maritime Resources Of The South Pacific*; the *Joint Declaration On Fishery Problems In The South Pacific*; and the *Regulations For Maritime Hunting Operations (of Whales) In The Waters Of The South Pacific*[13]. All of these, too, had occupied the time and the attention of the handful of delegates during that week. All the instruments underline the technical focus of the conference, on the management of whaling and fishing.

55. At the Final Working Session, the Ecuadorean delegate said that it was unlikely that the current government of Ecuador would

> "engage in definitive agreements at this time, not only because they are related with topics of which its Government has not had a chance to have prior deep knowledge, but also because for an outgoing Government that must hand over the Presidency in just a few days to the legitimate successor, it is only natural that it wishes to give such a sensitive responsibility to the new President of the Republic".

[13] See <http://iea.uoregon.edu/page.php?query=treaties_lineage&lineage=Permanent%20Commission%20South%20Pacific>, accessed 18 October 2012.

That passage appears on the website of the Permanent Commission for the South Pacific[14], and in tab 34 of your bundle. It is an eloquent insight into the nature of the exercise.

56. This is the process that Chile would have you believe led to a binding legal agreement between States fixing international boundaries between the three States. This is the process by which Chile says that Peru casually and silently signed away its rights to all of the waters of its 200-mile maritime zone south of the parallel.

57. But, on any reasonable reading, it is plain that the Declaration on the Maritime Zone is an initial step, a manifesto. It is not a self-executing instrument. Point VI declares that "for the application of the principles contained in [the] declaration", the participating States intend "to sign agreements or conventions which shall establish general norms" to regulate and protect hunting and fishing within their maritime zones.

58. The Court may wish to look again at Annex 91 to the Memorial, the instructions given by Peru's Minister for Foreign Affairs to the Chairman of Peru's delegation for the signing of the Santiago Declaration: that gives a very clear picture of what Peru thought it was subscribing to. It is tab 35 in your bundle. It contains no reference whatsoever to maritime boundaries. Indeed, in its final paragraph it emphasizes that the Santiago Declaration is *not* a declaration of sovereignty out to 200 miles, but is concerned with control measures "without implying full exercise of sovereignty". Can anyone reading that document think for a moment that it is credible that the Peruvian delegate was being instructed to sign a maritime boundary agreement? It is simply not credible.

59. And the Court may wish to look again at the Tripartite Act of 12 April 1955, in which Ecuador, Peru and Chile agree on the observations concerning the Declaration of Santiago that they will transmit to the United States and the United Kingdom — that is Memorial, Annex 58, tab 36, in your bundle.

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[14]Act of the Final Working Session Celebrated by the Juridical Affairs Commission during 14 and 16 August 1952, available at http://cpps.dyndns.info/joomla/index.php?option=com_content&view=article&ide=134:acuerdo-santiago-1952&catid=84:conferencias&Itemid=16> accessed 18 October 2012.

No evidence supports Chile's claim

60. Mr. President, there is not a shred of evidence that either of the delegates from Ecuador, or any of the five from Peru, thought that they were being invited to a negotiation over the settling of international maritime boundaries. And there is not a shred of evidence that when they left Santiago they thought that they had just fixed their international maritime boundaries.

61. Tellingly, there is nothing in the contemporaneous writings of jurists in Peru, or in Chile, that indicates that they considered that an international maritime boundary between the two States had been fixed in 1952.

62. Nor is there any official contemporaneous document from Peru, or from Chile, that suggests that a maritime boundary had been fixed. Chile's case is almost that the States must have agreed on a boundary in their sleep, and woken up years later to realize the fact. But the argument is absurd. A domestic court would scarcely infer the existence of an agreement to buy a second-hand car on the basis of the evidence that Chile has put forward. How much less should a court find that two international maritime boundaries were concluded on the basis of this evidence.

CONCLUSION

63. Chile has had two rounds of written pleadings in which it could have presented you with evidence that Peru and Chile agreed upon a permanent, all-purpose maritime boundary in August 1952. It has presented you with nothing. Instead, it has scraped through the record to find every reference to a line or a parallel or a zone or a boundary, and has tried to convince you in its vague and shifting pleadings that its montage of clippings somehow reveals a picture of a solemn agreement between the Governments of two sovereign States to fix a permanent international maritime boundary between them, extending over the high seas, for 200 miles from the shore. A maritime boundary separating zones unrecognized — opposed even — by the overwhelming majority of States in the world at that time, and having no basis in international law as it stood at that time.

64. Peru is confident that the Court will not slacken its grip on the principles and the criteria that are applicable in this area. Agreement upon an international maritime boundary is not something that one does inadvertently, accidentally. There are enough unsettled maritime boundaries around the world, between actual or putative or potential States, for this to be a matter

of continuing seriousness, and for the Court to adhere to the standards that it has set. Boundaries are important things. If a State asserts that there is an agreement on a maritime boundary, it must prove it. In our submission, Mr. President, Chile has not done so and cannot do so.

Unless I can help you further, Mr. President, that brings my part of the submission to a close and I would ask you to call on Sir Michael Wood.

The PRESIDENT: Thank you, Sir. I give the floor to Sir Michael Wood to continue. You have the floor.

Sir Michael WOOD:

CHILE'S RELIANCE UPON EVENTS BETWEEN 1954 AND THE 1970S

I. Introduction

1. Mr. President, Members of the Court, I shall now address Chile's arguments based on what it terms the "practice" of the Parties between 1954 and the 1970s. By referring to "practice" Chile seeks to convey the impression of an overall pattern that, in its view, "confirms" the existence of an agreement dating from 1952, an agreement set forth, according to Chile's lawyers, in point IV of the Santiago Declaration. In their own words, "Chile's case is that Chile and Peru fully and conclusively delimited their maritime entitlements in the Santiago Declaration of 1952."[15] Since, as Professor Lowe has just shown, this is not supported by the text of the Santiago Declaration, Chile clearly feels the need to bolster its case by referring to a number of miscellaneous events. But you cannot confirm or interpret a non-existent delimitation treaty on the basis of so-called practice.

2. Even if one were to assume, for the sake of argument, that a uniform and consistent practice could "confirm" an international maritime boundary not present in the text of 1952 — something we do not accept — the disparate materials invoked by Chile show nothing of the kind. Chile has not begun to show a consistent pattern of uniform practice, of the two States, that would "confirm" that which is not otherwise there.

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[15]CMC, para. 4.1.

3. There is a common thread in Chile's arguments: by picking on loose and varied terminology used in essentially technical contexts, Chile seeks to show that, in 1952, Peru and Chile were *ad idem* as to the existence of an all-purpose maritime boundary agreement. But however one looks at the so-called "evidence" relied upon by Chile, and however much it piles supposed "example" on "example", when you examine it carefully, the house of cards collapses. Chile's references to document after document, whether taken individually or together, are wholly unconvincing. They fail to establish, and the onus is on Chile, that Peru and Chile concluded an international maritime boundary agreement in 1952.

4. Chile's sole claim regarding the practice that it cites is that it "confirms" a boundary from 1952. As we understand it, Chile has not and does not claim that this practice establishes a tacit agreement. Nor does Chile, as we understand it, assert that the subsequent "practice" has somehow modified the 1952 Declaration — it will anyway be recalled that a proposed article providing for modification by subsequent practice was heavily defeated at the Vienna Conference in 1968[16].

5. Great caution is required when looking at practice in order to confirm or establish boundary agreements, in particular international maritime boundary agreements. The situation in the present case is like that described by a Chamber of this Court in its 1992 Judgment ~~on~~ the *Land, Island and Maritime Frontier Dispute* case:

> "[W]hile both customary law and the Vienna Convention on the Law of Treaties (Art. 31, para. 3 *(b)*) contemplate that such practice may be taken into account for purposes of interpretation, none of these considerations raised by Honduras can prevail over the absence from the text of any specific reference to delimitation. In considering the ordinary meaning to be given to the terms of the treaty, it is appropriate to compare them with the terms generally or commonly used in order to convey the idea that a delimitation is intended."[17]

6. During the period with which I am dealing, from 1954 to the 1970s, the supposed "subsequent practice" relied upon by Chile is to be found in a disjointed series of points. I shall address them in turn. First, I shall look at what Chile has to say about the 1954 Agreement on a Special Maritime Frontier Zone. Next I shall look at a series of miscellaneous elements between 1954 and 1967. Third, I shall consider what Chile has to say about the events of 1968/69

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[16]United Nations, *Official Records of the Conference on the Law of Treaties*, First Session, Vienna, 26 Mar—24 May 1968, Vol. II, p. 215.

[17]*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 586, para. 380.

concerning the "coastal lights". Then, I shall say a few words about Chile's own conduct, about which Chile is remarkably reticent. And finally I shall touch on the argument Chile seeks to make based on its 1976 negotiations with Bolivia over access to the sea.

II. The 1954 Agreement on a Special Zone

7. I shall first deal with the two strands of Chile's arguments concerning the 1954 Agreement: the terms of the Agreement itself; and the minutes of the Conference at which it was adopted.

The Terms of the 1954 Agreement on a Special Zone

8. The text of the Agreement was adopted on 4 December 1954, at the Second Conference on Exploitation and Conservation of the Marine Resources of the South Pacific, held in Lima. The main purpose of the 1954 Conference, like that of 1952, which Mr. Lowe has just described, was to reinforce regional solidarity in the face of opposition from third States to the 200-mile claims[18]. This is apparent from the very title of the conference, and from the fact that it was convened as a follow-up to the 1952 Conference. The purpose of the conference was also clear from the main instruments that were adopted, chief among which was the Complementary Convention to the Declaration of Sovereignty on the Two-Hundred-Mile Maritime Zone[19].

9. As this Court pointed out in *Romania v. Ukraine*, it is important to ascertain the purpose of an agreement before drawing inferences as to its possible relevance to a delimitation dispute, particularly when one side argues that an agreement concluded many years before has the effect of "an implied prospective renunciation" of maritime rights (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 88, para. 71; ~~MP 4.96~~). The Agreement on a Special Zone was by no means the most important agreement to be concluded at the 1954 Conference. Indeed it seems to have been something of an afterthought. The issue was only added to the agenda late in the day, at the October preparatory conference[20]. Its limited purpose was to avert disputes involving artisanal fishermen on small vessels fishing near to the coast.

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[18]MP, paras. 4.82-4.87; RP, paras. 4.5, 4.9-4.10.

[19]RP, Ann. 33.

[20]CMC, Anns. 35 and 36.

10. The 1954 Agreement seems to have had minimal effect in practice. Chile did not ratify it until 1967. It did not come into force until September 1967. And as is clear from its first article, which begins "A special zone is hereby established, at a distance of 12 nautical miles from the coast", the special zone established by the Agreement did not apply to fishing within the first 12 miles of the coast, which is where most coastal fishing took place. In fact, the small boats to which the Agreement applied did not in practice venture more than a few miles beyond 12 miles. It is, in this regard, significant that the incidents referred to in detail by Chile took place well within 12 miles of the coast.)

11. Thus, the 1954 Agreement was a practical arrangement, of a technical nature, and of limited geographical scope, not one dealing in any sense with political matters. This explains the use of the parallel to identify the "zone of tolerance", which could be identified by fishermen without high-end technology. The zone was, to adopt the words of Article 74 of the Law of the Sea Convention, a "provisional arrangement of a practical nature". And, as the Law of the Sea Convention says, such arrangements are "without prejudice to the final delimitation". Moreover, the zone was not depicted on maps. The Agreement contains no reference to the geographical extent of the special zone out to sea. There is no mention anywhere in the Agreement of a special zone extending out to sea for 200 nautical miles. The zone was only ever envisaged as relevant for a short distance beyond 12 miles, where shore-based fishermen fished. It is wholly anachronistic to think of this practical arrangement of a provisional nature, made in 1954, as applying throughout a 200-mile fisheries zone or EEZ, let alone to the continental shelf.

12. Mr. President, may I ask you to turn to the text of the 1954 Agreement[21], which can be found at tab 37 in the folders? It will readily be seen that the aim of the Agreement was specific and narrow. The first preambular paragraph, immediately following the words "Considering that" sets the scene:

> "Experience 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;"

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[21] MP, Ann. 50.

13. The reference to "the maritime frontier" is merely an acknowledgment that there would of course in principle be a division of the inshore waters as between any adjacent States. It does not imply that an agreed delimitation was in place. The preamble concludes by affirming that the purpose of the Agreement is "to avoid the occurrence of such unintentional infringements, the consequences of which affect principally the fishermen".

14. Paragraph 1 contains the subordinate clause, upon which Chile places such weight and to which I shall return in a minute. The paragraph reads:

> "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 a maritime boundary *[el límite marítimo]* between the two countries."

15. The main operative provision of the Agreement is its paragraph 2. You will see this now on the screen. It reads as follows:

> "The accidental presence in the said zone of a vessel of either of the adjacent countries, which is a [small vessel manned by a crew with insufficient knowledge of navigation or not equipped with the necessary instruments], shall not be considered to be a violation of the waters of the maritime zone, though this provision shall not be construed as recognizing any right to engage, with deliberate intent, in hunting or fishing in the said special zone."

16. As you will see, all that paragraph 2 says is that the accidental presence in the special zone of small fishing vessels shall not be considered a violation. It is not a fisheries agreement. It says nothing whatsoever about the right to fish in particular waters.

17. Paragraph 3 of the Agreement deals with a quite separate matter, fishing or hunting for whales within 12 miles of the coast, which is reserved exclusively to the nationals of each country.

18. Paragraph 4 confirms that, like the other agreements concluded in 1954, the Agreement is "deemed to be an integral and supplementary part of, and not in any way to abrogate" the work of the 1952 Conference.

19. Mr. President, Chile's legal arguments based on the 1954 Agreement are difficult to grasp. At one point, relying on paragraph 4, it claims that the 1954 Agreement is not merely — in its view — a subsequent agreement relevant to the interpretation of the Santiago Declaration, but is

so closely related to the Santiago Declaration as to be "deemed to be an integral and supplementary part" of it[22]. Elsewhere, it asserts that the two have to be "read together"[23].

20. But the essence of Chile's argument seems to be that the final words of paragraph 1 of the Agreement — "the parallel which constitutes a maritime boundary between the two countries" — established an agreement among the States that issued the 1952 Declaration regarding its interpretation, specifically, according to Chile, their agreement that the Declaration, despite its silence on the matter, established an all-purpose maritime boundary along a parallel of latitude out to 200 miles and even beyond.

21. Mr. President, Chile's argument is untenable:

— First, because of the strictly limited object and purpose of the 1954 Agreement, and its very limited application in practice. It would have been extraordinary if, in the text of a technical agreement establishing practical arrangements to assist inshore local fishermen, the negotiators had included language confirming the existence of an all-purpose maritime boundary agreement out to 200 nautical miles, an agreement that had never previously been written down.

— Second, the reference to "the parallel which constitutes a maritime boundary" is in the specific context of an *ad hoc*, provisional and practical arrangement aimed at avoiding conflicts involving artisanal fishermen. The parallel was a simple and easily located point of reference for such fishermen. As paragraph 2 makes clear, the arrangement did no more than absolve fishermen from sanctions if they accidently wandered into the zone of tolerance. Paragraphs 1 and 2 of the Agreement were not intended to deal with anything else.

— Third, there is nothing in the language of the 1954 Agreement that reflects the intention of the parties to agree an all-purpose international maritime boundary. Once again, Chile asks you to read into the text that which is not there.

22. Chile also seeks to rely[24] on the wording of an *aclaración* — clarification — adopted by the Conference on the same day as the 1954 Agreement. This stated that "accidental presence"

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[22]CMC, para. 4,6.

[23]*Ibid.*, paras. 4.1, 4. 24.

[24]*Ibid.*, paras. 2.210, 4.17.

within the meaning of paragraph 2 of the Agreement "will be qualified exclusively by the authorities of the country whose maritime jurisdictional boundary would have been passed"[25]. The use here of the term "maritime jurisdictional boundary" is to be understood in the context of the practical arrangement that the Parties had reached in the 1954 Agreement. For that arrangement, they employed a parallel of latitude only as a reference point to create a zone of tolerance which began 12 miles from the coast.

23. Neither the expression "maritime jurisdictional boundary", nor the clarification as such, could transform the object and purpose expressly stated in the preamble to the 1954 Agreement into something else. Nor could the clarification add provisions to, or otherwise modify, the Agreement. It simply served to clarify which State was to determine that there had been an "accidental presence" in connection with the zone of tolerance. Nothing in the clarification supports Chile's assertion that there already existed an all-purpose maritime boundary.

B. Minutes of Commission I of the 1954 Conference

24. I now turn to Chile's arguments based on the minutes of Commission I of the 1954 Conference[26].

25. Chile's heavy reliance upon the minutes is revealing. It is surely an admission that the text of the Agreement is far from supporting Chile's case. The minutes are not verbatim records — far from it. They are not even what, in the United Nations, would be termed summary records. They simply note particular points that arose in the course of the Conference. They do not purport to give a full and accurate picture of all that transpired. Their value, if any, is strictly limited.

26. Chile's principal argument concerns an exchange at the first meeting of Commission I, on 2 December 1954, in connection with the consideration of a quite different agreement, the Complementary Convention — a Convention, incidentally, which Chile never ratified.

27. According to Chile, in its Rejoinder: "[i]n the course of negotiating the 1954 Complementary Convention and the 1954 Agreement . . ., Chile, Ecuador and Peru agreed

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[25]CMC, Ann. 40, p. 12.

[26]*Ibid.*, Ann. 38.

that they had already delimited their maritime boundaries in 1952"[27]. Chile continues "[t]his is a point of fundamental importance to these proceedings"[28].

28. Mr. President, this may be a fundamental point for Chile's efforts, in its Rejoinder, to conjure up a maritime boundary agreement dating from 1952. It is also a fundamentally flawed point. Chile invokes Article 31.3 of the Vienna Convention, which refers to "any subsequent agreement between the parties regarding the interpretation of the treaty . . .". They then say that the alleged agreement "is an authentic interpretation of Article IV, of equal value and status to a joint interpretative declaration or protocol"[29]. In the Counter-Memorial the point is dealt with under the heading of *travaux préparatoires*[30]. And a passing reference to estoppel is thrown in for good measure[31].

29. But what Chile now claims, in its Rejoinder, and it is a very bold claim, is —

— first, that *the minutes show* that in 1954 the delegates in Commission I understood that an all-purpose international maritime boundary was established by point IV of the Santiago Declaration; and

— second, that this supposed understanding amounted to a "subsequent agreement" regarding the interpretation of point IV of the Santiago Declaration, within the meaning of the Vienna Convention, to the effect that, notwithstanding its actual terms, point IV embodied such an agreement.

30. Chile's claims are unpersuasive. What emerges from a reading of the minutes is the fact that the delegate of Ecuador was hoping to secure an agreement to extend point IV of the Santiago Declaration, so that the principle stated therein was no longer confined to the maritime entitlement of islands. The delegates of Chile and Peru, on the other hand, were not prepared to accept any extension of point IV, which for them was clear and satisfactory in scope, being confined to islands.

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[27]RC, 2.87.

[28]RC, 2.88.

[29]*Ibid.*

[30]CMC, paras. 4.47-4.51.

[31]*Ibid.*, para. 4.51.

31. As we explained in our Reply[32], the actual exchange between the delegates, as recorded in the minutes, is anything but clear. You will find the minutes at tab 39 in the folders. In its Rejoinder[33], Chile draws attention to the fact that the delegate of Ecuador is recorded as having moved "for the inclusion in [the Complementary Convention] of a complementary article clarifying the concept of the dividing line of the jurisdictional sea, which had already been expounded at the Conference of Santiago, but which would not be redundant to repeat here"[34]. Note that he referred to clarifying a "concept"; he referred to that "concept" as the concept of the dividing line of the jurisdictional sea"; and he said it had already been "expounded" at the 1952 Conference. The delegate of Ecuador did not refer to point IV of the Santiago Declaration. The term "the dividing line of the jurisdictional sea" is scarcely an apt description of an all-purpose international maritime boundary, covering sea-bed, subsoil, and water-column and all the uses thereof. Chile's explanation of the vagueness of the language amounts to nothing more than an assertion that the numerous terms that occur in the minutes "were used interchangeably to refer to the maritime boundary between the maritime zones of sovereignty and jurisdiction claimed by the three States in the Santiago Declaration"[35]. That is a wholly unconvincing explanation.

32. There is a related paragraph in the minutes that Chile is careful not to cite. It is the statement by the Chilean chairman of the Commission and it is quite revealing. I quote:

> "Since the Delegate of Ecuador insists on his belief that a declaration to that effect should be included in the [Complementary] Convention, *because Article 4 of the Declaration of Santiago is aimed at establishing the principle of delimitation of waters regarding the islands*, Mr. PRESIDENT asks the Delegate of Ecuador if he would accept, instead of a new article, that a record is kept in the Minutes of his speech."[36]

33. This statement by the Chilean Chairman reflects the actual terms of point IV of the Santiago Declaration. Point IV was indeed "aimed at establishing the principle of delimitation or entitlement of waters regarding the islands" — only a principle, and regarding islands, *only* islands.

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[32]RP, paras. 4.13-4.18.

[33]RC, paras. 2.94-2.95.

[34]CMC, Ann. 38, p. 3 (revised translation submitted by Chile, 16 Nov. 2012).

[35]RC, para. 2.91.

[36]CMC, Vol. II, Ann. 38, p. 3; emphasis added.

34. Before leaving the minutes, I should draw attention to something else that Chile has conveniently omitted to mention. At the first meeting of Commission I, on 2 December 1954, the Secretary of the Permanent Commission, Mr. Ruiz of Chile, placed on record that all the agreements signed at Lima, like those done at Santiago two years earlier, were subject to unilateral withdrawal[37]. That would have been extraordinary had it been thought that in 1952 the participating States had concluded an international maritime boundary agreement. Treaties establishing a boundary are the classic example of those which, by their nature, are not subject to unilateral withdrawal[38].

III. Chile's reliance upon miscellaneous events between 1954 and 1968

35. Mr. President, Members of the Court, I shall next turn to some miscellaneous events between 1954 and 1968, relied upon by Chile.

A. The 1955 Supreme Resolution

36. First, Peru's Supreme Resolution of 12 January 1955[39]. Chile attaches much importance to this in its Rejoinder[40], claiming that it confirms "the understanding that a maritime boundary was in place between [Peru and Chile], on the basis of Article IV of the Santiago Declaration"[41]. You will find the Supreme Resolution at tab 40 in the folders.

37. Mr. President, this is yet another example of Chile giving more weight to, and reading more into, an instrument than is justified by the text or the surrounding circumstances. A short answer is that the Resolution cannot have "confirmed" any such understanding because, as we have seen, there was none.

38. The need for clear cartography had become apparent as a result of the Onassis incident of October 1954[42], which had raised the issue of the precise outer limit of Peru's 200-mile zone. That was the reason for the 1955 Resolution. Not at issue were lateral delimitations.

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[37]CMC, Vol. II, Ann. 38, p. 4 (complete translation submitted by Chile, 16 Nov. 2012).

[38]*Yearbook of the International Law Commission,* 1966, Vol. II, p. 251 (commentary (3) to draft Art. 53).

[39]MP, Ann. 9.

[40]RC, paras. 3.3-3.10.

[41]RC, para.3.2 *(a)*.

[42]MP, paras. 4.83-4.85.

39. Let us look at the text of the Resolution — it is at tab 40.

40. The preamble makes it clear that the Resolution is an instruction to the Peruvian authorities responsible for cartographic and geodesic work. It recalls that it is necessary, in such work, to specify "the manner of determining the Peruvian maritime zone of 200 miles" referred to in the 1947 Supreme Decree and the Santiago Declaration.

41. Paragraph 1 then determines what that manner is. It describes the arcs-of-circles method, using language similar to that ~~of~~ Peru's 1952 Petroleum Law ("a line parallel to the Peruvian coast and at a constant distance of 200 nautical miles from it").

42. Paragraph 2 then resolves that

> "[i]n accordance with clause IV of the Declaration of Santiago, the said line [that is to say, the line parallel to the coast that is the outer limit of the 200-mile zone] may not extend beyond that of the corresponding parallel at the point where the frontier of Peru reaches the sea".

43. There are a number of points to make about the Resolution:

— First, within Peru's legal system a Supreme Resolution — despite its name — is low in the hierarchy of legal norms[43]. It is not an instrument to set forth the high policy of the State. The Resolution was essentially an internal administrative instruction addressed to the relevant Peruvian authorities.

— Second, the purpose of the Resolution was narrow and technical — to determine, for the purposes of the geodesic work of the Peruvian authorities, and for no other purpose, the precise outer limit of the 200-mile "maritime zone" referred to in the 1947 Supreme Decree and the Santiago Declaration. As we have seen, the purpose of both these earlier instruments was to establish the outer limit of the 200-mile "zone" vis-à-vis foreign whaling and fishing fleets.

— Third, the Resolution contains no provision to the effect that lines had to be shown along the parallels. If Peru had already established its lateral maritime boundaries along the parallels, the Resolution would surely have provided that the lines were to be drawn along parallels of latitude corresponding to the land terminus with Ecuador and Chile. But it did not. Thus, no perimeter was referred to in the Resolution, contrary to Chile's assertion[44].

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[43]MP, p. 64, footnote 78.

[44]RC, para. 3.3.

— Fourth, the chief purpose of the Resolution was to specify that — as was already the case with the Petroleum Law — the arcs-of-circles method should be used, in cartographic and geodesic work, to establish the outer limit of the 200-mile zone.

— Fifth, all that paragraph 2 did was to say where, and again I stress, in cartographic and geodesic work, the depiction of the 200-mile outer limit line ("the said line") should end. It said nothing about lateral maritime boundaries between Peru and its neighbours.

— Sixth, paragraph 2 refers to point IV of the Santiago Declaration, which was only concerned with the limits of the "maritime zone" in the vicinity of islands. A paragraph in a domestic resolution could not change that, even if it had purported to do so — which it did not. Thus paragraph 2 had no bearing on the maritime boundary between Chile and Peru.

Seventh, as ~~As~~ I have said, the sole purpose of the 1955 Resolution was to determine a method for cartographic and geodesic work. It is therefore significant that at no stage did Peru's official maps, before or after the Resolution, show boundaries along the lines of parallel, as would have been expected if Chile's interpretation were correct.

B. Protocol of Accession to the Santiago Declaration (1955)

44. I now turn to the Protocol of Accession[45] to the Santiago Declaration, which was signed on 6 October 1955. The purpose of the Protocol was to enable other American countries to accept the "fundamental principles" and "norms" contained in the Declaration of Santiago. In fact, the Protocol was never used; indeed, it never came into force.

45. The Protocol omitted point IV from the provisions to which other countries could accede. The Parties have debated the significance of the submission at some length in the written pleadings[46].

46. There is nothing, nothing in the negotiating history of the Protocol of Accession that "confirms" a pre-existing all-purpose international maritime boundary between Peru and Chile. The exclusion of point IV certainly did not do so. Moreover, Chile ignores the terms of its own memorandum of 14 August 1955 to Ecuador regarding the draft Protocol[47]. In that memorandum,

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[45]MP, Ann. 52.

[46]MP, 4.109; CMC, 3.121-3.126; RP, 4.55-4.59; RC, 3.11-3.15.

[47]CMC, Ann. 71.

Chile refrained from referring to a maritime boundary that runs along a parallel, but was rather careful to refer, more vaguely, to "the *principle* of the Parallel stipulated in the Declaration of Santiago"[48] as inapplicable to other countries. This refers to a method contained in point IV that, in principle, could be used in the case of islands, not to any existing agreement regarding a boundary.

C. Fishing and whaling

47. Mr. President, Members of the Court, Chile next tries to rely on its own proposals for an "agreement that was not memorialized" with Peru in 1954-1955[49], and for a 100-mile-wide zone of tolerance in 1961[50]. Neither proposal led to an agreement.

48. According to Chile, in the first case the internal documents that Chile has presented to the Court demonstrate both States' "understanding that their maritime zones had been delimited". They do nothing of the kind. They show that Chile proposed to Peru a secret arrangement that would have allowed their respective fishing companies to undertake "fishing activities within the territorial waters contiguous to the Provinces of Tarapaca and Antofagasta in Chile, and the Departments of Tacna and Arequipa in Peru"[51]. There is no reference to an agreed maritime boundary.

49. In the 1961 case, according to Chile, the Parties "confirmed . . . the existence of a 'frontier line' dividing their respective maritime zones". In fact, Chile proposed to accept tolerance of fishing by certain vessels "in the zone of maritime jurisdiction of both countries along the area comprised between 50 miles to the North and to the South of the Chile-Peru frontier"[52]. Again, the Chilean proposal made no reference to a maritime boundary previously established.

50. I now turn briefly to the fishing practice alleged by Chile during the period in question. Chile makes much of fishing incidents, which it tries to use to construct an implied boundary line, again in the absence of any explicit facts to support its case. Chile asserts that these fishing

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[48]CMC, Ann. 71; emphasis added.

[49]CMC, para. 3.9.

[50]*Ibid.*, paras. 3.10-3.11.

[51]*Ibid.*, Ann. 114.

[52]*Ibid.*, Ann. 72.

incidents show that "Peru was ready and willing to defend, by use of force if necessary, the dividing lines of the maritime zones [of Chile and Peru]"[53].

51. Chile tries to paint a picture whereby Peruvian communications regarding fishery incidents recognize the existence of an all-purpose maritime boundary. Yet the language actually used did no such thing. For example, the Peruvian memorandum to Chile following the *Diez Canseco* incident in 1966, which took place very close inshore and not far from the Peru-Chile land boundary, referred to "the frontier line", not to any international maritime boundary[54]. What is clear is that, in the *Diez Canseco* incident, the matter of concern was unlicensed Chilean fishing in waters that would fall in Peru's territorial sea under both Parties' present claims. Peru was fully entitled to enforce its laws in maritime areas that were undisputedly within its jurisdiction, even in the absence of a maritime boundary agreement.

52. In fact, all the incidents referred to by Chile which took place prior to the establishment of the coastal lights in 1968-1969, and which are referred to in the communications over fishing, occurred in close proximity to the coast, and no more than a few miles from the land boundary terminus. They have no relevance to a maritime boundary running along a parallel out to 200 nautical miles or even further[55]. What the incidents do is to confirm that the installation of the coastal lights was meant to serve a very specific purpose.

IV. 1968/1969 arrangements concerning coastal lights

53. This brings me to another of the elements relied upon by Chile: the arrangements in 1968/1969 concerning coastal lights.

54. Chile asserts, in the Rejoinder, that

> "the contemporaneous records, in particular the 1968 Minutes and the 1969 Act . . . show . . . that the Parties considered that a maritime boundary already existed and that they were agreeing to erect the lighthouses to signal that pre-existing maritime boundary"[56].

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[53]RC, para. 3.55.

[54]CMC, Ann. 75.

[55]CMC, Vol. VI, Appendix ("Peruvian Vessels Captured in Chilean Waters").

[56]RC, para. 2.130.

55. Mr. President, that argument suffers from the same defects as those which I have just considered. The lights were a practical arrangement for a very specific purpose, to facilitate the orientation of small local fishing vessels within a few miles of the coast, which for very practical reasons took as a reference the parallel passing through boundary marker No. 1. It was not necessary, for that purpose, to take as a reference Point Concordia[57]. Chile, however, now seeks to use this practical arrangement for inshore fishing boats to confirm an all-purpose maritime boundary extending out to 200 miles. Chile seeks to enlist the imprecise and non-technical language found in certain documents to bolster its argument, in particular the use of expressions like "maritime frontier" or "maritime boundary". These terms, used indifferently, do not indicate "a definitive, all-purpose maritime boundary", as Chile baldly asserts[58]. And they do not indicate that those who used them considered that point IV of the Santiago Declaration constituted an international maritime boundary agreement, as Chile would have you believe. Moreover, none of the 1968-69 documents refers in any way to the Santiago Declaration or the 1954 Agreement. The arrangement on the lights was unconnected with those two instruments.

56. In order correctly to identify the effects of the arrangements of 1968-69 concerning the coastal lights, one must take into account the original agreement of the two States for setting them up. That agreement contains a clear mandate of the two States, provides the context for what was being agreed, and establishes the object and purpose of the lights. The Note from Peru's Ministry of Foreign Affairs of 6 February 1968 expressly mentions that "on the basis of the meeting held in Lima" by representatives of the two States, it was convenient to build "posts or signs . . . at the point at which the common border reaches the sea, near boundary marker number one"[59]. Chile's response was in similar terms[60].

57. The Peruvian Memorandum of 24 January 1968[61] further clarifies that there was a "signaling issue in the boundary close to Boundary Marker number 1" and that it was necessary that the signaling "could be sighted from the sea" and "could be perfectly visible several miles off

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[57]RP, para. 2.86.

[58]RC, para. 2. 145.

[59]MP, Ann. 71.

[60]MP, Ann. 72.

[61]RP, Ann. 10.

the coasts". It is clear that this signaling arrangement had nothing to do with establishing a maritime boundary or signaling a pre-existing maritime boundary. The concern of the two States was to signal a point on land, visible by small fishing boats from the sea, "near" or "close" to boundary marker No. 1 which, I note in passing, they recognized was not the terminus of the land boundary.

58. Mr. President, Chile devotes a long passage in its Rejoinder to explaining that 'the lights were to signal the maritime boundary, not the land boundary'[62]. In doing so, they distort what Peru, and Ambassador Pérez de Cuéllar[63], were saying. They were not, of course, saying that the lights were not intended to assist small fishing boats, close to the coast, to locate themselves at sea. What they were saying was that they did this by reference to a point on land[64].

59. In any case, this debate started by Chile is beside the point. What matters is the nature of the arrangement. It is clear beyond doubt that the "lighthouses were constructed as a practical solution for a specific purpose" which concerned small fishing vessels, as Chile accepts[65], for a short distance out to sea, and nothing more. The lights, and the correspondence that refers to them, had no purpose or subject-matter other than that. Above all, they did not and could not have the purpose or effect of confirming a pre-existing all-purpose international maritime boundary agreement extending to 200 nautical miles, and dating from 1952.

V. Chile's conduct

60. I now turn to Chile's conduct during the period in question. Chile says very little about its own conduct, and one can understand why. Chile's conduct does not help its case.

A. No mention of a maritime boundary in Chile's legislation

61. The absence of an agreed maritime boundary is evident from Chile's internal legislation. In 1953, for example, Chile adopted a decree which defined the maritime jurisdiction of its

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[62]RC, paras. 2.132-2.144.

[63]RP, Vol. II, App. B.

[64]MP, Ann. 73.

[65]CMC, para. 3.6. See also RC, paras. 2.146-2.147.

Directorate General of Maritime Territory and Merchant Marine[66]. No mention was made of an existing maritime boundary with Peru in fixing the limits of the Directorate's maritime jurisdiction.

62. In 1954, Chile submitted the Santiago Declaration to its Congress for approval, in a Presidential Message[67]. Once again, there was no indication that the Declaration had established a maritime boundary — an omission which is inconceivable if Chile thought at the time that the Declaration had delimited what it now contends was "a comprehensive and complete boundary between the Parties"[68].

63. Later in 1954, Chile enacted a Supreme Decree approving the Santiago Declaration. The Decree was published in Chile's *Official Gazette*. Nowhere was it mentioned that the Declaration had dealt with the establishment of maritime boundaries[69]. In fact, the published version[70] omitted point IV of the Declaration, and was only corrected a year later. That omission might be thought somewhat surprising if point IV had indeed established a maritime boundary, as Chile now claims.

64. In 1959, Chile's Ministry of Agriculture issued a decree concerning the regulation of permits for foreign fishing vessels operating within its territorial waters[71]. Once again, there was no mention of a maritime boundary with Peru. A similar decree, issued in 1963, applied to Chile's 200-mile maritime zone; but it too did not refer to any existing maritime boundary with Peru for purposes of identifying areas within which permits were required[72].

65. For the sake of completeness, I would just recall that, as we explained in the Reply[73], there is no reference to an international maritime boundary in any Peruvian legislation. This is so despite Chile's strenuous attempts to argue otherwise, and to interpret Peru's legislation differently from Peru's long-standing interpretation of its own laws.

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[66]MP, Ann. 29.

[67]MP, Ann. 92.

[68]CMC, para. 1.9.

[69]RP, para. 3.121.

[70]Supreme Decree No. 432: MP, Ann. 30.

[71]CMC, Ann. 117.

[72]MP, Ann. 31.

[73]RP, para. 4.92, fn. 465.

B. Chile's 1964 legal opinion

66. Mr. President, I now turn to the Bazán legal opinion[74]. This, you will recall, was given in September 1964 by the Legal Adviser to the Chilean Ministry of Foreign Affairs at the request of the Borders Directorate. Both the fact that a request was made and the legal opinion indicate that, in 1964, twelve years after the Santiago Declaration, there was great uncertainty in Chile over the existence of, and the legal basis for, an agreement between Peru and Chile on their maritime boundary.

67. In his opinion, the Legal Adviser said that he believed "that it is possible to state that such an agreement exists"[75] — "*it is possible to state . . .*". At the same time, he noted that point IV of the Santiago Declaration "does not constitute an express pact for determining the lateral boundary of the respective territorial seas"[76]. Likewise, the Legal Adviser noted that Article 1 of the 1954 Agreement "does not involve a pact whereby the parties have established their maritime boundaries"[77]. He concedes that he "has not been able to determine . . . when and how that agreement was reached"[78]. ~~[Sketch from RC, Ann. 47]~~ Interestingly, the Legal Adviser attached to his opinion a sketch showing the effect of three possible alternative lines which you will find at tab 41 and on the screen. As I said, the Legal Adviser attached to his opinion a sketch showing the effect of three possible alternative lines: a parallel, a median line and a perpendicular. The sketch shows the self-evident unreasonableness of the line along the parallel. [Sketch off]

68. It is impossible to reconcile the 1964 legal opinion with Chile's position in the present proceedings. The legal opinion states clearly that the Santiago Declaration was not a maritime delimitation agreement.

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[74]RC, Ann. 47.

[75]*Ibid.*, p. 2, fourth para.

[76]*Ibid.*, p. 3, first para.

[77]*Ibid.*, p. 4, first full para.

[78]*Ibid.*, p. 5, first full para.

VI. Negotiations in the 1970s between Chile and Bolivia concerning Bolivia's access to the sea

69. Mr. President, I now turn, with your permission, to a new argument, raised for the first time in Chile's Rejoinder, this concerns negotiations in the mid-1970s between Chile and Bolivia about a Bolivian corridor to the sea.

70. Chile tries to show that, in the margins of these negotiations, Peru somehow accepted that the maritime boundary between Peru and Chile went along the parallel through boundary marker No. 1. This is not sustainable. Chile has produced no records of the consultations to which it refers, and we are not aware of any. Chile's arguments are based on misleading "evidence", including maps prepared by Chile, and not, as Chile seems to imply, by Peru. The picture that Chile tries to paint of these negotiations is, to put it mildly, distorted. Chile states that Peru was "specifically consulted on the matter" of the maritime zone appertaining to the corridor offered to Bolivia, and that Peru "expressed no objection or reservation" about an alleged existing maritime boundary[79]. In fact, neither Peru's Note of 29 January 1976[80] nor Peru's "alternative proposal" to Chile of 18 November 1976[81] mentioned a parallel of latitude or suggested any method of maritime delimitation for Bolivia's perspective maritime zone.

71. An example of Chile's attempts to distort reality can be found in Annex 87 in the Rejoinder. At Annex 87 Chile included, as though it were part of Peru's alternative proposal to Chile[82], a sketch-map showing two parallels at the extreme points of the coast to be ceded to Bolivia as well as shaded zones that do not reflect the text of Peru's Memorandum of November 1976. That sketch-map was not annexed to Peru's proposal. Peru's Memorandum made no reference whatsoever to a sketch-map. Contrary to what Chile would have you believe, the sketch-map that Chile has included in Annex 87 is a gross distortion of the Peruvian proposal.

72. The only sketch-map published by Peru was included in an official notice of the Ministry of Foreign Affairs of November 1976. The same map was reproduced in an article written by Ambassador Jose de la Puente Radbill, which Chile has used as the basis to create figure 72 in its

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[79]RC, para.3.16.

[80]RC, Ann. 26.

[81]RC, Ann. 87 (Memorandum of 18 November 1976 of the Embassy of Peru in Chile).

[82]*Ibid.*

Rejoinder. You will find a copy of the original Peruvian map at tab 42 and on the screen. As you can see, this map has no parallel of latitude as a boundary for the maritime area to be granted to Bolivia. Indeed it shows three differently shaded zones that are consistent with the text of Peru's "proposal", namely, a Bolivian corridor to the north of the Province of Arica, a land area under shared sovereignty of the three States and a tri-national administration in the port of Arica. The parallels of latitude that occur on figure 72 of the Chilean Rejoinder have been added by Chile. When you look at the two maps together, the original and Chile's transformation, you can easily see just how distorted Chile's representation is.

73. Mr. President, that concludes what I have to say about Chile's efforts to construct, retrospectively, an international maritime agreement by praying in aid what it claims is the "practice" of the Parties in the period from 1954 to the 1970s.

74. I apologize for addressing so many miscellaneous points. If there is an underlying theme to what I have said, it is the uncertainty of Chile's position. Nothing is clear in Chile's case; all is doubt, all is impressionistic. If one puts any one of Chile's disparate points under a microscope, it vanishes. Yet, Mr. President, an international maritime boundary cannot be built on such shifting sands. The mix of events and instruments relied upon by Chile cannot, by any stretch of the imagination, be seen as having "confirmed", or established, an otherwise non-existent international maritime boundary agreement.

75. Mr. President, Members of the Court, I thank you for your attention. Professor Treves will be our next speaker.

The PRESIDENT: Thank you very much, Sir Michael. Professor Treves will address the Court after the break. The hearing is suspended for 15 minutes.

The Court adjourned from 11.35 to 11.55 a.m.

The PRESIDENT: Please be seated. The hearings are resumed. Je donne la parole au professeur Tullio Treves. Vous avez la parole, Monsieur.

M. TREVES :

LA POSITION DU PÉROU PENDANT ET APRÈS LA TROISIÈME CONFÉRENCE DES NATIONS UNIES SUR LE DROIT DE LA MER

1. Monsieur le président, Mesdames et Messieurs de la Cour, la présente plaidoirie examine la position du Pérou pendant et après la troisième conférence du droit de la mer. Il en ressortira que l'engagement du Pérou dans la conférence fut celui d'un Etat ayant encore à résoudre ses problèmes de délimitation et que, en 1986, le Pérou approcha le Chili en vue de trouver un accord sur le problème de la frontière maritime entre les deux Etats.

2. Le Pérou s'est également préoccupé de rendre son droit interne, et notamment sa Constitution, compatible avec le nouveau droit de la mer tel qu'il était reflété par la convention des Nations Unies[83]. Sur ce dernier point M. l'agent du Pérou s'est déjà exprimé.

3. Cette période se caractérise par des changements rapides du droit de la mer. Ces changements sont surtout la conséquence de l'impact de la troisième conférence des Nations Unies. Cette conférence eut la durée exceptionnelle d'une décennie de 1973 à 1982 (ou plus, si on compte les travaux du comité préparatoire qui débutèrent en 1968) et s'acheva avec l'adoption de la convention des Nations Unies sur le droit de la mer (CNUDM).

4. Pendant ces années, le droit de la mer se transforma. Il passa d'une situation d'incertitude quant à l'extension et à la nature des droits de l'Etat côtier à une reconnaissance générale de droits souverains jusqu'à 200 milles et, pour ce qui est du plateau continental, même au-delà.

5. Cette reconnaissance se trouve explicitement prévue à la convention, notamment par la notion de zone économique exclusive. Elle est devenue partie du droit coutumier par l'effet de la pratique antérieure et contemporaine à la troisième conférence et, notamment, de l'adoption de la convention.

6. Pour les Etats d'Amérique latine, et notamment pour les Parties au présent différend, cela constitua un changement soudain. De prêcheurs isolés d'un nouveau droit de la mer rejeté par la majorité des Etats, ils devenaient les protagonistes de la formation d'un nouvel ensemble de règles générales agréées disciplinant les mers et les océans.

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[83] RP, par. 17-19.

La participation du Pérou aux négociations de la conférence portant sur la délimitation

7. La participation du Pérou à la troisième conférence des Nations Unies sur le droit de la mer fut active et enthousiaste.

8. Le Pérou vit dans l'acceptation de la zone économique exclusive la confirmation des positions qu'il soutenait depuis longtemps. Dans le débat général tenu à Caracas en juillet 1974, le chef de la délégation péruvienne, l'ambassadeur Juan Miguel Bákula, en se référant au «domaine maritime» du Pérou, affirma que «[l]es pays qui sont en faveur d'une mer patrimoniale ou d'une zone économique exclusive dont la largeur atteindrait 200 milles ont au fond le même point de vue que le Pérou et défendent les mêmes intérêts»[84]. Plus emphatiquement, le représentant du Chili, affirma que «le Chili a été le premier Etat à proclamer en 1947 que sa juridiction s'étendait sur une zone de 200 milles» caractérisée par le fait d'être «de caractère essentiellement économique ... sans entraver la liberté de navigation et de survol»[85].

9. Dans ce même sens, à la fin de la troisième conférence sur le droit de la mer, les chefs des délégations du Chili, de la Colombie, de l'Equateur et du Pérou affirmèrent conjointement :

> «la reconnaissance universelle de la souveraineté et de la juridiction de l'Etat côtier dans la limite de 200 milles consacrée par le projet de convention est un objectif fondamental des pays membres de la [c]ommission permanente du Pacifique Sud, conforme aux objectifs de base énoncés dans la [d]éclaration de Santiago de 1952»[86].

10. Du point de vue de la présente affaire, l'aspect le plus remarquable de la participation du Pérou à la troisième conférence des Nations Unies sur le droit de la mer est son engagement actif dans le groupe de négociation 7, dont la tâche était d'élaborer des règles portant sur la délimitation des zones maritimes.

11. Il faut rappeler que, en même temps que le groupe de négociation 7, pendant la septième session de la conférence, en 1978, six autres groupes de négociation furent établis pour s'occuper des questions du «noyau dur» encore ouvertes. Les commissions et les autres enceintes de négociation de la conférence n'en restant pas moins en fonction, les ressources de toutes les délégations, y compris la péruvienne, se trouvèrent sous pression.

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[84] Troisième conférence des Nations Unies sur le droit de la mer, *documents officiels*, vol. I, session plénière 37e session, p. 177, par. 45.

[85] Troisième conférence des Nations Unies sur le droit de la mer, *documents officiels*, vol. I, session plénière 46e session, p. 229, par. 68.

[86] MP, annexe 108.

12. Le Pérou participa activement aux travaux du groupe de négociation 7 du début à la fin. L'ambassadeur Arias Schreiber, qui était alors le chef de la délégation, nonobstant la nécessité de suivre simultanément les discussions dans d'autres enceintes de la conférence, choisit d'être constamment présent dans ce groupe de négociation.

13. Le groupe de négociation 7 était ouvert à la participation de «tous les pays qui portaient un intérêt particulier à cette question», question qui était définie comme suit : «Délimitation des frontières maritimes entre Etats qui se font face ou sont limitrophes et le règlement des différends s'y rapportant»[87].

14. Ce qui précède montre clairement que le Pérou se considérait comme étant «un pays ayant un intérêt particulier» à la question de la délimitation de zones maritimes. S'il avait été de l'avis que tous ses problèmes de délimitation maritime étaient déjà réglés dès 1952 (comme le soutient maintenant le Chili), il n'aurait pas consacré à cette question le temps, l'énergie et l'habileté de négociateur du chef de sa délégation.

15. Le rôle exercé par le Pérou dans le groupe de négociation 7 fut très actif. C'est dans cette enceinte que le Pérou articula pour la première fois sa position sur la délimitation de zones maritimes. Il le fit dès les toutes premières réunions du groupe. Cette position est clairement énoncée dans un document soumis au groupe le 24 avril 1978. Le document, que vous pouvez lire sur l'écran et à l'onglet n° 43 de votre dossier, se lit ainsi :

> «La délimitation de la zone économique exclusive du plateau continental entre Etats limitrophes ou qui se font face se fait par voie d'accord entre ces Etats et d'une manière conforme au principe de l'équité. A cette fin, on utilisera la méthode générale de la ligne médiane ou ligne d'équidistance et, lorsqu'il existe des circonstances spéciales, on tiendra compte de ces circonstances pour assurer l'application du principe de l'équité.»[88]

~~[Projection]~~

16. Cette position est toujours celle du Pérou aujourd'hui. Il est intéressant de noter que la position ~~celle~~ que le Chili soutint au sein du groupe de négociation 7 était très proche. Une lecture de la proposition du Pérou montre qu'elle correspond à la position maintenant adoptée par la Cour internationale de Justice, y compris dans son arrêt tout récent dans l'affaire *Nicaragua*

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[87] Doc. A/CONF.62/63 du 18 avril 1978, troisième conférence des Nations Unies sur le droit de la mer, *documents officiels*, vol. IX, p. 183-184.

[88] Doc. NG7/6 du 24 avril 1978, PR, annexe 61 (versions espagnole et anglaise).

c. Colombie[89]. Cette position a fait l'objet d'expositions détaillées dans d'autres plaidoiries de l'équipe péruvienne. Je souhaite seulement souligner sa ressemblance frappante avec la position du Pérou. Cela ressort notamment de la manière dont la Cour présente sa position dans l'arrêt portant sur l'affaire *Cameroun c. Nigéria*[90].

17. Les propositions avancées ultérieurement par le Pérou au groupe de négociation 7 afin d'aider les Etats engagés dans la négociation à trouver une solution acceptable pour tous[91] ne changent pas la substance qui consiste à utiliser l'équidistance à moins que des circonstances pertinentes n'exigent une solution différente pour faire en sorte que le principe d'équité soit appliqué.

18. Il serait absurde d'imaginer que le Pérou n'avait pas d'intérêt direct à obtenir l'adoption d'une règle générale basée sur l'équidistance. L'importance attribuée à ce sujet se trouve par ailleurs confirmée par la déclaration du chef de la délégation péruvienne à la plénière de la conférence en date du 30 avril 1982, le jour même où le texte de la convention fut soumis au vote. Il se référa à la déclaration qu'il avait adressée à la plénière deux ans auparavant en 1980[92]. En choisissant, parmi les nombreux sujets examinés dans cette déclaration, de ne mentionner que la position péruvienne concernant la délimitation, l'ambassadeur Arias Schreiber soutint que (conjointement ~~à~~ avec une déclaration écrite de 1980) cette déclaration constituait — je cite — «le cadre de référence de la position du Pérou»[93].

19. L'engagement actif du Pérou dans le travail de la conférence du droit de la mer pour ce qui est de la délimitation est celui d'un Etat intéressé à obtenir des règles générales claires et raisonnables sur ce sujet éminemment bilatéral. Et cela non seulement dans l'intérêt de la communauté internationale, mais, surtout, dans son propre intérêt.

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[89] *Arrêt du 19 novembre 2012*, www.icj-cij.org, par. 190-193.

[90] *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria; Guinée équatoriale (intervenant))*, *arrêt, C.I.J. Recueil 2002*, p. 304 et suiv., notamment p. 441, par. 288.

[91] Doc. NG7/14 du 8 mai 1978, RP, annexe 63 ; doc. NG7/34, RP, annexe 64. Voir aussi les documents présentés conjointement avec le Mexique, NG7/36 et rev. 1 du 11 et 18 avril 1979, RP, annexe 67.

[92] MP, annexe 107.

[93] RP, annexe 107.

Le mémorandum Bákula

20. Monsieur le président, Mesdames et Messieurs de la Cour, l'importance que le Pérou reconnaissait à la question de la délimitation, au vu des développements à la troisième conférence des Nations Unies sur le droit de la mer et de l'engagement de sa délégation dans la négociation portant sur ce sujet, le persuadèrent que le moment était venu de faire une démarche auprès du Chili pour lui proposer de négocier une frontière maritime.

21. A la suite d'une approche faite par le ministre des affaires étrangères du Pérou au ministre des affaires étrangères du Chili à l'occasion d'une visite à Santiago, l'un des diplomates de haut rang du Pérou, l'ambassadeur Juan Miguel Bákula, fut reçu le 23 mai 1986 par le ministre des affaires étrangères du Chili. L'ambassadeur Bákula était porteur d'un «message personnel» du ministre des affaires étrangères du Pérou. Ce message soulignait que — je cite — «l'objet de la visite est lié à des propositions de la plus haute importance pour les relations entre les deux pays»[94].

22. L'ambassadeur Bákula présenta la position du Pérou en exposant l'exigence de procéder à la délimitation des espaces maritimes entre les deux Etats, ce qui fut le seul sujet discuté au cours de l'audience.

23. Comme l'avait demandé le ministre chilien, les propositions illustrées par l'ambassadeur Bákula furent aussi soumises par écrit avec une note diplomatique portant la date du jour même de l'audience, le 23 mai 1986, sous la forme d'un mémorandum, qu'on connaît comme le «mémorandum Bákula»[95] — que vous trouvez dans votre dossier sous l'onglet n° 44. Il faut souligner tout de suite que le mémorandum est un résumé de points avancés oralement, pas un texte juridique.

24. Les deux Parties à la présente affaire ont présenté dans leurs défenses écrites des arguments détaillés sur le mémorandum Bákula[96]. Au stade de la procédure où nous nous trouvons il est nécessaire de se concentrer sur la question principale qui divise les Parties sur ce sujet.

25. Il s'agit de la question suivante : le mémorandum Bákula est-il une proposition (la première proposition) pour la négociation d'un accord de délimitation entre le Pérou et le Chili,

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[94] MP, annexe 76.

[95] MP, annexe 76.

[96] MP, par. 4.130-4.134 ; CMC, par. 1.39-1.43 ; RP, par. 4.47-4.52 ; DC, par. 3.106-3.119.

comme le soutient le Pérou, ou est-il, comme l'affirme le Chili[97], une proposition pour la renégociation d'une frontière maritime qui — comme le Chili le soutient — existait déjà entre les Parties ?

26. En fait, cette opposition de points de vue a été bâtie artificiellement par le Chili. Si on se reporte au mémorandum Bákula, on constate que le Pérou proposait la négociation d'un accord de délimitation et non la renégociation d'un accord existant. La phrase suivante du mémorandum, que vous pouvez lire sur l'écran et qui se trouve à l'onglet n° 45 de votre dossier, est d'une importance clef à l'appui de ce point de vue. La phrase se lit comme suit :

> «L'une des questions qui mérite sans délai notre attention est celle de la délimitation officielle et définitive des espaces maritimes, qui reflètent la proximité géographique du Pérou et du Chili et font, depuis longtemps, l'objet d'une action conjointe fructueuse.»

27. Avec cette phrase, le mémorandum indique clairement que, du point de vue du Pérou, il n'y avait aucune délimitation entre le Pérou et le Chili, et qu'il s'agissait d'une question méritant l'«attention immédiate» des deux Etats.

28. Bref, en l'absence d'un accord de délimitation, il était nécessaire d'en négocier et d'en conclure un. La nécessité d'un tel accord était particulièrement urgente au vu du nouveau droit de la mer résultant de l'approbation de la convention des Nations Unies sur le droit de la mer.

29. Se référant à l'accord de 1954, le mémorandum parle

> «[d']une formule qui, bien qu'elle ait rempli et continue à remplir l'objectif exprès d'éviter des incidents impliquant des «marins ayant une connaissance insuffisante de la navigation», n'est pas adéquate pour satisfaire aux exigences de la sécurité ni à celles de la bonne gestion des ressources marines».

30. Le mémorandum ajoute qu'«une interprétation large pourrait générer une situation notoire d'injustice et de risque, au détriment des intérêts légitimes du Pérou, lesquels en sortiraient gravement lésés».

31. Le Chili semble donner à cette phrase une grande importance en soutenant que la possible interprétation extensive mentionnée dans le mémorandum se référait à des «accords en vigueur entre les Parties»[98]. En réalité le mémorandum ne précise pas de l'interprétation extensive de quoi il s'agissait. Il ne se référait certainement pas à *des accords*$_{H}$ Au plus, on peut le lire

H — au pluriel.

[97] DC, par. 3.107.

[98] DC, par. 3.108.

comme se référant à l'accord de 1954. Mais pourquoi devrait-on donner une interprétation large à un accord qui contiendrait, si on l'interprète ainsi, des «insuffisances» et «pourrait générer une situation notoire d'injustice et de risque, au détriment des intérêts légitimes du Pérou» ? La mention de l'accord de 1954 dans le mémorandum, loin d'être une reconnaissance de sa nature d'accord de délimitation, est une indication de l'absurdité d'une telle interprétation.

32. Il y a une confirmation ultérieure de l'inexactitude de la lecture chilienne de la référence à l'accord de 1954 dans le mémorandum Bákula. Le Chili insiste sur l'affirmation que le Pérou, quand il se réfère dans le mémorandum à l'accord de 1954, se réfère aussi à la déclaration de Santiago de 1952. Cela montrerait, de l'avis du Chili, que le Pérou interprétait en réalité les textes de 1952 et de 1954 «comme ayant établi une frontière»[99]. En fait le mémorandum Bákula ne se réfère jamais à la déclaration de Santiago conjointement à l'accord de 1954. Comment pourrait-on considérer une frontière comme établie par la déclaration de Santiago à laquelle on ne fait aucune référence ? Dans le mémorandum on ne trouve aucune trace de l'opinion que le Chili prête au Pérou selon laquelle il existait un accord de délimitation et la déclaration de Santiago y était pour quelque chose. Le mémorandum ne mentionne la déclaration de Santiago que pour faire remarquer que la loi péruvienne du pétrole datait de cinq mois auparavant : comme on le voit, il s'agit d'un point tout à fait mineur et sans rapport avec la thèse du Chili selon laquelle le Pérou aurait reconnu dans le mémorandum que la déclaration de Santiago constituait un accord de délimitation maritime.

33. Evidemment, en préparant sa duplique, le Chili a cédé à la tentation de soutenir que le mémorandum Bákula considérait la déclaration de Santiago comme un accord de délimitation. Mais il s'agit là de la position du Chili. Ce n'était point la position du Pérou en 1952, ni en 1986 à l'époque du mémorandum Bákula et ce n'est pas la position péruvienne aujourd'hui.

34. La position du Pérou est reprise dans le mémorandum Bákula en se référant à celle présentée par l'ambassadeur Arias Schreiber dans le discours déjà mentionné qu'il tint à la troisième conférence des Nations Unies sur le droit de la mer le 27 août 1980. Cette position, que vous pouvez lire sur l'écran et à l'onglet n° 46 de votre dossier, avait été formulée comme suit :

~~[Projeter les versions française et anglaise.]~~

[99] DC, par. 3.108 et 3.109.

> «A défaut d'un accord exprès portant spécifiquement sur la délimitation de la mer territoriale, de la zone économique exclusive et du plateau continental entre Etats dont les côtes sont adjacentes ou se font face ou lorsqu'il n'existe pas de circonstances spéciales ou de droits historiques reconnus par les parties, la méthode de la ligne médiane devrait être appliquée en règle générale, conformément à la deuxième révision, car c'est la meilleure manière de parvenir à une solution équitable.»[100]

35. Le mémorandum ajoute que la démarche de l'ambassadeur Bákula constituait «la première initiative diplomatique du Gouvernement péruvien pour présenter au Gouvernement chilien sa position fondée sur les raisons et circonstances énoncées dans les premiers paragraphes du présent mémorandum», en d'autres termes, la nécessité de réserver une attention immédiate à la délimitation de l'espace marin entre les deux pays.

36. On aurait pu s'attendre que le Chili réponde au mémorandum Bákula en soutenant, selon la position qui est la sienne dans le présent différend, qu'il n'y avait aucune nécessité de négocier une délimitation maritime car la question était déjà réglée dès 1952.

37. Mais le Chili prit au sérieux les points soulevés par l'ambassadeur Bákula et ne les rejeta pas. Dans un communiqué de presse publié après la visite de l'ambassadeur Bákula, le ministère chilien des affaires étrangères fit savoir que le ministre chilien avait pris note de l'intérêt du Gouvernement péruvien pour des conversations portant sur les positions des deux gouvernements relatives à la délimitation maritime et que «la question serait étudiée en temps utile»[101].

38. Il est vrai que par la suite le Chili ne fit aucune référence au mémorandum Bákula ou à la conduite d'études sur les sujets qui y avaient été soulevés. L'objectif poursuivi par la démarche de l'ambassadeur Bákula n'en fut pas moins atteint. Il en est résulté que la question de la délimitation maritime figure à l'agenda bilatéral entre le Pérou et le Chili. C'est ainsi que le Pérou se référa aux points soulevés dans le mémorandum dans sa note de protestation adressée au Chili le 20 octobre 2000[102] ainsi que dans la note du 19 juillet 2004[103] dans laquelle il proposait au Chili des négociations pour résoudre le différend en matière de délimitation. Et c'est à la suite de cette note que les ministres des affaires étrangères du Pérou et du Chili purent affirmer conjointement, dans un communiqué publié à Rio de Janeiro le 4 novembre 2004, que celle de la délimitation était

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[100] MP, annexe 107.

[101] MP, annexe 109.

[102] MP, annexe 77.

[103] MP, annexe 79.

une question bilatérale de nature juridique à propos de laquelle les deux Etats avaient des positions différentes[104].

39. La période examinée marque la pleine prise de conscience par le Pérou de l'impact du nouveau droit de la mer sur sa position, position qui passa de l'avancement de nouvelles prétentions à la jouissance de droits correspondant à ceux qui étaient désormais universellement reconnus. Cela imposait une détermination des frontières maritimes, ce que le Pérou proposa au Chili par la démarche Bákula.

40. Cette démarche et le mémorandum restent un moment décisif dans les relations entre les deux Parties au présent différend. A la lumière de cette démarche et du mémorandum, on peut interpréter plusieurs aspects de la pratique chilienne après 1986 comme des efforts pour fabriquer des éléments à utiliser dans le différend avec le Pérou dont l'existence était désormais admise.

Merci, Monsieur le président, Mesdames et Messieurs les juges, pour votre attention et votre patience. Puis-je vous demander de bien vouloir aimablement donner la parole au prochain orateur de l'équipe péruvienne, M[e] Bundy.

The PRESIDENT: Merci, Monsieur le professeur. I invite Mr. Bundy to continue in oral presentation by Peru. You have the floor, Sir.

Mr. BUNDY:

THE RECENT CONDUCT OF THE PARTIES

1. Thank you very much, Mr. President, Members of the Court. In this presentation, I shall address some of the more recent aspects of the Parties' conduct which further undermine Chile's theory that the 1952 Santiago Declaration delimited the maritime boundary between Peru and Chile.

2. First, I shall discuss various unilateral steps that Chile began to take, after having received the 1986 Bákula Memorandum, to create the impression that a maritime boundary already existed between the Parties. Following that, I will turn to elements of Peruvian conduct that Chile relies on in an attempt to demonstrate a pre-existing boundary, and I shall show that these elements do not

[104] MP, annexe 113.

support Chile's thesis of such a pre-existing boundary. Lastly, I will address the manner in which each Party proceeded when it actually intended to enter into a maritime boundary agreement. In Chile's case, this involves examining the 1984 Agreement it concluded with Argentina. And in Peru's case, I shall describe the maritime boundary that it agreed with Ecuador in May 2011: and in both instances, Chile's agreement in 1984 with Argentina and Peru's agreement in 2011 with Ecuador, the Parties' conduct in entering into those agreements and the terms of those agreements were very different than what they were with respect to the Santiago Declaration.

1. Self-serving conduct by Chile after the Bákula Memorandum

A. Chile's cartographic practice

3. With that introduction, let me turn directly to the way in which, in recent years, Chile has tried to manufacture a case that a maritime boundary exists along a parallel of latitude. I will start with examining how Chile's cartographic practice began to change in the 1990s, following the Bákula Memorandum with respect to the boundary situation with Peru.

4. The first point to note is that, between 1952 and 1992, that is a period of 40 years, Chile did not issue a single map or chart that purported to depict the maritime boundary with Peru. ~~[Place fig. 5.19 from Peru's Memorial on screen.]~~ Take, for example, Chile's Chart of Arica, which is in the vicinity of the land boundary terminus that was published in 1973 — it is also at tab 47 of your folders. There is no sign of a maritime boundary lying off of Point Concordia, which is the terminal point of the land boundary. What there are are some dashed lines showing the very short scope and limit of the range of the coastal lights that Sir Michael addressed earlier this morning. And the same "no maritime boundary" situation is repeated over and over in Chile's maps and charts during the 40-year period following the Santiago Declaration. ~~And~~ I refer, for the Court at its convenience, as examples, to have reference to figures 5.20 and 5.23 in Peru's Memorial. And these charts — these no boundary charts — are a telling indication that Chile did not consider that such a boundary existed.

5. It was only in the 1990s that Chile began to alter its charts. ~~[Place figure 5.24 from Peru's Memorial on screen.]~~ I have had placed on the screen, which is also in tab 48 of your folders, a chart that was published in 1994. It shows, again, the Arica region. Inexplicably, however, there

now appears — for the first time — a line on the map purporting to show a maritime boundary between Peru and Chile. Why the change? Chile has not told us. When, therefore, a couple of years later in 1998, Chile published a further large-scale chart of the Port of Arica showing another dashed line out to sea along the parallel and changing the depiction of the land boundary — a matter that I will deal with later this afternoon — Peru officially protested[105].

6. Now, similar inconsistencies appear with respect to information that Chile supplied to the United Nations. In 1997, Chile notified the United Nations of its ratification of the 1982 Law of the Sea Convention. That notification referred to the boundary agreement between Chile and Argentina, but made no mention of any similar agreement with Peru. In 2000, however, Chile proceeded to deposit charts with the United Nations which referred for the first time to the 18° 21' S parallel of latitude as the maritime boundary between Chile and Peru. And, once again, promptly Peru protested[106].

7. And the same practice can be seen to be replicated with respect to Chile's National Atlas and in its maps published by its Military Geographic Institute. And, again, for over 40 years after the Santiago Declaration, Chile issued numerous official maps, but none of them showed a maritime boundary with Peru[107]. And that only changed in recent years when, again without explanation, Chile's National Atlas included a chart and map depicting what was said to be a "Límite Chile-Peru" extending out to sea along the parallel of latitude[108].

8. These very late changes in Chile's cartography were plainly self-serving. Chile knew full well that there was no boundary and, in any case, it was aware from the 1986 Bákula Memorandum that Peru did not consider that any maritime boundary had ever been agreed between the Parties. And merely drawing a new line after 40 years of silence — merely drawing a line on a map — could not create a boundary where none had previously existed.

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[105]See fig. 5.25 in Vol. IV of Peru's Memorial and MP Ann. 77.

[106]MP, Ann. 78.

[107]See figs. 5.9, 5.10, 5.12, 5.13, 5.14, 5.15, 5.16 and 5.17 included in Vol. IV to Peru's Memorial.

[108]MP, fig. 5.26.

B. Chile's naval interdictions

9. A similar pattern can be seen from the evidence Chile relies on with respect to its naval patrols and the interdiction of Peruvian fishing vessels.

10. In Volume VI of its Counter-Memorial, Chile provided a list of 309 instances where Peruvian vessels were said to have been captured in Chilean waters. Apparently, Chile considers that this seemingly impressive number of incidents somehow confirms the existence of a maritime boundary along its claim line. But a close look at the facts reveals a very different picture.

11. Of these 309 cases listed by Chile, only 14 took place before the Bákula Memorandum was delivered to Chile. Those 14 cases all occurred in 1984.

~~[Place new Peruvian Team map of the 14 cases on screen]~~

12. What is striking about these incidents — and we have had them plotted on the map on the screen, using the information from Chile's own annex — what is striking about these incidents is their location. All but one of them are located below, or to south of, the equidistance line, and even the last one virtually straddles that line, and all of them occurred within 12 nautical miles of the coast. The other incidents listed by Chile actually took place either during the 1990s, when Chile began to change its maps, or after the year 2000, at a time when it is clear that a dispute over the boundary existed between the Parties.

13. And, once again, this was the result of a very late and self-serving change in Chile's practice — this time with respect to its rules of naval engagement, which Chile itself concedes, with respect to such rules, that they were only modified in the 1990s to provide for naval interdiction up to Chile's parallel of latitude claim[109]. And you can see that at Figure 20 in Chile's Counter-Memorial.

14. In short, Chile's conduct after 1986 stands in sharp contrast to its earlier conduct. Previously, as my colleagues have explained, Chile's internal laws, its maps, the opinion of its Foreign Ministry's Legal Adviser, in no way suggested that Chile considered the Santiago Declaration to have established a maritime boundary with Peru. Chile's more recent conduct represents nothing more than a belated attempt to build up a case that a boundary exists. But unilateral conduct of this nature cannot create a boundary where none existed before.

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[109]See fig. 20 facing page 176 to Chile's Counter-Memorial.

2. Chile's reliance on Peruvian practice

15. Rather than focus on its own actions which do not support its case, Chile prefers to take aim at Peru's practice in an effort to show that Peru considered the maritime boundary to be fully delimited. Apart from the legal deficiencies in this line of attack that Sir Michael has exposed, Chile's arguments are also factually misplaced.

A. No official Peruvian maps showing a maritime boundary

16. First, there is the question of Peru's cartography. Here, the plain fact, which Chile has been unable to contradict, is that there is not a single official map issued by the Government of Peru that has ever depicted a maritime boundary with Chile. And as I noted, for a period spanning some four decades, Chile's practice was actually exactly the same — no suggestion of a maritime boundary.

17. As a result of this, Chile has been forced to forage in secondary sources, such as school textbooks and the publications of private entities, to find maps that purport to show a maritime boundary. And Chile argues Peru's Foreign Ministry somehow "authorized" some of these maps[110]. But, as Peru fully explained in its Reply, under a 1961 — that is over 50 years ago — Peruvian Ministerial Resolution, any so-called "authorizations" did not imply approval of the contents of such maps, which remained the exclusive responsibility of their authors, and that was stated, and they did not somehow transfer private maps into official Government maps[111].

18. And as the Chamber of the Court observed in the *Frontier Dispute (Burkina Faso/Mali)* case which, as a statement of principle, I would suggest, is equally applicable to questions of maritime delimitation:

> "Whether in frontier delimitations or in international territorial conflicts, maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights." (*Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 582, para. 54; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Judgment of 19 November 2012, para. 100.)

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[110]See, for example, RC, para. 3.33.

[111]RP, paras. 4.128-4.131.

B. Other Peruvian conduct relied on by Chile

19. The other material Chile cites in an attempt to buttress its case is legally irrelevant and mostly post-dates Peru's invitation to Chile in 1986 to negotiate the maritime boundary as well as the 2004 Joint Communiqué issued by the Parties' Foreign Ministers indicating that the two States had a dispute over the issue of the maritime boundary.

20. Let me deal with four categories of conduct referred to by Chile, which our opponents rely on to evidence the existence of a maritime boundary. These are: (i) Chile's reliance on the division of Flight Information Regions (FIRs) between the two countries; (ii) the Parties' practice relating to carrying out search and rescue missions (SARs); (iii) Navigational Warning Services (NAVAREAs) put into operation by Peru and Chile; and (iv) the Parties' naval practice. And the short answer to Chile's arguments is that none of these categories of activities has anything to do with the establishment or recognition of international boundaries. ~~And, in~~ fact, as a matter of principle, Chile agrees with this proposition because in its Rejoinder it acknowledges that the division of such zones is entirely separate from the delimitation of maritime boundaries[112], which makes one wonder why they have put this material in.

(i) Flight Information Regions

21. With respect to the establishment of Flight Information Regions (FIRs), these are irrelevant to the present case. FIRs are established under the framework of the Chicago Convention and the International Civil Aviation Organisation (ICAO) for technical and operational purposes relating to air traffic control. Legally, neither the Chicago Convention nor ICAO deal with the delimitation of maritime boundaries. It is that straightforward. Factually, the division of FIRs between Peru and Chile did not remain constant following the 1952 Santiago Declaration. They were changed in 1962 — which has been documented in Peru's pleadings, a fact which scarcely supports Chile's contention that they have a bearing on the existence or course of a maritime boundary between the Parties dating from 1952. Moreover, Lima's FIR extends well beyond the 200-mile limit of Peru's maritime zones[113]. And I suspect that that is the case with many States' FIRs, they are not related to maritime boundaries.

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[112]RC, para. 3.79.

[113]RP, para. 4.40.

(ii) Search and rescue

22. So then I turn to search and rescue operations, which are obviously aimed at the protection of life at sea, not questions of maritime delimitation: and that is borne out very clearly by paragraph 2.1.7 of the Annex to the Convention on Maritime Search and Rescue, to which both Peru and Chile are parties. That provides that "[t]he delimitation of search and rescue regions is not related to and shall not prejudice the delimitation of any boundary between States"[114].

(iii) NAVAREAs

23. Equally unavailing is Chile's reliance on these navigational areas (NAVAREAs), which are areas that are designated under the auspices of the International Maritime Organization and the International Hydrographic Office for the promulgation of warnings about hazards to maritime navigation.

24. Chile cites a 1975 Working Group Report from the Inter-Governmental Maritime Consultative Organization for the proposition that so-called NAVAREAs and the NAVAREA between Peru and Chile was a parallel of latitude that reflects what Chile asserts was their "border"[115]. But what our colleagues fail to note is that this report was simply part of a working session that was considering a draft plan to establish a worldwide navigational system; this was not any final agreement or any convention.

25. When one actually consults the subsequent IMO/IHO Worldwide Navigational Warning Service Guidance document that was published after the NAVAREA system was put into place, the delimitation of NAVAREAs is specifically subject to a proviso that reads as follows: "The delimitation of such areas [these NAVAREAs] is not related to and shall not prejudice the delimitation of any boundaries between States." (Definitions, Section 2.1 (15)[116])

~~[Place map from this publication on screen]~~

26. Similarly, the map in the IMO Guidance document — which is at tab 50 of your folders and on the screen — this shows the worldwide NAVAREAs and it has exactly the same disclaimer.

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[114]Para. 2.1.7 of the Annex to the International Convention on Maritime Search and Rescue, Hamburg, 27 April 1979, 1405 *UNTS* 119; also publicly available at <http://www.unhcr.org/refworld/publisher,IMO,,,469224c82,0.html>, accessed 13 Nov. 2012.

[115]RC, paras. 3.82-3.83.

[116]Publicly available at <http://www.iho.int/mtg_docs/com_wg/CPRNW/CPRNW_Doc-review/AR%20706(17)-Final%20Draft.pdf>, accessed 13 Nov. 2012.

The delimitation of such areas is not related to and shall not prejudice the delimitation of any boundaries between States. And I would suggest this is not surprising: there are only 21 NAVAREAs around the world, and there are certainly many more coastal States and literally hundreds of actual or potential maritime boundaries.

(iv) Naval practice

27. Chile also seeks support for its claim in co-operative efforts that were undertaken between the naval forces of both countries in what was referred to as their naval frontier zone[117]. But, once again, there is a short answer to this argument, because in September 2003, the Chief of the General Staff of the Chilean Navy — Chile's Navy — explained in a meeting with his Peruvian counterpart that: "[t]he agreements between the Naval Zones are only intended to increase co-operation in terms of maritime operations, without making any reference to treaties or boundary issues", and the Chilean Chief of General Staff went on to state that the agreement between the two Parties' navies "does not address the nature of the boundaries or the scope of jurisdictional zones, so it cannot prejudice, affect or amend them"[118].

28. Lastly, in its Rejoinder, Chile cites Peru's 1987 Regulation of Captaincies and Maritime, Fluvial and Lacustrine Activities — that is a document which set out various naval districts off of Peru's coast. And Chile relies on part of that document in which it is stated that Peru's southernmost Maritime District No. 31 covered an area from "*the provincial limit between Caraveli and Camaná (Parallel 16° 25' South) to the frontier boundary between Peru and Chile*"[119]. Based on this language, Chile argues that the southern limit of this District No. 31 in Peru shows that the projection of the relevant Peruvian coastline does not extend south of the parallel passing through Hito No. 1 boundary, marker No. 1 on the land boundary[120]. Now that argument founders for three basic reasons.

29. First, these Peruvian regulations make no reference to a "maritime boundary" with Chile. Rather, the southern limit of District 31 is defined as extending to the "frontier boundary" which, as

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[117]RC, para. 3.66.

[118]RP, Vol. II, Ann. RP 89.

[119]RC, para. 3.67; emphasis added.

[120]RC, para. 3.68.

Peru explained in its written pleadings, was a reference to the land boundary[121]. Second, unlike the northern limit of District No. 31 which was identified by a specific parallel of latitude — 16° 25' south — the southern limit — the "frontier boundary" — is not identified by any line of latitude. That completely undermines Chile's argument that it coincided with the parallel of latitude passing through Hito No. 1. That is pure wishful thinking. Third, at the end of the day Chile has quite simply been unable to point to any piece of legislation issued by Peru — or by Chile, for that matter — indicating that a parallel of latitude is the maritime boundary between the two countries.

30. It follows that none of the so-called evidence of Peruvian conduct adduced by Chile in its written pleadings supports the contention that a recognized maritime boundary has been in place since 1952. The material cited by Chile may be long in pages, but ~~they are~~ short in substance.

3. How the Parties acted when they intended to enter into maritime boundary agreements

31. Now this, Mr. President, brings me to the final element of the Parties' conduct that I need to address: the manner in which the Parties acted when they genuinely intended to enter into maritime delimitation agreements. I shall first address the boundary agreement that Chile signed with Argentina in 1984, before turning to Peru's more recent boundary agreement with Ecuador concluded last year.

A. Chile's treatment of its boundary with Argentina

32. With respect to Chile's maritime boundary with Argentina, there are two main points that I would suggest are relevant for the present case. First, the Chile-Argentina boundary agreement is a very different kind of instrument than the Santiago Declaration. The former is a delimitation agreement; the latter is not. You will be able to see that by comparing their terms. Second, Chile's conduct following the conclusion of its agreement with Argentina was completely different from its conduct relating to the Santiago Declaration. Let me just summarize the relevant facts.

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[121] RP, para. 4.32.

[Place Peru Memorial figure 5.1 on screen]

33. In 1984, Chile and Argentina concluded an agreement, Article 7 of which fully delimited the maritime boundary between them. The Court can see the course of that boundary on the map on the screen, which is the map that was attached to the agreement itself and of which it formed an integral part. Both the 1984 Agreement and the map may be found in tab 51 of your folders. No similar map depicting maritime boundaries was attached to the Santiago Declaration.

34. The 1984 Agreement indicated that the boundary delimited the sea, sea-bed and subsoil between Chile and Argentina. So it was specific in terms of the régimes that it purported to delimit. It also specified the starting-point of the boundary, which was point A, the co-ordinates of six points through which the delimitation line ran, and the endpoint. In contrast, nothing of the kind exists with respect to the Santiago Declaration.

35. Moreover, unlike the Santiago Declaration, Chile and Argentina promptly registered the agreement with the United Nations in June 1985, just one month after it came into force. In 1986, Chile then issued a revised nautical chart which showed the boundary — an official chart — it is on your screen and in tab 52. And again, that was in sharp contrast to Chile's practice with respect to Peru. As I noted a few minutes ago, Chile did not issue a single map or chart purporting to show a maritime boundary with Peru until 1992, 40 years after the conclusion of the Santiago Declaration.

36. In the same vein, Chilean legislation frequently referred to the boundary agreement with Argentina without mentioning any similar agreement with Peru — we have documented this in our written pleadings. For example, in 1990 Chile issued a decree — No. 704 — relating to the organization of its search and rescue operations by its Navy[122]. That Chilean decree limited the area of national maritime jurisdiction in the south to the waters lying west of the line established in Chile's boundary agreement with Argentina. But in contrast, no mention was made to any boundary agreement in the north. Other examples of this same kind of treatment, Chilean legislation referring to the Argentine boundary but no boundary with Peru are set forth in our written pleadings — the references will be given with the text[123].

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[122]RP, Ann. 26.

[123]See RP, paras. 4.92 and 4.100-4.106.

37. The only conclusion that can be drawn from these facts is that Chile considered that it had a maritime boundary agreement with Argentina, but not with Peru.

B. The Peru-Ecuador delimitation agreement

38. Let me now turn to the delimitation agreement between Peru and Ecuador, which was set out in an Exchange of Notes dated 2 May 2011[124]. Because that agreement was signed after Peru filed its Reply, Peru has not yet discussed it. Chile's Rejoinder has addressed it[125]; but does so in what I would suggest is such an incomplete and inaccurate way that I need to set the record straight as to what actually happened.

~~[Left hand figure from PM figure 2.2 on screen]~~

39. To place the matter in perspective, let me first review the relevant background. This requires, I'm afraid, returning to point IV of the Santiago Declaration with the aid of the map that now appears on your screen and in tab 53, depicting the coastal geography between Peru and Ecuador.

40. As Professor Lowe explained earlier this morning, the first sentence of point IV of the Declaration states that the 200-mile maritime zone declared under point II of the Declaration shall apply to the entire coast of an island or a group of islands. The second sentence of point IV then limits the maritime zone of an island or group of islands to the parallel at which the land frontier of the States concerned reaches the sea if the island or group of islands is situated less than 200 nautical miles from the general maritime zone of a signatory State. This was not an all-purpose delimitation provision; it concerned the maritime entitlements of islands and in some circumstances the limits to those entitlements.

41. Peru has shown how the second sentence of point IV only applies to the situation between Peru and Ecuador. For example, you can see from the map on the screen that Ecuador has several islands — particularly Santa Clara and Puna, but there are others — which lie much closer than 200 nautical miles from the maritime areas lying off Peru's coast. Under the second sentence

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[124]RC, Anns. 39 and 41.

[125]RC, paras. 4.16-4-26.

of point IV, the maritime entitlements of those islands are limited by the parallel at the point at which the Peru-Ecuador land frontier meets the sea.

42. In the past, Peru has consistently maintained that it has no boundary problem with Ecuador. Peru fully accepted that the second sentence of point IV addressed the situation between itself and Ecuador, and Peru's President reconfirmed Peru's position to this effect in a letter he addressed to the President of Ecuador, which we filed on the record, dated 9 June 2010[126].

43. At the same time, Peru has also considered that point IV did not in and of itself constitute a delimitation agreement — it simply set out a principle that applied between Peru and Ecuador because of the presence of Ecuadorian islands near Peru's general maritime zone. Peru therefore took the position that Peru and Ecuador needed to negotiate and sign a comprehensive, all-purpose maritime boundary agreement.

44. That is what happened on 2 May 2011 when the Foreign Ministers of both States exchanged Notes of Identical Content which delimited the course of their maritime boundary. You will find a copy of those Notes in tab 54 of your folders[127].

45. That Exchange of Notes, unquestionably constitute a maritime boundary agreement. The term "maritime boundary" is used at paragraphs 3, 4 and 6 of the identical Notes for purposes of specifying the course of the boundary. It is also clear that the purpose of the Exchange of Notes was not to confirm some pre-existing boundary, or to suggest that a maritime boundary had already been delimited by the Santiago Declaration. Rather, the Notes involved the delimitation of the maritime boundary *de novo*. Quite apart from the fact that the Notes make no reference to the Santiago Declaration, paragraph 2 begins by stating the following — it is also in tab 55:

~~[Place quote on screen]~~

> "In view of the existence of special circumstances in the area adjacent to the land frontier between our two countries, the limit of the maritime spaces under sovereignty or rights of sovereignty and jurisdiction of Peru and Ecuador, including the water column as well as the soil and subsoil, *shall* extend along the geographic parallel 03° 23' 33.96" S . . ." (Emphasis added.)

The use of the word "shall" ("se extenderá" in the Spanish text) evidences the intention of the parties to establish their maritime boundary by means of the agreement set out in the Exchange

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[126]RP, Ann. 81.

[127]RC, Anns. 39 and 41.

of Notes, not by any other instrument. The reference to "special circumstances in the area adjacent to the land frontier" was to the presence of Ecuador's islands situated in the vicinity of the land frontier. In contrast, there are no such special circumstances in the area to be delimited between Peru and Chile.

46. The Notes contain a number of details relating to the boundary which are normally found in delimitation agreements, but which had not been agreed by Peru and Ecuador before, and which are conspicuously absent from the 1952 Declaration of Santiago. These include the following elements:

— the Notes contain a specification of the maritime régimes that were being delimited; in other words, the column of water, the sea-bed and the subsoil (paragraph 2);

— the precise starting-point of the maritime boundary, identified by WGS 84 co-ordinates (paragraph 3);

— the course of the maritime boundary seaward of its starting-point, again identified by the exact co-ordinates of the parallel of latitude it followed, together with the co-ordinates of the starting-point of the land boundary on the basis of which the parallel was established (paragraph 2);

— the end of the maritime boundary, which was described as extending to a distance of 200 nautical miles from its starting-point — the starting-point having been precisely identified — (paragraph 4);

— the course of the line delimiting the internal waters adjacent to the Parties' coasts lying landward, or inside, of the starting-point of the maritime boundary (paragraph 5);

~~[Place map from Vol. II, Ann. 39, p. 206 of RC on screen]~~

The Exchange of Notes also included — and it is now being projected on the screen, and is in tab 56:

— a graphic representation of the course of the maritime boundary in the form of a map that was attached to the Notes and, just like in the Chile/Argentina agreement, formed an integral part of the agreement (paragraph 6); and

— a stipulation that the understanding contained in the Notes will come into force on the date of the last communication by which the Parties notify each other of the fulfilment of their respective internal procedures (paragraph 7).

47. The agreement set forth in the Exchange of Notes dated 2 May 2011 came into force on 20 May 2011, and Peru and Ecuador jointly registered it with the United Nations Secretariat on 27 June 2011.

48. Mr. President, Members of the Court, I have taken the Court through the details of the boundary established pursuant to the 2 May 2011 Exchange of Notes because Chile's Rejoinder ignores them. Chile must realize that the Notes constitute a delimitation agreement, and that nothing of the kind has ever been agreed between Chile and Peru.

Mr. President, at this point, I find myself in the unenvious position of competing with the lunch and, if this would be a convenient time for the Court, I would be pleased to break my presentation here.

The PRESIDENT: Indeed, I think this is a convenient time to close the morning sitting. You will be able to continue at 3 o'clock this afternoon.

The sitting is adjourned.

The Court rose at 1.00 p.m.