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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2012

Public sitting

held on Thursday 6 December 2012, at 3 p.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 jeudi 6 décembre 2012, à 15 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
Orrego Vicuña, juges *ad hoc*

M. Couvreur, greffier

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The PRESIDENT: Good afternoon. Please be seated. The sitting is now open. This afternoon the Court will hear Chile begin its first round of oral argument. I note the presence at today's hearing of His Excellency Mr. Alfredo Moreno, the Minister for Foreign Affairs of Chile. I give the floor to His Excellency Mr. Van Klaveren Stork, Agent for Chile. You have the floor, Sir.

Mr. VAN KLAVEREN STORK:

1. Introduction

1.1. Mr. President, Members of the Court, it is a great honour for me to appear before this distinguished Court and a great privilege to represent Chile, a country committed to peace, co-operation and the rule of law in international relations.

1.2. Chile and Peru have lived together in peace for 130 years. We have worked together on innumerable occasions to further economic integration and development and to improve the lives of our peoples. Chile conducts its relations with Peru based on principles of good faith, mutual respect and observance of international agreements.

1.3. All boundary issues between Chile and Peru have been settled for many decades. We established our land boundary by agreement in 1929 and determined and demarcated it in 1929 to 1930[1]. We delimited our maritime boundary in 1952, through a trilateral treaty with Peru, Ecuador and Chile, called the Declaration on the Maritime Zone, or the Santiago Declaration, in which the three States set forth their claims to 200-mile maritime zones[2]. The Parties concluded the Agreement Relating to a Special Maritime Frontier Zone only two years later, in 1954, and expressly agreed that it was an integral part of the Santiago Declaration[3]. We jointly and permanently physically gave effect to the maritime boundary by agreeing in 1968 and 1969 to construct alignment towers to signal the parallel of latitude constituting the maritime boundary[4].

1.4. These agreements are sufficient to establish Chile's case. But Chile's case does not rest on agreements alone. It is grounded, too, in 60 years of practice confirming the existence of a

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[1]MP, Vol. II, Ann. 45; MP, Vol. II, Ann. 54; MP, Vol. II, Ann. 55.

[2]*Ibid.*, Ann. 47.

[3]*Ibid.*, Ann. 50.

[4]*Ibid.*, Ann. 59; *ibid.*, Vol. III, Ann. 74; *ibid.*, Ann. 75; CMC, Vol. II, Ann. 6.

fully-delimited, all-purpose maritime boundary. Chile has provided the Court with extensive evidence demonstrating the agreed position of the Parties. Peru has been rather less forthcoming. And Peru fails to provide any evidence that the all-purpose maritime boundary is instead a provisional fishing arrangement.

1.5. That argument is part of Peru's attempt to ask the Court to unsettle the agreed boundary. It is a new argument unsupported by the historical record. For many decades, both Chile and Peru have observed their treaty obligations in good faith. By instituting these proceedings, Peru goes so far as to deny the existence of the maritime boundary, an astounding position to take as we celebrate the sixtieth anniversary of the Santiago Declaration.

1.6. In 1998, Peru and Ecuador concluded an agreement on their land boundary, and in 1999, Chile and Peru agreed to an Act of Execution granting Peru port facilities in Arica. Subsequently, in 1999, the Foreign Affairs Committee of Peru's Congress declared these acts "end[ed] any pending possible conflict" with Peru's neighbours[5]. Peru's Foreign Minister separately reaffirmed this statement at the conclusion of the 1999 Execution Act with Chile[6]. Surely the Foreign Minister and the Peruvian Congress would have known if the maritime boundary was in dispute or did not exist.

1.7. Mr. President, Members of the Court, this case is about the interpretation and application of existing treaties. Simply, no maritime spaces require delimitation. Instead, this case calls upon the Court to uphold *pacta sunt servanda* and the stability of a previously delimited maritime boundary.

1.8. The history and background of the Parties' maritime boundary treaty and subsequent implementing agreements may be summarized in a straightforward way.

2. The Parties' maritime boundary agreement and subsequent implementing treaties

2.1. In 1947, Chile and Peru issued unilateral and concordant proclamations claiming sovereignty and jurisdiction — I repeat, sovereignty and jurisdiction — over an area extending to a

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[5]CMC, Vol. IV, Ann. 183.

[6]*Ibid.*, Ann. 182.

minimum of 200 nautical miles off their respective coasts[7]. Peru defined its maritime zone as a seaward projection "following the line of the geographical parallels"[8]. This applied to Peru's lateral limits with both Chile and Ecuador. As Peru's Foreign Affairs Committee subsequently explained, the 1947 Proclamations were a "necessary antecedent"[9] to the Santiago Declaration and the Agreement Relating to a Special Maritime Frontier Zone.

2.2. On 18 August 1952, Chile, Ecuador and Peru concluded the Santiago Declaration. Professor Dupuy will analyse this agreement shortly. I wish only to emphasize that this Declaration is and has always been a treaty, as defined by the Vienna Convention on the Law of Treaties.

2.3. Article IV of the Santiago Declaration established the maritime boundary between the Parties' respective maritime zones. The boundary line agreed by the Parties to this treaty was and still is "the parallel at the point at which the land frontier of the States concerned reaches the sea"[10].

2.4. As Professor Crawford will explain later this afternoon, the Minutes of the Legal Affairs Commission charged with drafting the Santiago Declaration, the 1952 Minutes, confirm that Article IV established an all-purpose maritime boundary. Those Minutes record the agreement of the three countries that the Santiago Declaration was, to "be drafted on the basis that the boundary line of the jurisdictional zone of each country be the respective parallel from the point at which the frontier of the countries touches or reaches the sea"[11].

2.5. Two years later, the Parties explicitly reaffirmed their understanding that the Santiago Declaration established the maritime boundaries between Peru and its neighbours, in the Minutes of their trilateral conference, the 1954 Minutes[12], and in the Agreement relating to a Special Maritime Frontier Zone. The Parties entered into the Agreement relating to a Special Maritime Frontier Zone on the basis of their pre-existing maritime boundary. This was made clear in the title, in the recitals and in the first operative article.

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[7]MP, Vol. II, Ann. 27 and *ibid.*, Ann. 6.

[8]*Ibid.*, Art. 3.

[9]RC, Vol. III, Ann. 78, p. 1.

[10]MP, Vol. II, Ann. 47, Art. IV.

[11]*Ibid.*, Ann. 56, p. 2.

[12]CMC, Vol. II, Ann. 38.

2.6. Finally, in 1968 and 1969, the Parties concluded agreements to signal the parallel that constitutes the maritime boundary.

2.7. Mr. President, Members of the Court, the interpretation that the Santiago Declaration effected a maritime delimitation between Chile and Peru and between Peru and Ecuador has been shared by Ecuador since 1952. As Professor Dupuy will explain tomorrow, the 2011 Exchange of Notes between Peru and Ecuador only serves to confirm this historical interpretation of the 1952 Declaration. Peru refers to this strikingly recent Exchange of Notes between it and Ecuador in an attempt to improve its position in this case between Peru and Chile. Peru claims that the Exchange of Notes establishes for the first time a maritime boundary between Peru and Ecuador. There is no new boundary here. The 2011 parallel is exactly the same as the maritime boundary agreed in the Santiago Declaration and the Agreement Relating to a Special Maritime Frontier Zone.

3. Subsequent practice and implementation of the maritime boundary

3.1. Mr. President, Peru and Chile have enjoyed peaceful and quiet possession on either side of the agreed boundary parallel for 60 years.

3.2. Chile has submitted abundant evidence to the Court showing the use and respect of the boundary parallel for numerous purposes, ranging from the laying of submarine cables, to fisheries enforcement, to air space. Peru had ample opportunities to object to Chile's actions. Yet, it never did. To the contrary, it vigorously enforced its sovereign rights with repeated references to its maritime frontier[13].

3.3. Peru argues that it failed to object to repeated incursions into the alleged disputed area over the course of 60 years because this "was the least contentious option"[14], and Peru did not want to "provoke a confrontation with neighbouring States"[15]. These arguments only confirm the weakness of its case. Certainly, Peru's conduct was not that of a State whose resources were allegedly being exploited by its neighbour!

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[13]See CMC, paras. 3.90-3.92, 4.33-4.37; RC 1.31-1.35, 1.44, 3.51-3.55.

[14]RP, para. 4.44.

[15]*Ibid.*

3.4. At the domestic level, Peru's Supreme Resolution No. 23 of 12 January 1955, recognized that its maritime dominion "shall be limited at sea by a line parallel to the Peruvian coast"[16] and that this outer limit "may not extend beyond that of the corresponding parallel at the point where the frontier of Peru reaches the sea"[17]. It specifically referred to Article IV of the Santiago Declaration. In doing so, the Resolution clearly acknowledged that the Santiago Declaration delimited both of Peru's maritime boundaries.

3.5. As I mentioned earlier, a particularly important and explicit recognition of the maritime boundary came in 1968 and 1969, when Chile and Peru agreed to signal the precise course of their maritime boundary. In agreements concluded during this process, they identified the first boundary marker of their land boundary — known as Hito No. 1 — as the reference point for the parallel of latitude constituting their maritime boundary. They instructed a Mixed Commission "physically to give effect *[materializar]* to the parallel that passes through . . . Hito No. 1" in order to "signal the maritime boundary"[18].

3.6. The existence of a clear and stable boundary between Chile and Peru has allowed both States to develop their economies and to live together in peace for 60 years. Peru's fisheries industry is one of the largest in the world. Chile and Peru have co-operated on numerous issues, including mutually beneficial activities which were possible because there was no dispute over the maritime boundary between the two States. Both States acted in reliance on this boundary for half a century. So, too, have the people of Arica, located only a few kilometres from the common boundary.

4. Recognition of the agreed boundary at the international level

4.1. Mr. President, Members of the Court, the parties to the Santiago Declaration recognized the boundaries between them, and so too does the international community. Third States' and international organizations' official publications have done so on numerous occasions, as have States pleading before this distinguished Court. Peru did not object to these third-party positions.

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[16]MP, Vol. II, Ann. 9, first operative paragraph.

[17]*Ibid*, second operative paragraph.

[18]CMC, para. 1.36. See also CMC, Vol. II, Ann. 6.

4.2. It is well known that the use of parallels of latitude extending out to sea as maritime boundaries is part of the practice of Latin American States on the west coast of South America. Chile, Ecuador, Peru and Colombia divided their full 200-nautical-mile entitlements in the Pacific Ocean along parallels of latitude, as you see in the diagram on your screens.

4.3. A former President of this Court, His Excellency Eduardo Jiménez de Aréchaga, explained in a detailed report on South American maritime boundaries that the Santiago Declaration constituted a delimitation agreement between the three Parties. This is what he wrote in the series on maritime boundaries published by the American Society of International Law.

> "In 1952 the states that were party to the tripartite declaration were opening entirely new ground in the Law of the Sea by making their 200-nautical mile (n.m.) claims. In the absence at that time of known principles or agreed rules of delimitations, they chose the method of the parallel of latitude drawn from the point where the land frontier reaches the sea . . ."[19].

5. Peru's discontent with the existing maritime boundary

5.1. Peru is now evidently dissatisfied with the maritime boundary that it agreed with Chile in 1952. Peru's dissatisfaction is not a legitimate basis for unsettling a maritime boundary, especially one that has preserved peace and driven economic growth on both sides of the boundary for 60 years. In 1986, Peru attempted to invite Chile to discuss the existing maritime boundary by despatching Ambassador Bákula to Santiago because, in his view, the conclusion of the United Nations Convention on the Law of the Sea (UNCLOS) raised an immediate need to revisit the boundary[20].

5.2. Peru's invocation of UNCLOS was puzzling then and continues to be so now. The Santiago Declaration's terms accord with the modern law of the sea embodied in UNCLOS. Chile ratified UNCLOS and adapted its domestic legislation accordingly. Peru did neither. Peru argues that UNCLOS is a basis to alter and renegotiate an agreed maritime boundary, yet it is unwilling to ratify it.

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[19]CMC, Vol. V, Ann. 279, pp. 285-286.

[20]MP, Vol. III, Ann. 76.

5.3. Chile's response to Ambassador Bákula's invitation was simple: Chile politely acknowledged receipt of Peru's Note[21]. Peru did not follow up on this démarche. Neither Chile nor Peru refrained from applying enforcement measures at the maritime boundary. Nothing changed in 1986 or thereafter. As I have mentioned, as late as 1999, the Peruvian Foreign Minister and Congress stated that all possible conflicts with Peru's neighbours had ended.

5.4. Given this reality, Peru resorts to irrelevancies in its attempts to unsettle the agreed maritime boundary. It spent 55 pages of its Reply and a good portion of its oral presentation contriving a non-existent dispute over the location of the land boundary terminus to distract the Court from the task at hand. There is much that can be said on this topic, but I limit myself to three dispositive observations.

— First, the land boundary was fully delimited and demarcated by agreement in 1929 and 1930, and Hito No. 1 is its most seaward determined point.

— Second, Hito No. 1 is the agreed reference point for the parallel of latitude that constitutes the maritime boundary.

— Third, Peru cannot seise this Court of any matter concerning the delimitation or demarcation of the land boundary, as this is a matter "already settled by arrangement between the parties" in the sense of Article VI of the Pact of Bogotá. All outstanding land boundary issues were settled in 1929, when Peru and Chile concluded the Treaty of Lima. This treaty remains in full force and effect.

6. All-purpose maritime boundary: Peru's alternative claim

6.1. Mr. President, Members of the Court, together with its claim for maritime delimitation, Peru asks the Court as a second claim, to adjudge and declare that "[b]eyond the point where the common maritime border ends, Peru is entitled to exercise sovereign rights over a maritime area lying out to a distance of 200 nautical miles from its baselines"[22]. Peru calls this area "the outer triangle"; Chile calls it the "alta mar".

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[21]MP, Vol. III, Ann. 109, para. 2.

[22]MP, p. 275.

6.2. Peru characterized this claim as being "independent and complementary"[23] to its first submission. The Court will have no difficulty recognizing it as an alternative claim, as Peru itself did on Tuesday. It arises only upon the Court's confirmation of the agreed 200-nautical-mile boundary along the parallel of latitude.

6.3. Peru argues that it is entitled to enjoy exclusive sovereign rights over this area, which has always been treated as high seas by Chile, Peru and the international community. As Mr. Colson will explain tomorrow, the Santiago Declaration established a complete and comprehensive maritime boundary. No areas remained to be delimited. No claims remained to be resolved. The parties agreed that Chile could not extend its jurisdiction to the north of the boundary parallel, and that Peru could not extend its jurisdiction to the south of the same parallel. The parties are bound by the Santiago Declaration.

7. Conclusion

7.1. Mr. President, Members of the Court, in conclusion, it is Chile's position that:

1. the maritime zones of Chile and Peru have been fully delimited by agreement;
2. the maritime boundary between Chile and Peru is "the parallel at the point at which the land frontier of the States concerned reaches the sea";
3. that is the parallel of Hito No. 1 with a latitude of 18° 21' 00" S in the WGS84 Datum; and
4. Peru has no entitlement to any maritime zone south of that parallel.

7.2. Mr. President, Chile's presentation today continues with Professor Dupuy, who will address the legal character of the Santiago Declaration. Next, Mr. Colson will clarify Peru's confusing account of the *tracé* parallel. Then Professor Crawford will explain the key agreements establishing and confirming the maritime boundary.

7.3. Je vous remercie, Monsieur le président, Mesdames et Messieurs les juges, de votre attention. Je vous prie, Monsieur le président, de bien vouloir donner la parole au professeur Dupuy.

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[23] RP, para. 6.6.

LE PRESIDENT : Merci, Monsieur l'ambassadeur. Je donne la parole au professeur Dupuy. Vous avez la parole, Monsieur.

M. DUPUY :

LA NATURE JURIDIQUE DE LA DÉCLARATION DE SANTIAGO

1. Monsieur le président, Mesdames et Messieurs les juges, c'est toujours un honneur et un plaisir de plaider devant vous et je suis particulièrement reconnaissant à la République du Chili de pouvoir le faire aujourd'hui en son nom.

2. Le premier tour des plaidoiries du Pérou nous a confirmé, mais était-ce bien nécessaire, tout le talent de ses avocats et conseils, et leur grande aptitude à estomper les aspérités du dossier difficile qu'il leur était demandé de défendre. Sans comporter de réelles nouveautés par rapport aux thèses défendues dans les écritures péruviennes, ce premier tour a néanmoins apporté son lot de surprises, petites ou grandes, aussi relatives soient-elles. Il a pu notamment paraître étonnant que M[e] Bundy souligne l'inexistence de frontières maritimes dont il avait pourtant pris soin de noter l'importance dans l'excellent ouvrage intitulé «Maritime Boundaries», au chapitre dont le titre est «State Practice in Maritime Delimitation».

[Projection.]

3. On trouve dans cet ouvrage de référence non seulement la mention mais la représentation cartographique des frontières dont il dit bien lui-même qu'elles ont été opérées par voie d'accord entre le Chili et le Pérou ainsi qu'entre le Pérou et l'Equateur.

[Projection.]

4. Toutefois, un tel exemple, pris parmi bien d'autres, semblerait presque anecdotique par rapport à l'accentuation radicale d'une tendance jusque-là manifestée avec beaucoup plus de prudence dans les écritures péruviennes. Celle qui consiste, toute honte bue, à ne plus vraiment remettre en cause le fait que la déclaration de Santiago soit bel et bien un traité, comportant des dispositions authentiquement normatives dont certaines manifestent qu'elles portent également sur la délimitation des frontières maritimes. Certes, le mémoire et la réplique péruviens nous avaient déjà mis en présence du malaise manifestement ressenti par le Pérou lorsqu'il abordait la question, pourtant absolument fondamentale, de la nature juridique propre à la déclaration de Santiago. On

avait ainsi assisté aux glissements progressifs de la sémantique péruvienne dont vous trouverez la liste, au demeurant incomplète, à l'onglet n° 31 de votre dossier. Je n'en donnerai ici que quelques exemples. Au début de son mémoire, le ton est encore radical : «The Declaration was conceived ... not as a treaty but as a proclamation of the international maritime policy of the three States.»[24]

5. Très vite pourtant, le Pérou introduit l'idée que cette nature non conventionnelle aurait évolué avec le temps. Toujours dans son mémoire, il poursuit en disant de la même déclaration qu'elle avait été «*initially* conceived as a soft law instrument»[25], which «acquired the status of a treaty»[26]. Se ravisant tout aussitôt après, comme si elle prenait conscience du péril que cette reconnaissance pourrait faire courir à ses propres thèses, la réplique péruvienne revient d'abord à la thèse initiale selon laquelle la déclaration n'était qu'un «provisional declarative instrument»[27] ou bien encore «a purely political instrument»[28], dont elle consent tout de même à admettre qu'elle en vint à être «treated as though it were a treaty»[29] !

6. Alors on a retrouvé cette valse d'hésitations péruviennes au début de la semaine, mais l'amplitude des pas de tango jusque-là effectués s'est radicalement réduite jusqu'à ne plus vraiment remettre en cause la réalité conventionnelle de la déclaration, au point que j'ai dû modifier le texte de la plaidoirie que j'avais moi-même préparée, ce qui, je dois le confesser, Monsieur le président, est toujours pénible pour un plaideur !

7. Certes, on retrouve dans les propos de mon éminent collègue le professeur Vaughan Lowe la prudence bien tempérée des premiers jours. Il nous disait mardi dernier que la déclaration était tout au plus «an initial step, a manifesto. It is not a self-executing agreement»[30], ce qui était déjà pourtant, fût-ce de façon involontaire, une façon de reconnaître que c'était bien «an agreement».

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[24] MP, par. 4.70.

[25] *Ibid.*, par. 4.81.

[26] *Ibid.*, par. 4.70 (les italiques sont de nous).

[27] RP, par. 6.

[28] *Ibid.*, par. 3.144.

[29] *Ibid.*

[30] CR 2012/28, p. 24, par. 57 (Lowe).

8. Cependant, bien vite, nos distingués contradicteurs n'ont pas pu faire autrement que de s'appuyer sur la déclaration de Santiago ; ceci, pour défendre précisément la conception qu'ils se font des droits dont ils reconnaissent ainsi qu'ils trouvent leur fondement dans ce même instrument. C'est, en particulier, ce qu'il advint à mon ami le professeur Pellet lorsqu'il lui a fallu, mardi après-midi, s'aventurer dans la haute mer du «triangle extérieur» ! Il vous disait ainsi, en s'appuyant sur le texte de la déclaration, que «le Pérou est fondé à revendiquer l'exercice de sa juridiction et de ses droits souverains sur le triangle extérieur à la fois en vertu même du point II de la déclaration et indépendamment de celle-ci»[31]. Point II dont il disait un peu plus loin qu'il «accorde les mêmes droits aux trois partenaires»[32]. Le professeur Pellet s'appuyait par ailleurs tout aussi bien sur le point IV pour constater qu'il désigne «le parallèle passant par le point où aboutit en mer la frontière terrestre des Etats en cause»[33].

9. Dans ces conditions, Mesdames et Messieurs les juges, est-il encore nécessaire pour moi de relever l'ensemble des preuves du caractère conventionnel, c'est-à-dire juridiquement liant des dispositions que comporte la déclaration de Santiago ?

10. Ce qui m'incite à répondre positivement, en dépit de l'atténuation très sensible des thèses péruviennes sur ce point, c'est que le Pérou, malgré la mise en œuvre d'un prudent repli stratégique, n'a pas pour autant totalement éliminé la dualité de ses thèses à l'égard de la déclaration, tantôt perçue comme proclamation politique, tantôt utilisée comme fondement juridique de ses prétentions. C'est aussi parce que la discussion de la *nature* juridique de la déclaration est le plus souvent menée par le Pérou à l'occasion de l'analyse de son *objet*, dont ses conseils ont continué à répéter qu'il ne pouvait concerner la délimitation maritime. Je m'en tiendrai quoi qu'il en soit à l'essentiel, en vous rappelant d'abord que l'intention des trois Etats parties était bien que la déclaration soit un traité ; ensuite, que la conduite subséquente des parties a bel et bien confirmé cette intention initiale.

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[31] CR 2012/29, p. 51, par. 19 (Pellet)

[32] *Ibid.*, p. 53, par. 24 (Pellet).

[33] *Ibid.*, p. 53, par. 23 (Pellet).

I. LA DÉCLARATION DE SANTIAGO A TOUJOURS ÉTÉ UN TRAITÉ COMPORTANT DES DISPOSITIONS RELATIVES À LA DÉLIMITATION

11. La jurisprudence de la Cour destinée à déterminer la nature juridique, conventionnelle ou non, d'un acte juridique est caractérisée par sa grande constance. On peut l'énoncer en deux principes au demeurant bien connus : en premier lieu, la forme et, en particulier, l'intitulé de l'acte sont sans pertinence sur sa nature juridique ; en second lieu, ce qui, en revanche, est déterminant c'est l'intention des Parties, telle qu'exprimée par le texte et le contexte de l'instrument en cause.

A. L'indifférence de l'intitulé et de la forme de la déclaration de Santiago au regard du droit international

12. J'irai très vite sur ce point, Mesdames et Messieurs de la Cour, tant il semble désormais admis par la Partie adverse. En droit international, l'intitulé d'un instrument tel que choisi par les parties n'affecte en aucune manière sa qualification. Comme l'a dit notamment la Cour dans l'affaire du *Sud-Ouest africain*, lors de l'examen des exceptions préliminaires :

> «La terminologie n'est pas un élément déterminant quant au caractère d'un accord ou d'un engagement international. Dans la pratique des Etats et des organisations internationales, comme dans la jurisprudence des tribunaux internationaux, on trouve des usages très variés.» (*Sud-Ouest africain (Ethiopie c. Afrique du Sud ; Libéria c. Afrique du Sud), exceptions préliminaires, arrêt, C.I.J. Recueil 1962,* p. 331.)

Cette évidence est constamment reprise par la jurisprudence internationale inspirée par votre haute juridiction[34].

13. Au demeurant, les exemples abondent d'instruments s'intitulant «déclarations» et dont la qualification de «traité» ne fait pourtant aucun doute. La Cour permanente de Justice internationale l'avait d'ailleurs reconnu en 1931 déjà dans son avis consultatif sur le *Régime douanier entre l'Allemagne et l'Autriche* lorsqu'elle déclarait : «Au point de vue du caractère obligatoire des engagements internationaux, on sait que ceux-ci peuvent être pris sous forme de traités, de conventions, de déclarations, d'accords, de protocoles ou de notes échangées.» (*Régime douanier entre l'Allemagne et l'Autriche, avis consultatif, 1931, C.P.J.I. série A/B n° 41*, p. 47.)

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[34] Voir *Différend relatif à la délimitation de la frontière maritime entre le Bangladesh et le Myanmar dans le golfe du Bengale (Bangladesh/Myanmar)*, TIDM., arrêt du 14 mars 2012, par. 89 : «In the view of the tribunal, what is important is not the form or designation of an instrument but its legal nature and content.»

14. Plus près de nous, dans l'affaire relative à la *Frontière terrestre et maritime entre le Cameroun et le Nigeria*, votre haute juridiction avait de même affirmé à propos d'accords de délimitation :

> «La Cour estime que la déclaration de Maroua constitue un accord international conclu par écrit entre Etats et traçant une frontière ; elle est donc régie par le droit international et constitue un traité au sens de la convention de Vienne sur le droit des traités.»[35] (*Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria; Guinée équatoriale (intervenant)), arrêt, C.I.J. Recueil 2002*, par. 263.)

15. C'est, du reste, ce que le Pérou est bien obligé de reconnaître lui-même dans sa réplique[36]. Alors, quoi qu'il en soit, les observations dépréciatives à l'égard du texte de la déclaration faites mardi matin par le professeur Lowe, lorsqu'il croyait encore pouvoir s'appuyer sur le fait que la déclaration ne comporte pas d'articles intitulés comme tels[37], m'amènent à souligner ici les similitudes existant entre la déclaration de Maroua précitée et celle de Santiago. Dans chacune des deux déclarations, les signataires ne sont pas formellement désignés comme «parties» ; de plus, les différentes dispositions de la déclaration de Maroua, pas plus que celles de Santiago, ne sont précédées du terme «article» suivi d'un numéro[38].

16. On pourrait au demeurant citer bien d'autres exemples d'accords de délimitation maritime pourtant intitulés «déclaration», telle, par exemple, la «déclaration entre la France et Monaco concernant la délimitation des eaux territoriales de la Principauté de Monaco», conclue et entrée en vigueur le 20 avril 1967 et, consécutivement enregistrée par le Secrétaire général et publiée au *Recueil des traités* des Nations Unies[39].

17. S'agissant des traités de délimitation, nulle condition particulière de forme n'est par ailleurs requise, dès lors que l'instrument traduit clairement l'intention des parties de déterminer le tracé de la frontière. Peu importe si les attributs qui, selon le Pérou, sont «généralement employés»

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[35] C'est d'ailleurs aussi la thèse de la doctrine et de la jurisprudence citées par le Pérou : A. Aust, *Modern Treaty Law and Practice*, p. 17 (cité dans PR, par. 3.153) et *Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn), compétence et recevabilité, arrêt, C.I.J. Recueil 1994*, p. 120, par. 23.

[36] RP, par. 3.153 et note de bas de page n° 291.

[37] CR 2012/28, p. 23, par. 52 (Lowe).

[38] DC, vol. II, annexe 5.

[39] *Recueil des traités* des Nations Unies, vol. 1516, p. 131.

dans les traités de délimitation sont absents ou non de la déclaration de Santiago[40]. Ainsi, dans votre arrêt relatif à l'affaire *Libye/Tchad*, la Cour déclarait-elle :

> «Les parties auraient pu indiquer les frontières en en précisant littéralement le tracé ou en portant celui-ci sur une carte, à titre d'illustration ou à tout autre titre ; elles auraient pu faire l'un et l'autre. Elles ont décidé de procéder différemment, et de dresser d'un commun accord la liste des actes internationaux dont résultaient les frontières, mais la méthode qu'elles ont choisie ne suscite aucune difficulté d'interprétation ... Le texte de l'article 3 traduit clairement l'intention des parties d'assurer un règlement définitif de la question de leurs frontières communes.» (*Différend territorial (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994*, p. 25, par. 51.)

18. Dans l'affaire du *Temple de Préah Vihéar*, la Cour avait auparavant reconnu qu'une référence générale suffisait à démontrer l'intention commune des parties de délimiter une frontière : «La mention de la ligne de partage des eaux à l'article I[er] de la convention de 1904 n'était en soi rien de plus qu'une façon évidente et commode de décrire la frontière objectivement quoiqu'en termes généraux.»[41]

B. Les circonstances de l'adoption de la déclaration de Santiago confirment l'intention des Parties de conclure un traité régi par le droit international

19. Si l'on aborde alors les circonstances de l'adoption de la déclaration de Santiago, on voit qu'elle confirme l'intention des Parties de conclure un traité régi par le droit international. L'objet principal de la déclaration de Santiago était d'affirmer à la fois politiquement et juridiquement vis-à-vis des autres Etats l'extension par trois Etats signataires de leur «souveraineté et juridiction», pour employer l'expression retenue à l'article II, jusqu'à 200 milles nautiques de leurs côtes respectives. Le Pérou a beaucoup insisté là-dessus lors de ses récentes plaidoiries, mais de façon bien inutile car cela n'a jamais été contesté par le Chili. Quoi qu'il en soit, cette ferme prise de position trilatérale, d'abord destinée à la sauvegarde de leurs ressources naturelles, les deux Etats parties sont également d'accord là-dessus, constituait à l'époque une nouveauté, une innovation. Et cette innovation était suffisante pour justifier l'emploi solennel du terme «déclaration» adressée au reste de la communauté internationale. Pour autant, cette démarche collective en impliquait immédiatement une autre, déjà préparée dans l'ordre interne par les proclamations unilatérales

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[40] MP, par. 4.81.

[41] *Temple de Préah Vihéar (Cambodge c. Thaïlande), fond, arrêt, C.I.J. Recueil 1962*, p. 35.

adoptées dès 1947 par le Chili et le Pérou : celle d'établir entre eux et à l'égard des tiers les limites latérales de leurs frontières maritimes respectives afin que chacun des trois pays concernés sache à l'intérieur de quel espace il serait ainsi amené à exercer sa juridiction pour contribuer à la réalisation d'un objectif commun.

20. Comme ils devaient le réaffirmer les uns et les autres deux ans plus tard, lors de la conférence de Lima ayant conduit à la conclusion de la convention sur la zone frontalière maritime spéciale, l'intention du Chili, de l'Equateur et du Pérou, dès 1952, avait bel et bien été de conclure un traité (et un traité de délimitation maritime) régi par le droit international et imposant des obligations à la charge de chacune des parties.

21. Le fait que la déclaration, négociée par trois délégations comprenant leurs conseillers juridiques respectifs, était destinée à établir des droits et des obligations, ainsi que l'a finalement reconnu mardi après-midi mon ami Alain Pellet, ressort clairement du texte de cet instrument. Ainsi, vous le trouvez à l'onglet n° 32 de votre dossier, l'invitation à la conférence de 1952 envoyée par le Chili à l'Equateur décrit-elle l'un des objectifs de cette conférence dans les termes suivants (vous trouverez la traduction successivement en français et en anglais du texte espagnol) : [projection] «1. Mar Territorial. Legalización de las declaraciones de los Presidentes de Chile y Perú, en cuanto a la soberanía sobre 200 millas de aguas continentales.»[42]

22. L'emploi du terme «Legalización» désigne bien la volonté de créer un nouvel ensemble d'obligations juridiques entre les parties, ce qui, dans l'ordre international, se fait par voie de traité. De la même manière, aux termes du point ou article II de la déclaration, les parties s'obligent comme on vient de le rappeler à porter leur zone maritime à 200 milles nautiques. Il me paraît quoi qu'il en soit inutile d'insister outre mesure sur le caractère délibérément normatif des dispositions de la déclaration après la reconnaissance dont cet élément a fait l'objet dans les plaidoiries péruviennes de lundi et mardi dernier, en particulier pour ce qui concerne, on l'a déjà rappelé, les points II et IV. Notons simplement que la rédaction du point III, notamment, ne laisse pas davantage place au doute à cet égard quant à l'intention des parties de constituer des obligations juridiques liantes dans cet instrument. Ainsi de l'article 3, figurant à l'onglet n° 5 de votre dossier,

[42] CMC, vol. III, annexe 59, p. 487.

qui dispose [projection] : «La juridiction et la souveraineté exclusives sur la zone maritime indiquée entraînent également souveraineté et juridiction exclusives sur le sol et le sous-sol de ladite zone.»

23. Ces termes, Monsieur le président, Mesdames et Messieurs les juges, sont précis ; ils se suffisent à eux-mêmes ; ils créent des droits et obligations à la charge de chacune des Parties. Et encore une fois lorsqu'à l'occasion il s'y trouve amené, le Pérou reconnaît lui-même le caractère contraignant de l'une au moins de ses dispositions, mais pas seulement, en particulier l'article IV[43]. Il est vrai que, à propos de la délimitation que cet article IV effectue, M[e] Bundy nous disait qu'elle n'avait pas été établie en 1952, mais par l'échange de notes du 2 mai 2011[44]. Nous n'avons pas le temps ici de nous appesantir sur cette incohérence des thèses adverses.

24. Alors, avec tout le respect dû à un Etat souverain comme à ses défenseurs, nous nous permettrons de constater qu'il faudrait que le Pérou finisse par choisir la thèse qu'il défend ! Il ne peut pas dire, à la fois, que la déclaration n'est pas un traité et en même temps qu'elle crée bien des obligations bilatérales entre lui et le Chili, lorsqu'il s'agit du «triangle extérieur», ou entre lui et l'Equateur, lorsqu'il s'agit du tracé de la ligne de la délimitation maritime ! Et s'il fallait le croire, la déclaration de Santiago serait une sorte d'étrange acte mixte, sans portée juridique obligatoire mais comportant à l'occasion une dimension conventionnelle. Sorte de chimère à multiples faces, en quelque sorte, ou plutôt, acte dont la portée juridique serait à géométrie variable, et que le Pérou pourrait invoquer, selon qu'il le désire, sous la forme tantôt déclaratoire tantôt conventionnelle. Il faut pourtant choisir !

25. Quoi qu'il en soit, le caractère contraignant des dispositions de la déclaration de Santiago n'est nullement restreint aux articles que nous avons déjà cités.

26. On pourrait citer, par exemple, le point VI, lequel énonce en termes clairs une très classique *obligatio de contrahendo*[45] destinée à la conclusion d'accords en vue de définir le régime

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[43] Voir RP, par. 3.71 et 3.81.

[44] CR 2012/29, p. 13, par. 55 (Bundy).

[45] «Los Gobiernos de Chile, Ecuador y Perú expresan su propósito de suscribir acuerdos o convenciones para la aplicación de los principios indicados en esta Declaración en los cuales se establecerán normas generales destinadas a reglamentar y proteger la caza y la pesca dentro de la zona marítima que les corresponde, y a regular y coordinar la explotación y aprovechamiento de cualquier otro género de productor o riquezas naturales existentes en dichas aguas y que sean de interés común.»

de protection de la chasse et de la pêche, de même que l'exploitation des ressources naturelles à l'intérieur des zones maritimes établies dans la déclaration. Cette obligation a dû reste été scrupuleusement respectée par les Parties, et ce, dès 1954[46]. On constate ainsi que se trouve parfaitement satisfait le critère de l'intentionnalité clairement défini par votre jurisprudence pour l'identification de la nature conventionnelle d'un instrument multilatéral.

27. On observera du reste que, dans le préambule de la convention de 1954, elle-même qualifiée de complémentaire, dois-je y insister, les trois Etats prendront soin de rappeler qu'ils avaient déjà proclamé leur souveraineté sur les mers baignant leurs côtes jusqu'à une distance de 200 milles nautiques.

28. Or, il ne faisait pas de doute, aussi bien pour le Pérou que pour le Chili et l'Equateur, que cette proclamation résultait bien d'un traité, la déclaration de Santiago ; puisque, aussi bien la convention complémentaire que la convention sur la zone frontalière maritime spéciale mentionnent, selon leurs propres termes, «los acuerdos de Santiago», le principal d'entre eux étant précisément la déclaration. C'est en application de cet accord initial que ces conventions ont elles-mêmes été conclues. Au demeurant, et j'en viens au second point de cette plaidoirie, la pratique subséquente des parties à ce traité ne fait que confirmer que la conviction des trois Etats était d'avoir conclu un accord dès la déclaration, affirmée comme texte fondateur de leur engagement.

II. La pratique subséquente des Etats parties à la déclaration de Santiago confirme que celle-ci a toujours été un traité

29. Les actes ultérieurs des Etats parties à la déclaration confirment que les parties ont toujours considéré qu'elle était un traité international *ab initio*, c'est-à-dire dès l'adoption de cet instrument, en août 1952, selon le critère retenu par la Cour dans l'affaire du *Plateau continental de la mer Egée*[47].

30. Dans sa plaidoirie de mardi matin, le professeur Lowe suggérait qu'aucun document contemporain ne pouvait indiquer que les Etats avaient conclu un accord de délimitation. Ceci est inexact, et la pratique subséquente dont il s'agit ici est en particulier avérée par trois séries de

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[46] Voir, par exemple, MP, vol. II, annexe 51, p. 282.

[47] *Plateau continental de la mer Egée (Grèce c. Turquie), arrêt, C.I.J. Recueil 1978*, par. 106.

manifestations concordantes. Ce sont, respectivement, les initiatives prises, dans son ordre interne, par chacun des trois Etats pour ratifier la série des instruments adoptés le 18 août 1952 dont le premier et le plus solennel est précisément la déclaration de Santiago ; la seconde manifestation de la conviction des trois pays cosignataires selon laquelle la déclaration était un instrument conventionnel est constituée par l'enregistrement de la déclaration auprès des Nations Unies. Enfin, les prises de position respectives des trois pays, sur lesquelles mes collègues comme moi auront l'occasion de revenir ultérieurement, confirment bien, si besoin en était, que pour chacun d'entre eux, y compris le Pérou pendant plus de cinquante ans, pour ce qui le concerne, la déclaration de Santiago était un traité.

A. Les procédures de ratification de la déclaration adoptées dans son ordre interne par chacun des trois Etats

[Projection.]

31. Vous les trouverez sous l'onglet n° 33. C'est le Pérou qui ouvre la marche, si j'ose dire : le premier des trois, il adopte le 11 avril 1953, soit moins d'un an après l'adoption de la déclaration, une «résolution suprême» signée par le président de la République indiquant explicitement qu'elle «approuve» [«aprueba»] la déclaration sur la zone maritime signée à Santiago du Chili le 18 août 1952, instrument dont elle prend soin d'indiquer antérieurement qu'il contient, je traduis littéralement, «des dispositions et compromis qui rentrent dans les attributions du pouvoir exécutif, conformément à l'article 154, alinéa 8, de la Constitution de l'Etat»[48]. Cette reconnaissance du caractère conventionnel de la déclaration précède ainsi sa réitération par la «résolution suprême» du 12 janvier 1955, adoptée par le ministère des affaires étrangères du Pérou, dans laquelle l'existence des lignes de parallèles géographiques est spécifiquement mentionnée comme frontières maritimes entre les trois pays[49] et sur laquelle le commentaire de M. García Sayán, ministre des affaires étrangères de l'époque, apporte les plus utiles informations[50]. Plus tard, la «résolution législative» n° 12305 adoptée par le Congrès prendra acte

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[48] «Tratándose de una Declaración que comprende disposiciones y compromisos que se encuentran dentro de las atribuciones que corresponden al Poder Ejecutivo, conforme el inciso octavo del artículo 154 de la Constitución del Estado.» CMC, vol. IV, annexe 161, p. 974.

[49] *Ibid.*, annexe 170, p. 1024.

[50] *Ibid.*, vol. V, annexe 266, p. 1585.

de l'approbation des accords de Santiago antérieurement effectuée par le président de la République en vertu de la Constitution[51].

[Projection.]

32. On trouve ensuite, sous l'onglet n° 34, en date du 23 septembre 1954, le «décret suprême» n° 432 cette fois adopté par le président de la République du Chili, et portant approbation, nous dit son titre, des «déclarations et conventions entre le Chili, le Pérou et l'Equateur, convenues lors de la première conférence sur l'exploitation et la conservation des richesses maritimes du Pacifique Sud»[52]. Ce décret intervient au terme d'une procédure classique de ratification de ces divers instruments conventionnels ; son dernier paragraphe indique précisément qu'ils ont été «aprobados por el Congreso Nacional», c'est-à-dire approuvés par le Congrès.

[Projection.]

33. Vient enfin, troisième, l'Equateur. Quant à lui, c'est par le biais du décret n° 25 du 7 février 1955 que le président de la République de l'Equateur ratifie aux termes exacts de l'article premier, je traduis littéralement, «les instruments internationaux souscrits à Santiago, le 18 août 1952». Vous l'avez sous les yeux.

34. Il est ainsi très frappant, Monsieur le président, de constater que, dans les trois Etats, la procédure de ratification achevée par l'adoption d'un décret présidentiel vise toujours l'ensemble des instruments adoptés le même jour à Santiago dont le plus important est toujours la «Declaración sobre zona maritima», restée dans l'histoire sous le nom de «déclaration de Santiago», ainsi considérée au même titre que les autres actes juridiques concernés comme un traité international.

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[51] MP, vol. II, annexe 10, p. 42.

[52] «aprueba las declaraciones y convenios entre Chili, Perú y Ecuador, concertados en la primera conferencia sobre explotación y conservación de las riquezas marítimas del Pacífico Sur». MP, vol. II, annexe 30, p. 146.

B. La procédure d'enregistrement de la déclaration de Santiago auprès des Nations Unies confirme que la déclaration est un traité

35. Le Chili, le Pérou et l'Equateur ont, de manière conjointe, procédé à cet enregistrement par lettre envoyée auprès des Nations Unies le 3 décembre 1973[53]. Il est vrai que cet enregistrement est bien embarrassant pour le Pérou. Alors il dit dans sa réplique :

> «[P]rimary reason for registration may well have been a desire further to enhance the political weight of the Declaration in the context of the hard-fought negotiations on the 200-nautical-mile maritime zone at UNCLOS III.»[54]

36. Cependant, outre le fait que cette interprétation embarrassée cadre mal avec le récit que le professeur Treves nous faisait l'autre jour de l'attitude péruvienne à la troisième conférence, on voit mal pourquoi une déclaration politique ferait l'objet d'une procédure réservée à l'enregistrement des traités ! Toujours est-il que cette demande d'enregistrement concernait en tout douze instruments adoptés dans le cadre de la commission du Pacifique Sud entre 1952 et 1967 et, en réponse à la demande du Secrétaire général des Nations Unies de lui faire parvenir davantage d'informations s'agissant de certains traités dont l'enregistrement était demandé, une déclaration officielle fut émise par chacun des trois Etats parties à ces instruments : dans une déclaration adressée aux Nations Unies, le Chili confirma en 1971 que la déclaration de Santiago est entrée en vigueur au jour de sa signature[55]. Quant au Pérou, par l'entremise de son représentant permanent auprès des Nations Unies, dans une lettre envoyée au Secrétaire général des Nations Unies en 1976[56], c'est-à-dire au cœur de la troisième conférence des Nations Unies sur le droit de la mer (1977), il déclara que les trois Etats concernés s'étaient mis d'accord, lors de la treizième réunion ordinaire de la commission précitée pour l'enregistrement de ces instruments tripartites auprès des Nations Unies. Cela ne peut que se comprendre implicitement comme l'admission de la nature conventionnelle de la déclaration.

[Projection.]

37. En conséquence, le Secrétaire général procéda à l'enregistrement de la déclaration en tant que traité au sens de l'article 102 de la Charte. Le *Recueil des traités* des Nations Unies précise

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[53] CMC, vol. III, annexe 83, p. 597.

[54] RP, par. 3.168.

[55] RC, vol. II, annexe 52, p. 307.

[56] *Ibid.*, annexe 29, p. 157.

d'ailleurs que cet instrument était entré en vigueur au jour de sa signature[57]. Or, il est tout à fait remarquable de constater que le demandeur dans la présente affaire n'a, ni avant le commencement de cette affaire ni depuis, émis de protestation à l'encontre de cet enregistrement ni de la mention ajoutée par le Secrétaire général des Nations Unies. Nous ne reviendrons pas ici sur la mise en cause par le Pérou de l'efficacité de cet enregistrement en raison de la date à laquelle il est intervenu. Est-il besoin de rappeler ici votre jurisprudence selon laquelle l'enregistrement tardif est «sans conséquence sur la validité même de l'accord, qui n'en lie pas moins les parties». (*Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn), compétence et recevabilité, arrêt, C.I.J. Recueil 1994*, p. 122, p. 29.)

B. La déclaration de Santiago apparaît comme une source d'obligations dans les déclarations du Pérou et du Chili dès son adoption

1. Déclarations du Pérou et du Chili

38. Dans le cadre de la ratification par le Parlement péruvien de la déclaration de Santiago, M. Peña Prado, l'un des membres du comité des affaires étrangères du Parlement péruvien décrit les objectifs des conférences de 1952 et de 1954 comme étant «d'établir les limites maritimes entre les pays signataires»[58]. Ceci démontre bien que le comité des affaires étrangères du Pérou considérait que la déclaration de Santiago était un traité et qu'il avait délimité les frontières maritimes[59].

39. En 1958, dans sa déclaration du 13 mars, à la première conférence des Nations Unies sur le droit de la mer, M. Enrique García Sayán, toujours lui, ancien ministre des affaires étrangères du Pérou, parle au nom de sa délégation de la déclaration de Santiago comme d'un instrument de «droit positif» : «The *instruments of positive law* which stated Peru's position were the decree of 1 August 1947 and *the pact with Chile and Ecuador, referred to as the Santiago Declaration, signed in 1952.*»[60]

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[57] MP, vol. II, annexe 47, p. 261.

[58] CMC, vol. I, annexe 246, p. 1469.

[59] RC, par. 2.74 et suiv.

[60] MP, vol. III, annexe 101, p. 602 (les italiques sont de nous).

40. La retranscription de cette intervention dans la revue péruvienne *Revista Peruana de Derecho Internacional* va tout à fait dans le même sens ; elle confirme que la déclaration de Santiago est un «traité international avec force contraignante pour les Parties»[61].

41. De la même manière, les déclarations du Chili au lendemain de l'adoption de la déclaration confirment l'identité d'interprétation de son statut par les trois pays : ainsi, du ministre chilien des affaires étrangères lors de la session d'inauguration de la réunion de la CPPS en 1954 qui, on le verra, non sans un certain talent prophétique, affirmait :

> «Nous avons pleine confiance dans le fait que petit à petit, l'expression juridique que nos trois pays ont formulée dans l'accord de 52 ira en s'amplifiant jusqu'à être reconnue par tous les gouvernements désireux de préserver pour l'humanité les richesses aujourd'hui détruites par l'exercice anarchique d'exploitations individuelles ...»[62]

2. La déclaration de Santiago a été invoquée par le Chili, l'Equateur et le Pérou dans le cadre de leurs négociations avec les Etats-Unis

42. Les trois Etats parties à la déclaration ont invoqué celle-ci dans le cadre du différend qui les opposait aux Etats-Unis s'agissant des revendications maritimes des Etats du Pacifique Sud. Il ressort de ces déclarations que les trois Etats se sentaient liés en vertu de la déclaration de Santiago. Ainsi, en 1963, face à une protestation des Etats-Unis à propos de la saisine par le Pérou de navires battant pavillon américain, le Pérou invoque-t-il ses obligations internationales en vertu de la déclaration de Santiago : «Furthermore [Peru is] *bound by its international obligations under the 1952 Santiago Declaration* and other acts undertaken with Chile and Ecuador.»[63]

43. Comment, dès lors, ayant par le passé invoqué la déclaration de Santiago en tant que traité comme source d'obligations internationales, le Pérou pourrait-il aujourd'hui légitimement nier le caractère conventionnel de la déclaration dès son adoption ? C'est l'une des nombreuses questions qu'il faut ici lui poser. Mais ça n'est pas la seule !

44. On pourrait lui demander la réponse à d'autres interrogations : par exemple, si le Pérou allègue dans son mémoire que la déclaration de Santiago n'était pas, au jour de sa conclusion, un traité régi par le droit international, comment prétend-il par ailleurs que celle-ci est ensuite *devenue*

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[61] RC, vol. II, annexe 14, p. 81.

[62] CMC, vol. II, annexe 35, p. 302 (les italiques sont de nous).

[63] RC, vol. II, annexe 18, p. 100 (les italiques sont de nous).

un «traité»[64] ? Par la ratification, nous dit le Pérou. Tiens, tiens, la ratification ? Mais, comment un pur acte de droit interne, reconnu comme tel par le demandeur en cette affaire[65], peut-il transformer la nature juridique initiale d'un instrument qui n'aurait pas été conçu par ses cosignataires comme étant un traité à moins de reconnaître, précisément, qu'il intervient au terme de la procédure destinée à provoquer, dans l'ordre international, l'entrée en vigueur de cet instrument conventionnel[66] ?

45. Il faut dire qu'à cet égard, j'y ai déjà insisté, le Pérou manifeste beaucoup d'hésitations. Il affirme que la déclaration n'est pas devenue un «traité» au sens du droit international, mais — nous dit-il — un traité «in domestic political terms». Voilà qui est très nouveau et imaginatif !

> ««Ratification» by Congress may have given the Declaration of Santiago «the status of a treaty in domestic political terms». But such domestic approval did not, in and of itself, directly affect the status of the instrument as a matter of international law.»[67]

46. A l'appui d'une si étrange proposition, le Pérou ne se risque au demeurant à citer aucune jurisprudence, ni aucune pratique. A supposer que la déclaration de Santiago soit bien un traité «in domestic political terms», pourquoi figure-t-elle alors dans le *Recueil des traités* des Nations Unies ? Alors le Pérou répond — nous l'avons vu — que la déclaration «came to be treated as a treaty»[68], ce qui n'est décidément pas très rigoureux, car si elle a été traitée comme un traité, c'est tout simplement qu'elle en était un ! Enfin, si le Pérou allègue que la déclaration de Santiago ne répond à aucune des exigences de formalités qu'il croit requises, il reconnaît tout de même que «the form of an instrument is not in itself conclusive»[69].

47. Décidément, Monsieur le président, je me suis demandé s'il existerait à présent une sorte d'école surréaliste du droit international peuplée de traités dans l'ordre interne mais pas international comme il existe des montres molles dans les tableaux de Salvador Dali ? C'est là l'ultime interrogation qui clôturera cette plaidoirie. Je vous remercie pour votre patience et votre

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[64] MP, par. 4.70.

[65] RP, par. 3.161 : «the three participating States submitted the Declaration to their respective Congresses for *domestic* ratification». (Les italiques sont de nous.)

[66] CMC, par. 2.63.

[67] RP, par. 3.161.

[68] *Ibid.*, par. 3.144.

[69] *Ibid.*, par. 3.153 et note de bas de page n° 291.

attention et je vous demande, Monsieur le président, de bien vouloir passer la parole à M. David Colson.

The PRESIDENT: Merci, Monsieur le professeur. Now I give the floor to Mr. David Colson. You have the floor, Sir.

Mr. COLSON: Thank you, Mr. President, Members of the Court. It is an honour to be here before the Court today on behalf of the Republic of Chile.

1. The technique of trace parallel

1.1. On several occasions earlier this week, particularly in the presentations by Professor Lowe and Sir Michael Wood, the technical methodology for determining the outer limit of a distance-based zone, and its relationship to the outer limit of such a zone was, to be generous, incomplete. Before Chile asks you to call upon Professor Crawford to elaborate upon the delimitation agreement of the Parties, it seems important to clarify two points about the trace parallel method: how it works, and why it is important to understand it in this case. I will speak about Peru's arguments tomorrow about the arcs-of-circles method, but for now, with your indulgence, we will make a very short presentation about the trace parallel method. We do so with respect: we have no intention of lecturing the Court on this point.

1.2. Chile explored this subject in detail in an appendix to its Rejoinder, as an annex to its Rejoinder[70], and Sir Michael Wood referred to that document as "learned"[71], but he went on then to say it was partial, apparently because the appendix did not address developments subsequent to 1952. However, the purpose of the appendix was simply to explore this question as it stood on the date of the Santiago Declaration.

1.3. On the screen is a drawing of a simple coastline. Imagine that the coastal State claims a 200-nautical-mile zone and uses the trace parallel technique to determine the outer limit. The outer limit will be the blue line; it perfectly replicates all the contours of the coastline — in this case 200 nautical miles seaward of the coastline.

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[70]See RC, App. A.

[71]CR 2012/27, p. 66, para. 33 (Wood).

1.4. Aside from the tracing of the coastline, there is one other thing that needs to be said about the trace parallel technique. On the diagram, one sees that the coastline runs vertically, and that the 200-nautical-mile outer limit also runs perfectly parallel to it and on the same vertical plane. This seems obvious, but there is something important that has not been said. The way the outer limit is traced, so as to run parallel to the coastline, is done by lines of reference, or as Sir Michael Wood called them "geometric construction lines"[72], and which we now show. In this diagram, the lines of reference, or to use his phrase — the geometric construction lines — run as horizontal lines to the vertical, or perpendicular, if you wish, to the vertical coastline shown on the diagram. However, if the geometric construction lines had a different geometric basis, for instance 15° south of the horizontal, the outer limit would still be a perfect tracing of the coastline, it would still be determined by the tracing of a parallel line to the coastline, but it would be offset by 15° southward relative to the coastline. The point is that the orientation of the geometric construction lines relative to the coastline is the key factor in the trace parallel technique.

1.5. How would this work if State A and State B shared the coast as now shown on the diagram, and both used trace parallel to determine the outer limit and used lines running horizontal to the vertical as the geometric construction lines? The zone of State A is now shown in purple. Now the zone of State B is shown in green. We can see that the zones do not overlap; they abut on a line corresponding to where the land boundary meets the coast shown in red; the outer limits of the two zones as determined by the trace parallel technique meet perfectly; and if State A were to expand its claim, the zone of State A would extend seaward and not infringe on maritime areas seaward of the zone of State B.

1.6. But what if both States use trace parallel, but the geometric construction lines used are different? Imagine that State A uses geometric construction lines that are offset 15° southward relative to the vertical, but State B's geometric construction lines are horizontal lines. The zone of State A would be as shown. There would be an obvious overlap with the zone of State B. The overlapping area would only grow with expanded claims. The Court can imagine the attendant consequences that would arise in such a situation. Thus we can conclude that, if the geometric

[72]CR 2012/27, p. 64, para. 27 (Wood).

construction lines used by two neighbouring States are the same, and the application of the trace parallel method and the breadth of their zones is the same, there is not going to be a problem; if the geometric construction lines are different, there will be[73].

2. The use of trace parallel by Peru and Chile

2.1. Peru admits at paragraphs 3.31 and following of the Reply, and Professor Lowe[74] and Sir Michael Wood[75] confirmed earlier this week, that in 1947 Peru used trace parallel to determine the outer limit of its claim and that it used the geographic parallel as the geometric construction lines. Since both Chile and Peru as neighbouring States proceeded on the same basis and used the same geometric construction lines — that is parallels of latitude — to apply the trace parallel technique to determine the outer limit of their zones, this had four important consequences:

(i) First, it was not possible for there to be any overlap between Chile and Peru's 200-nautical-mile zones as then claimed.

(ii) Second, the respective zones abutted along the parallel of latitude of the land boundary terminus — in other words the geographic limit between the 200-nautical-mile zones of Chile and Peru was the latitude of the land boundary terminus.

(iii) Third, the outer limits of both Chile and Peru's zones were aligned and they met at sea, 200 nautical miles from the land boundary terminus and on its parallel.

(iv) Fourth, it also meant that if either Chile or Peru, or both, extended their zone for a distance greater than 200 nautical miles, as they had reserved the right to do in their 1947 proclamations, those extended zones would be directed seaward and would not extend onto the other side of the land boundary parallel terminus.

Thank you, Mr. President, Members of the Court. I thank you for your attention. I ask that you call upon Professor Crawford to begin his presentation.

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[73]This demonstration may be found at tab 38 of the judges' folders.

[74]See CR 2012/28, p. 13, para. 6 (Lowe).

[75]See CR 2012/27, p. 64, para. 27 (Wood).

The PRESIDENT: Thank you, Mr. Colson. I think at this moment, both Members of the Court and members of the teams will enjoy either coffee or tea, so I declare a pause of 15 minutes. The sitting is suspended.

The Court adjourned from 4.20 to 4.35 p.m.

The PRESIDENT: Please be seated. The hearing is resumed and I give the floor to Professor Crawford. You have the floor, Sir.

Mr. CRAWFORD:

1. Introduction

1.1. Mr. President, Members of the Court, it is an honour to appear before you on behalf of the Republic of Chile. Peru instituted these proceedings to ask you to delimit its maritime boundary with Chile. But there is a problem with that request, for Peru and Chile already have a maritime boundary. They delimited it by agreement in the Santiago Declaration and on various subsequent occasions they jointly acknowledged that they had done so.

1.2. As we have seen, Peru's case that the Santiago Declaration is not a treaty at all has largely fallen by the wayside, and all the emphasis this week has been placed on its second line of attack — that the Declaration did not determine a boundary. As Professor Lowe put it on Tuesday, "Nothing in the Declaration refers to maritime boundaries."[76] Nothing, nothing. In so far as anyone from Peru's team could steel themselves to refer to the 1954 Agreement Relating to a Special *Maritime Frontier* Zone, the title of which does rather speak for itself, this was to downgrade it to "a practical arrangement, of a technical nature, and of limited geographical scope"[77]. It is true, it was limited, it was limited to the *frontier zone*. But according to Peru there is no frontier zone because there is no frontier. So much for the title and content of treaties!

1.3. I note in passing that, in its written pleadings, Peru also had a third line of argument, which is that, if there was an agreed delimitation in 1952, it concerned Peru and Ecuador only. We

[76]CR 2012/28, p. 23, para. 53 (Lowe).

[77]*Ibid.*, p. 29, para. 11 (Wood).

have heard no more on that, and as I take you to the key agreements, you will readily see why. So, from three arguments we are down to one.

1.4. The simple point I will be making here is that there was indeed an agreement on delimitation in 1952, that agreement falls to be respected, as the parties intended at the time, and as today follows both as a matter of customary international law[78], and also pursuant to the 1982 Convention.

1.5. Mr. President, Members of the Court, I am afraid that this is going to be a plodding, mechanical sort of exercise, going through the treaties and minutes in a chronological fashion, if fashion is the right word for this sort of lawyering. I can only apologize for my pedantry in insisting on the texts and try and help you through the documentation in an orderly way. In the binder before you, you will see that we have included the core texts, which I will be taking you to consecutively — unlike Peru we do not read history backwards. I have deliberately asked for complete translations of key documents to be before you, as this is a case that will turn on the careful study of a relatively small core of documents, the Court is not going to be greatly assisted by a series of short extracts being flashed up, flashily, on the screen. So, have you your dossiers in front of you?

2. The 1947 proclamations

2.1. I start by way of important background with the unilateral Proclamations of 1947.

2.2. The first of these two was issued in June 1947 by the President of Chile. The second was issued a month later, jointly by the President and Foreign Minister of Peru. Each State's proclamation declared that State's "sovereignty" over the sea and continental shelf within 200 nautical miles.

2.3. Chile's 1947 Proclamation is at tab 1 of your folders. I will be referring to page numbers in bold at the foot of each page, which have been superimposed over the originals.

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[78] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Judgment of 19 November 2012, paras. 137-139.

2.4. You will see that in the highlighted text on page 6 Chile "proclaims its national sovereignty over all the continental shelf"[79]. In Article 2 Chile "proclaims its national sovereignty over the seas adjacent to its coasts"[80].

2.5. Chile reserved the right to alter in the future the area over which this proclamation was to have effect. But in Article 3, Chile declared its maritime zone to be established "immediately over all the seas contained within the perimeter formed by the coast and the mathematical parallel projected into the sea at a distance of 200 nautical miles from the coasts of Chilean territory"[81]. It is clear from the context that "mathematical parallel" was another way of saying *tracé parallèle*, and that Chile conceived its maritime zone as having a "perimeter", as befits a zone of sovereignty.

2.6. On Monday, Sir Michael Wood wished to explore the domestic legal status of Chile's 1947 Declaration[82]. There is no need to spend time on that point because all that matters is that it was an international claim, with immediate international effect and was understood internationally as such. Chile's Ambassador in Lima accordingly informed Peru's Foreign Minister, Dr. García Sayán, of Chile's Declaration[83].

2.7. Peru issued its own unilateral proclamation just one week later, and also acknowledged receipt of Chile's Declaration[84].

2.8. We now move to tab 2 of your binders, where you find Peru's 1947 declaration. As Chile had just done, in Article 1 Peru declared "national sovereignty and jurisdiction"[85] over the continental shelf. In Article 2 Peru proclaimed that: "National sovereignty and jurisdiction are exercised as well over the sea adjoining the shores of national territory."[86] Again following Chile, in Article 3 Peru indicated that the limits of its claim could be changed in the future. At the same time, Peru actually claimed — and you will see this highlighted at the top of page 5 — "the area covered between the coast and an imaginary parallel line to it at a distance of two hundred (200)

[79]MP, Vol. II, Ann. 27, p. 136, Art. 1.

[80]*Ibid.*, Art. 2.

[81]*Ibid.*, Art. 3.

[82]CR 2012/27, p. 62, para. 16 (Wood).

[83]CMC, Vol. III, Ann. 52.

[84]*Ibid.*, Ann. 54.

[85]MP, Vol. II, Ann. 6, p. 26, Art. 1.

[86]*Ibid.*, Art. 2.

nautical miles measured following the line of the geographic parallels"[87]. Those last eight words are particularly relevant: "measured following the line of the geographic parallels".

2.9. Peru's declared method of projection determined both the outer limit and the lateral limits of its maritime zone. Indeed, the Parties agree about how this method of projection worked. Peru's Memorial explains that

> "at each point on the coast a line 200-mile[s] long would be drawn seaward along the geographical line of latitude, so that there would be a 'mirror' coastline parallel to the real coastline — the real coastline would in effect be transposed 200 miles offshore and form the outer edge of the 200-mile zone"[88].

2.10. Peru's Supreme Decree declared sovereignty over the area *"covered between"* the coast and that imaginary line. Peru specified how the imaginary line was projected from the coast. Each point was projected 200 miles to sea along the geographic parallel on which it lay.

2.11. Obviously the southernmost point on Peru's coastline is the point at which its land boundary with Chile reaches the sea. Peru's 1947 Decree used a method of projection by which the parallel of latitude passing through that point and running out 200 nautical miles to sea constituted the southern limit of Peru's maritime projection.

2.12. As you see from its conclusion, Peru's 1947 Supreme Decree was issued by President Bustamante y Rivero, a man who needs no introduction before this Court over which he presided, and by its Foreign Minister García Sayán. Just a week earlier the latter had received notification of the equivalent proclamation of Chile.

2.13. With this clearly identified method of projection — "measured following the line of the geographic parallels" — Peru's Ambassador to Chile delivered the Supreme Decree to the Chilean Minister of Foreign Affairs. Chile acknowledged receipt[89].

2.14. Just as Peru had made no objection to Chile's Presidential Proclamation, Chile made no objection to Peru's method of projection or any other aspect of its Decree.

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[87]MP, Vol. II Ann. 6, p. 27, Art. 3.

[88]MP, para. 4.58.

[89]CMC, Vol. III, Ann. 55.

2.15. On Monday, Sir Michael raised the question whether the unilateral proclamations created international *obligations*[90]. That question is beside the point. They are relevant because they were international *claims*.

2.16. The method of maritime projection used by the two States in 1947 created a situation in which the maritime zones claimed by Chile and Peru abutted perfectly. There was no overlap between them. The line at which they abutted was the parallel of latitude of the point where their land boundary reached the sea. You can see this now on the screens.

(a) In the first frame there is the Peruvian coast accompanied by the northernmost and southernmost parallels of latitude that pass through it.

(b) In the next frame each point on the Peruvian coast is marked, and of course that results in the solid blue line along the Peruvian coastline.

(c) Then, in the next frame each point on the coastline is projected 200 miles to sea along the parallel of latitude. The outer limit is the "imaginary parallel line" specified in Article 3 of Peru's Supreme Decree.

(d) The next frame shows that the method of projection used to create the outer limits also created the northern and southern lateral limits of the zone. These are the lines marked in red.

(e) The final frame, tab 40, adds the *tracé parallèle* of Chile's coast, Chile having also used that method for the outer limit of its maritime zone in Article 3 of its Declaration.

2.17. On Monday, Sir Michael stressed that this Peruvian Presidential Decree did not create a maritime boundary[91]. That is correct, but it also misses the point. The method of projection used in the Supreme Decree meant that Peru simply had no maritime claim south of the parallel of latitude of the point where its land boundary reached the sea.

2.18. The unilateral proclamations of 1947 meant that boundary delimitation between the two was uncontroversial in 1952. It is not possible to imagine circumstances in which boundary delimitation could be less controversial than where the maritime zones claimed by two adjacent States abut perfectly and do not overlap — a situation that the Court would no doubt like to see more of.

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[90]CR 2012/27, pp. 59-60, para. 11 (Wood).

[91]*Ibid.*, e.g. p. 64, para. 27 (Wood).

2.19. The position was also straightforward at the northern extremity of Peru's maritime zone, where it met Ecuador's. At tab 20 you will see a diplomatic memorandum of 1969 from Argentina asking Ecuador to inform it of "the antecedents that served as the basis for the countries of the South Pacific to adopt, in demarcating their respective territorial seas, the geographic parallels as boundary lines"[92].

2.20. In tab 21, you will see the reply of Ecuador's Ministry of Foreign Affairs to Argentina. This referred to Peru's unilateral proclamation of 1947 as one of the "antecedents" of the boundaries in the region. Ecuador recalled that Peru's proclamation identified an outer limit "following the line of the geographic parallels". Ecuador explained the use of geographic parallels as follows: "for each point of the coast, starting at that at which the northern frontier of Peru reaches the sea and ending at that at which its southern frontier reaches the sea, corresponds another one located on the same latitude at two hundred miles from the coast"[93]. This is precisely what you have seen in illustrated form and precisely the same as the explanation given by Peru in its Memorial[94]. Peru, Chile and Ecuador all agreed on how this method worked — and nothing you have heard from Peru this week contradicts that.

2.21. In its response to Argentina, Ecuador indicated that it had "concurred in the adoption of such criterion" in "the conventions of the South Pacific"[95]. The conventions of the South Pacific to which it referred were the Santiago Declaration and the 1954 Agreements, including the Agreement Relating to a Special Maritime Frontier Zone. Ecuador observed that this method of delimitation established, "both the outer maritime limit and the international maritime frontier [as] lines of easy and simple recognition"[96]. And yet Professor Lowe says that nothing, nothing in these treaties, "refers to maritime boundaries"[97].

2.22. Peru now contends that the parallel of latitude was used only as a fisheries limit and only close to the shore because it was easy for artisanal fishermen with limited navigational

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[92]RC, Vol. II, Ann. 21, p. 113.

[93]*Ibid.*, Ann. 22, p. 117.

[94]MP, para 4.58.

[95]RC, Vol. II, Ann. 22, p. 117.

[96]*Ibid.*, pp. 117 and 119.

[97]CR 2012/28, p. 23, para. 53 (Lowe).

abilities to locate such a simple boundary. But it is obvious that in 1947 the use of parallels of latitude as lines in the sea had nothing to do with itinerant, artisanal fishermen. It concerned sovereignty to 200 nautical miles projected along parallels of latitude.

2.23. Mr. President, Members of the Court, the unilateral claims of sovereignty that Chile and Peru made in 1947 were concordant. Each State communicated its claim to the other. Neither objected to the other's claim. These unilateral claims to sovereignty were then agreed, and delimited, in the Santiago Declaration of 1952.

3. The 1952 Santiago Declaration

3.1. You will find the Santiago Declaration at tab 5.

3.2. The first relevant provision is Article II, at page 5. In it, the three States agreed amongst themselves that they "each possess exclusive sovereignty and jurisdiction over the sea along the coasts of their respective countries to a minimum distance of 200 nautical miles from these coasts"[98]. The parties agreed that *each* of them possessed *exclusive* sovereignty over those zones.

3.3. In Article III, the parties agreed that their "exclusive jurisdiction and sovereignty over this maritime zone shall also encompass exclusive sovereignty and jurisdiction over the sea-bed and the subsoil thereof"[99] — not a provision you would expect in an agreement dealing with fisheries. The parties agreed between themselves, and asserted against the rest of the world, that each of them had a *comprehensive* as well as *"exclusive"* maritime entitlement.

3.4. The comprehensive character of these maritime claims makes it abundantly clear that these assertions about the Parties having nothing more than a temporary and informal — even hesitant and provisional — line for limited functional purposes is untrue. They were aware of the magnitude of what they were doing, and that it would arouse opposition. But that only emphasized the importance of presenting a united front. In Articles II and III of the Declaration, the parties made plenary claims of sovereignty and jurisdiction to 200 nautical miles from their coasts. And they meant it, as witness Peru's arrests of the Onassis whaling fleet 110 miles offshore in 1954[100]. This was a once-in-a-lifetime opportunity to protect their offshore fisheries and whaleries — I am

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[98]MP, Vol. II, Ann. 47, p. 261, Art. II.

[99]*Ibid.*, Art. III.

[100]CR 2012/28, p. 35, para. 38 (Wood); CMC, Vol. IV, Ann. 163, p. 983.

told that "whalery" is not a word, but it is now — from a post-War resurgence of powerful distant water fishing interests. And they did it, not by making, à la Trèves, diffident diplomatic démarches but by asserting zones of exclusive sovereignty with *perimeters*.

3.5. I should add that Professor Lowe's attempts to play down the importance of the Declaration is not only belied by its objects and by the contemporaneous events, but also by the way the three States themselves saw matters, as witnessed not least by their joint affirmation at the closure of the Third Law of the Sea Conference, to which Professor Treves helpfully took you on Tuesday[101]. There, together with Colombia, they stated their wish — and I quote

> "to point out that the universal recognition of the rights of sovereignty and jurisdiction of the coastal State within the 200-mile limit provided for in the draft Convention is a fundamental achievement of the countries members of the Permanent Commission of the South Pacific, in accordance with the basic objectives stated in the Santiago Declaration of 1952"[102].

And, in a passage you were not taken to, the affirmation continues to describe how the Permanent Commission "has the merit of having been the first to denounce the unjust practices existing in the maritime spaces and of having proposed appropriate legal solutions, thereby contributing to the development of the new law of the sea"[103]. In Professor Lowe's eyes, the 1952 Conference may have had no more than a "limited, scientific purpose"[104], but that is not how the States that actually participated saw matters.

3.6. Chile agrees entirely that whales and fish were the most important resources at the time of the Declaration. Fisheries still are vital. But the regulatory authority that the three States exerted over those resources was only one attribute of the sovereignty they claimed, and claimed out to 200 miles.

3.7. On Monday, Peru relied on its Petroleum Law promulgated in March 1952 to assert that by the time of the Santiago Declaration it was using a different method of maritime projection from the one it used in 1947[105]. David Colson will come back to that in due course; for the moment I just want to make the simple point that, through its Petroleum Law, Peru exercised jurisdiction over

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[101]CR 2012/28, p. 47, para. 9 (Treves).

[102]MP, Vol. III, Ann. 108, p. 632.

[103]*Ibid.*

[104]CR 2012/28, p. 18, para. 32 (Lowe).

[105]CR 2012/27, pp. 65-67, paras. 30-34 (Wood).

all hydrocarbons in its continental shelf to a distance of 200 nautical miles from the coast. And now, Peru asks the Court to find that, five months later, its international maritime claim was concerned "only" with fish and whales.

3.8. In short, in Articles II and III of the Declaration, the parties were acting together to give multilateral support to the *comprehensive* maritime claims they had each already each made unilaterally in 1947.

3.9. In Article IV of the Declaration, the parties delimited these comprehensive claims. Of course, you have heard many times this week — the chorus of counsel opposite — that the Article is only about islands but, on the correct interpretation, a boundary was agreed in Article IV and this, as you see from the last highlighted passage on page 5 of tab 5, was "the parallel at the point at which the land frontier of the States concerned reaches the sea". Professor Lowe read Article IV and I will not read it again, but I will analyse it[106].

3.10. Article IV refers to the maritime zone generated by the frontal projection of a State's continental coast as its "general" maritime zone. That is a zone of sovereignty, not a figment of construction lines. It has a perimeter. As we know from the exchange of unilateral proclamations, there is no overlap between the general maritime zones produced by the frontal projection of the continental coastlines of Chile and Peru.

3.11. In the first sentence of Article IV the three States agreed that all of their islands enjoyed a 200-nautical-mile radial projection. That created overlap between the "general" maritime zone resulting from the frontal projection of the continental coastline and the radial projection of any island belonging to an adjacent State that lay within 200 nautical miles of that general maritime zone.

3.12. That brings us to the second sentence of Article IV, which requires the parties to be able to determine if an island "is situated less than 200 nautical miles from the general maritime zone belonging to another of those countries".

3.13. Peru's present position — that the general maritime zones have never been delimited — would deprive the second sentence of Article IV of any meaning or effect.

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[106]MP, Vol. II, Ann. 47, Art. IV, p. 261.

Professor Lowe acknowledged on Tuesday that Article IV applies to islands "situated less than 200 nautical miles from the general maritime zone belonging to another of those countries"[107]. He added that: "If that situation occurs", then the insular zone shall be limited by the parallel[108]. But if the general zones are not delimited, then it would be impossible to know "if that situation occurs". It would be impossible to know if an island is within 200 nautical miles of the general maritime zone of the neighbouring State.

3.14. Under Peru's interpretation, Article IV would therefore not apply to any island at all. But of course treaty provisions must be given effect. That is part of the principle of effectiveness you articulated in the *Libya/Chad* case[109]. Since the meaning that Peru proposes would deprive the second sentence of Article IV of any effect at all, the principle of effective interpretation precludes it.

3.15. The ordinary meaning of Article IV, interpreted in good faith and by reference to its context, does grant it an effect. It was possible to know if an island was within 200 miles of an adjacent State's general maritime zone, because the general maritime zones of each pair of adjacent States were delimited by "the parallel at the point at which the land frontier of the States concerned reaches the sea".

3.16. How issues of overlap between the insular maritime zones and the general maritime zones of the adjacent State was resolved is quite simple. The parties agreed on the lateral delimitation of their general maritime zones. This was an agreement easily reached because — at least as between Chile and Peru — of the events of 1947. The delimitation in 1952 did not depend on the presence of islands that followed "the parallel at the point at which the land frontier of the States concerned reaches the sea". Those words came last in the text of Article IV, but as a matter of logic the maritime boundary that they created came first.

3.17. If an island was not within 200 nautical miles of the maritime boundary, it would have a full 200-nautical-mile radial projection. That is the effect of the first sentence of Article IV. If it

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[107]CR 2012/28, p. 14, para. 13 (Lowe).

[108]*Ibid.*

[109]*Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994,* pp. 23-24, para. 47.

was within 200 nautical miles of the general maritime boundary, then its radial projection was truncated by that boundary. That is the effect of the second sentence of Article IV.

3.18. Insular projections needed special attention, because it was only they that created the overlap. But the attention that they received was that they were truncated by the same maritime boundary that was agreed to apply as between the general maritime zones of adjacent States. With the benefit of hindsight no doubt it could have been better formulated. But the intention of the parties is evident, and that is what matters.

3.19. An illustration using actual islands within 200 nautical miles of the Peru-Chile maritime boundary demonstrates how this works.

(a) The first frame is our canvas, showing the maritime boundary.

(b) Isla Blanca is a Peruvian island, not a rock, as Professor Lowe anachronistically likes to portray it[110]; it has a surface area of 15 hectares. It is within 200 nautical miles of Peru's maritime boundary with Chile.

(c) If it had a full 200-nautical-mile radial projection, its maritime zone would look like this.

(d) The effect of the second sentence of Article IV is that the insular maritime zone is truncated at the maritime boundary, and so actually looks like this, a maritime boundary which is apparently non-existent.

(e) The same applies to the Chilean island of Alacrán, which is 8 hectares in area, off the coast of Arica, less than 8 nautical miles from the maritime boundary.

(f) The first sentence of Article IV would give it a radial projection like this.

(g) Obviously that would be unacceptable. Hence the second sentence truncates the zone at the maritime boundary — according to Peru non-existent — like this. Today Alacrán is now joined by causeway to the city of Arica, but there was no causeway in 1952, nor in 1968 when Peru depicted it as an island on the official Peruvian nautical chart of which you can see an extract in this diagram. The "I" stands for Isla, there is no "F" for Feature, as Professor Lowe would have us believe[111]. Peru labelled this *Isla Alacrán.*

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[110]CR 2012/28, pp. 21-22, para. 47 (Lowe).

[111]*Ibid.*, paras. 48 and 49 (Lowe).

3.20. Peru said on Monday[112], as it has said in its written pleadings, that Article IV applies only to Peru and Ecuador because of the presence of islands. But, as you have seen, there are also islands in the vicinity of the Chile-Peru maritime boundary. They are shown on historical Peruvian charts. But they are not acknowledged in any of Peru's written pleadings.

3.21. The presence of islands is in any event not the important point. The important point is that all maritime zones, general and insular, are delimited by the parallel of latitude at the point where the land frontier reaches the sea. That is the complete meaning of the second sentence of Article IV.

3.22. President Jiménez de Aréchaga — who was not nothing in international law — discussed the Santiago Declaration when he wrote the section on the Chile-Peru maritime boundary in Charney and Alexander's reference work *International Maritime Boundaries* (tab 25). He summarized the effects — this is in tab 25 of Article IV — as being "the general maritime zone of their countries shall be bounded by the parallel of latitude drawn from the point where the land frontier between the respective countries reaches the sea"[113].

3.23. Referring to Articles II and III, he characterized the boundary established in Article IV as "an all-purpose delimitation line"[114].

3.24. He went on to remark, it is true, that there "is some ambiguity in the wording of Article IV" because of the focus on the maritime zones of islands, and he concluded as follows:

> "That the maritime boundary is, in fact, constituted by a parallel of latitude from the mainland was *confirmed* [I stress, confirmed] by the parties in an agreement signed on 4 December 1954."[115]

I will come to that 1954 Agreement shortly.

3.25. On the next page you can see that President Jiménez de Aréchaga linked the maritime delimitation using the parallel of latitude to the method of maritime projection used by the States concerned. This is on page 3. It was the logical corollary of "the direct and linear projection of their land boundaries and land territories into the adjacent seas"[116].

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[112]CR 2012/27, p. 19, para. 11 (Wagner).

[113]CMC, Vol. V, Ann. 280, p. 1654.

[114]*Ibid.*

[115]*Ibid.*; emphasis added.

[116]*Ibid.*, p. 1655.

3.26. The ordinary meaning of Article IV, as I have analysed it, is also confirmed by reference to the Minutes of the Commission that drafted it. As part of the inter-State conference that met in Santiago in August 1952, there was a Legal Affairs Commission. It was in that Commission that the Declaration was drafted. The first draft was presented by Mr. Cruz Ocampo[117], Director of the Legal Office of the Chilean Ministry of Foreign Affairs.

3.27. The Commission met twice, on 11 and 12 August 1952. The Minutes, *Acta* in the original Spanish, were not merely preparatory works of the kind to which reference is optional under Article 32 of the Vienna Convention. They recorded agreements relating to the interpretation of the Santiago Declaration made in connection with its conclusion. Recourse to them as part of the context is mandatory under Article 31 (2) *(a)* of the Vienna Convention.

3.28. The Minutes of the first day are set out at tab 3. There is the text of the draft declaration as originally proposed.

3.29. That had three sentences — it was at the time, Article III.

3.30. The first, reproduced the *tracé parallèle* method of maritime projection used by both States in 1947. It said:

> "The zone indicated comprises all waters within the perimeter formed by the coasts of each country and a mathematical parallel projected into the sea to 200 nautical miles away from the mainland, along the coastal fringe."[118]

I stress the words "mathematical parallel".

3.31. The second sentence is the same as what ultimately became the first sentence of Article IV. It said:

> "In the case of island territories, the zone of 200 nautical miles will apply all around the island or group of islands."

3.32. The third sentence is the one from which the second sentence of Article IV, as finally agreed, was developed:

> "If an island or group of islands belonging to one of the countries making the declaration is situated less than 200 nautical miles from the general maritime zone belonging to another of those countries, according to what has been established in the first paragraph of this article, the maritime zone of the said island or group of islands

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[117]MP, Vol. II, Ann. 56, p. 318.

[118]*Ibid.*

shall be limited, in the corresponding part, to the distance that separates it from the maritime zone of the other State or country."

3.33. This draft text was not a model of clarity, but it did proceed, like the final text of Article IV, on the basis that the limits of the general maritime zone of each country were known, and that the radial projection of any island of an adjacent State would stop when it reached that general maritime zone.

3.34. The Ecuadorean delegate suggested that, and you see these words highlighted on the next page, "it would be advisable to provide more clarity to article 3, in order to avoid any error in the interpretation of the interference zone in the case of islands"[119].

3.35. Professor Lowe said "The purpose behind the redrafted point IV was 'to prevent any misinterpretation of the interference zone in the case of islands'. Full stop!"[120] Actually, points of punctuation are important and it is not a full stop, it is a comma: and after the comma comes an important passage in which the Ecuadorean delegate, Mr. Fernandez "suggested that the declaration be drafted on the basis the boundary line of the jurisdictional zone of *each country* be the respective parallel from the point at which the frontier of the countries touches or reaches the sea"[121]. Some full stop!

3.36. The translation submitted by Peru as Annex 56 to its Memorial did not include what happened next, but you will see it highlighted in the Spanish original and in the new translation which is at tab 3. The Minutes record that: "All the delegates were in agreement with that proposition."[122]

3.37. Thus, all three States agreed with the proposition that the Santiago Declaration "be drafted on the basis that the boundary line of the jurisdictional zone of each country be the respective parallel from the point at which the frontier of the countries touches or reaches the sea"[123]. How this translates into Professor Lowe's "not the faintest hint of any concern with international maritime boundaries"[124] is, to me at least, something of a puzzle.

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[119]MP, Vol. II, Ann. 56, p. 320.

[120]CR 2012/28, p. 20, para. 40 (Lowe).

[121]MP, Vol. II, Ann. 56, p. 320, emphasis added.

[122]*Ibid.*, p. 319.

[123]*Ibid.*, p. 320.

[124]CR 2012/28, p. 19, para. 35 (Lowe).

3.38. The Minutes also record that Chile and Peru agreed with Ecuador's proposal and that the President of the Legal Affairs Commission, Peru's delegate, assigned the task of redrafting the article to himself and Mr. Cruz Ocampo of Chile[125].

3.39. Now turn to the Minutes of the next day, which is tab 4: you see on page 5 the words that they added at the end of the last sentence of what became Article IV. Those words are "the parallel at the point at which the land frontier of the States concerned reaches the sea"[126].

3.40. That is what in the Minutes of the previous day had been agreed by all three States to constitute "the boundary line of the jurisdictional zone of each country"[127], "on the basis"[128] of which the Declaration was to be drafted.

3.41. On that basis all three States — acting in plenary — signed the Declaration. The Minutes confirm that the added phrase implemented their common intent to delimit the maritime boundaries in the way specified.

3.42. Throughout the written pleadings Peru ignored the agreement between the parties recorded in the 1952 Minutes. Silence was its tactic faced with this contemporaneous evidence of the agreed basis on which Article IV was drafted. That was also its tactic this week, and I would invite the Court to look back at tab 29 in Peru's second judges' folder, and see how the key wording is omitted from the translation there.

3.43. What you did hear much from Peru on Tuesday morning were about the invitations to the 1952 Conference and about its agenda. I have five brief observations to make on those topics.

3.44. First, Chile's invitation to Peru specifically suggested that each participating country include in its delegation a member versed in international law, given the repercussions that the agreements to be reached at the Conference would very probably have on matters of the kind covered in the declarations of 1947[129]. So international lawyers were required.

3.45. Second, Chile's invitation to Peru identified defence of the fishing industries and concern about international regulation of whaling as motives for the conference. But they were not

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[125]MP, Vol. II, Ann. 56, p. 319.

[126]CMC, Vol. II, Ann. 34, p. 293.

[127]MP, Vol. II, Ann. 56, p. 320.

[128]*Ibid.*

[129]*Ibid.*, Vol. III, Ann. 64, p. 382.

just gathering to talk about fish and whales. They were to study "the measures that should be adopted"[130]. That is why international lawyers were invited. *We* are operational.

3.46. Third, on Tuesday Peru sought to make something of the fact that the invitations to Peru and Ecuador were different. But Ecuador had not made a unilateral proclamation in 1947, and that was no doubt why the invitation sent to it was more detailed. It listed "Territorial Sea" as an agenda item. It referred to the "*legalization* of the declarations of the Presidents of Chile and Peru with respect to sovereignty over 200 miles of continental waters"[131]. Ecuador was being invited to join Peru and Chile to provide multilateral support, not by way of moral support or diplomatic support, but by way of legalization to the unilateral claims that Chile and Peru had already made. And the invitation to Ecuador specifically stated "the determination of the Territorial Sea is set out as one of the objectives of the meeting"[132]. Determination means delimitation. It was also used by Chile and Peru, for example, in Article 3 of the Treaty of Lima by which they delimited their land boundary[133].

3.47. Fourth, agendas and invitations are in any event of very limited relevance. What matters is what the States agreed when they met, and they agreed on boundary delimitation. The Court will no doubt have in its mind your predecessor's Advisory Opinion on *Employment of Women during the Night*[134], which unfortunately I do not have time to analyse, but the reference is in the transcript. Much more important than what any invitations did or did not say is what happened *after the Conference* — including the fact that after the delegates of the three States had signed the Declaration, all three Congresses later approved it. An unusual thing to do for a merely scientific conclave.

3.48. In a related line of argument, Peru contends that the Parties 60 years ago were "feeling their way in uncertain, uncharted waters . . ."[135] — this is some more diffidence. Much of what we

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[130]MP, Vol. III, Ann. 64, p. 382.

[131]CMC, Vol. III, Ann. 59, p. 487; emphasis added.

[132]*Ibid.*, pp. 484 and 485.

[133]MP, Vol. II, Ann. 45, pp. 228 and 236.

[134]*Interpretation of the Convention of 1919 concerning Employment of Women during the Night, Advisory Opinion, 1932, P.C.I.J. Series A/B, No. 50*, pp. 369, 376; and cf the dissent of Baron Rolin-Jaequemyns, Count Rostworowski, Judges Fromageot and Schücking, *ibid.*, p. 382.

[135]PR, para. 4.7.

heard at the beginning of the week was that they were not even thinking about maritime boundaries and so could not have delimited theirs by agreement. This is an attempt retrospectively to impute ignorance to people who knew what they were doing, and it is inconsistent not only with the text of the Declaration and the Minutes, but also with other contemporaneous circumstances.

3.49. First, the Truman Proclamation had already stated that in cases where the United States shared an entitlement to a continental shelf with an adjacent State, the boundary would be determined by agreement between the two States[136].

3.50. It bears emphasis that the Truman Proclamation was cited by both Chile[137] and Peru[138] in their respective proclamations of 1947. They can be assumed to have read it.

3.51. By the time of the Santiago Declaration, the International Law Commission (ILC) was already working on the law of the sea, including delimitation. In the ILC Judge Hudson had, in 1950, expressed the view that attempts to find a generally applicable means to delimit overlapping entitlements should be "set aside" because: "Custom and theory gave no enlightenment on the subject." He considered that the position was that "the States concerned must come to an agreement"[139].

3.52. In 1951 the ILC reported to the General Assembly that "boundaries should be fixed by agreement amongst the States concerned. It is not feasible to lay down any general rule which States should follow."[140] Now, of course, the position later evolved, but that is where things stood in 1952. Indeed, speaking at the Fourth International Conference of the Legal Profession in Madrid in July 1952 — they had conferences on the legal profession in 1952 — Gilbert Gidel considered that,

> "La difficulté de poser par avance les règles adéquates susceptibles de répondre à l'extrême diversité des situations de fait justifie la solution adoptée par la [Commission du droit international]."[141]

That is Gidel.

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[136]MP, Vol. III, Ann. 88.

[137]*Ibid.*, Vol. II, Ann. 27, p. 136, first recital.

[138]*Ibid.*, Ann. 6, p. 26, fifth recital.

[139]CMC, Vol. IV, Ann. 229, p. 1361, paras 39 and 42.

[140]*Ibid.*, Ann. 230, p. 1365.

[141]G. Gidel, *Le Plateau Continental, Fourth International Conference of the Legal Profession in Madrid, IBA, July 1952*, 1952, p. 17.

3.53. Sir Michael reminded you on Monday that the ILC's Committee of Experts did not convene until 1953[142]. The Committee explained the equidistance methodology. We must not read that history backwards. In Santiago in 1952, the delegates did not have either the Committee or Peru's counsel of today to explain to them their ignorance. Nor did they have the benefit of the judgments of this Court in *Romania* v. *Ukraine*. The only articulated rule in 1952 was that States shall delimit their maritime boundaries by agreement.

3.54. Mr. President, Members of the Court, that is actually *still* the primary rule: equitable solutions are not *jus cogens*, and depending on their situation, States may differ on equity, as the Court has had recent occasion to observe. Once agreed, it is a matter of "grave importance" that maritime boundaries be respected. It is not a question of going back 60 years and second guessing delegates in relation to what were their priorities at the time.

3.55. Conscious of the Truman Proclamation and of the work of the ILC concerning delimitation of maritime boundaries by agreement, that is precisely what Chile, Peru and Ecuador did in the Santiago Declaration. It was not nothing!

4. The 1954 complementary Convention

4.1. Under Article VI of the Santiago Declaration, the parties agreed that they would sign further agreements to establish general norms of regulation and protection within "the maritime zone belonging to them".

4.2. In October 1954, they held a meeting of the Permanent Commission of the South Pacific to prepare for that conference in order to reinforce the joint position taken in the Santiago Declaration.

4.3. It needed reinforcement. The extended maritime claims made trilaterally in the Santiago Declaration had been met with protests by maritime powers[143] including the United Kingdom[144], the United States[145], Norway[146], Sweden[147], Denmark[148] and the Netherlands[149].

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[142]CR 2012/27, p. 67, para. 34 (Wood).

[143]MP, Vol. III, Ann. 98, p. 580.

[144]CMC, Vol. III, Anns. 60 and 68.

[145]*Ibid.*, Ann. 62.

[146]*Ibid.*, Ann. 63.

[147]*Ibid.*, Ann. 64.

4.4. The month after the preparatory meeting of the Permanent Commission of the South Pacific, the Onassis whaling fleet announced that it was going to flout the claims of sovereignty made in the Santiago Declaration and it promptly, and very publicly, did so.

4.5. Peru's Navy used force to arrest a number of Onassis vessels, 110 nautical miles off the coast. The Harbour Master of Paita fined them US$3 million[150] — a substantial amount in those days, although these days it is a mere bagatelle — an amount that it is difficult to describe as "tentative". The fine was for "invading Peruvian jurisdictional waters without a permit"[151]. The Harbour Master relied on the Santiago Declaration and the Supreme Decree as bases for his decision[152]. The Onassis fleet was not arrested for transgressing construction lines!

4.6. At the beginning of the next month, December 1954, the three States met as planned at their inter-State conference in Lima to reinforce their joint position and agree on further co-operation. Those were the purposes of the Complementary Convention of 1954, which is at tab 9. Its full title is the "Complementary Convention to the Declaration of Sovereignty over the Maritime Zone of Two Hundred Miles".

4.7. The first recital, beginning at the foot of page 4 — at tab 9 — recalls that the three States had already "proclaimed their Sovereignty over the sea along the coasts of their respective countries, up to a minimum distance of two hundred nautical miles from the said coasts, including the corresponding soil and subsoil of said Maritime Zone"[153]. There are four salient points.

(a) First, and most obviously, the Complementary Convention acknowledged that the three States had already proclaimed their sovereignty over their maritime zones.

(b) Second, those claims were comprehensive. They were limited neither in time nor by any limitation to fisheries. They included the sea, the soil and the subsoil.

(c) Third, the existing claim applied to the "respective" coast of each country, indicating that each country claimed its own sovereign maritime zone.

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[148]CMC, Vol. III, Ann. 65.

[149]*Ibid.*, Ann. 66.

[150]*Ibid.*, Vol. IV, Ann. 163, p. 986.

[151]*Ibid.*, p. 987.

[152]*Ibid.*

[153]MP, Vol. II, Ann. 51, pp. 282-283, first recital.

(d) Fourth, Article 5 states that all of the provisions of the Complementary Convention "shall be deemed to be an integral and complementary part, and shall not [derogate from], the resolutions and agreements adopted"[154] in Santiago.

4.8. The Minutes relating to the Complementary Convention are also important, in that they record an important agreement about why boundary delimitation was *not* addressed in 1954. These are the Minutes that Sir Michael introduced on Tuesday, and he took Chile to task for the "very bold claim" — he might have said "imaginative claim" — that the Minutes show how the delegates in Commission I understood that an all-purpose maritime boundary had been established by Article IV of the Santiago Declaration[155].

4.9. You will find the Minutes for 2 December 1954 behind tab 6. They record that Ecuador's delegate to the 1954 conference, Mr. Salvador Lara, wished to include a provision in the Complementary Convention repeating what had already been agreed two years earlier in Santiago on the topic of maritime delimitation — this is page 10 of tab 6. Mr. Salvador Lara:

> "move[d] for the inclusion in this Convention of a complementary article clarifying the concept of the dividing line of the jurisdictional sea, which has already been expounded at the Conference of Santiago, but which would not be redundant to repeat herein" [156].

4.10. The 1954 Minutes record the joint response of the Peruvian and Chilean delegates.

4.11. Their joint position was that: "Article 4 of the Declaration of Santiago is already sufficiently clear and does not require a new exposition." [157]

4.12. The Chilean delegate involved was again Mr. Cruz Ocampo. He had drafted Article IV together with his Peruvian colleague.

4.13. The Ecuadorean delegate at the 1954 conference, who had not been in Santiago, persisted. The 1954 Minutes record that:

> "Since the Delegate of Ecuador insists on his belief that a declaration to that effect should be included in the 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

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[154]MP, Vol. II, Ann. 51, pp. 283-284, Art. 5.

[155]CR 2012/28, p. 33, para. 29 (Wood).

[156]CMC, Vol. II, Ann. 38, p. 341.

[157]*Ibid.*

new article, that a record is kept in the Minutes of his speech."[158] [It is something that Chairmen often do, "we'll put your speech in the minutes and someone will read it one day".]

4.14. The Ecuadorean delegate was not having any of it. He gave a detailed response:

> "The Delegate of Ecuador states that if the other countries consider that no explicit record is necessary in the Convention, he agrees to record in the Minutes that the three countries consider the matter on the dividing line of the jurisdictional waters resolved and that said line is the parallel starting at the point at which the land frontier between both countries reaches the sea."[159]

4.15. Immediately following this statement, the Peruvian delegate, Naval Commander Llosa, expressed "his agreement with doing that, but clarifies that this agreement *was already established* in the Conference of Santiago as recorded in the relevant Minutes as per the request of the Delegate of Ecuador, Mr. Gonzalez"[160]. In fact, the Ecuadorean delegate in Santiago in 1952 was Mr. Fernández, not Mr. Gonzalez — it was he who asked for a clarification of what became Article IV.

4.16. In 1954, Commander Llosa on behalf of Peru, referred not only to the Santiago Declaration, but also to the agreement included in the 1952 Minutes. The 1952 Minutes recorded Mr. Fernández's suggestion that Article IV should be drafted "on the basis that the boundary line of the jurisdictional zone of each country be the respective parallel from the point at which the frontier of the countries touches or reaches the sea"[161].

4.17. You will also recall that the 1952 Minutes recorded immediately thereafter: "All the delegates were in agreement with that proposition."[162]

4.18. In 1954, Peru specifically relied on the 1952 Minutes to deny Ecuador's request for repetition.

4.19. Peru said it would be redundant to include an additional article in the Complementary Convention that would repeat, as Ecuador had wanted, that "the parallel at the point at which the land frontier of the States concerned reaches the sea"[163] constitutes the dividing line of the

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[158]CMC, Vol. II, Ann. 38, p. 341.

[159]*Ibid.*

[160]*Ibid.*, p. 342, emphasis added.

[161]MP, Vol. II, Ann. 56, p. 320.

[162]*Ibid.*, p. 319.

[163]*Ibid.*, Ann. 47, p. 261, Art. 4.

jurisdictional waters. That is where events were left on 2 December, as the parties headed off for dinner.

4.20. The Minutes for the following day, 3 December 1954, are to be found at tab 7. The session began with a reading of the Minutes from the previous day. The Ecuadorean delegate was evidently not satisfied with what he heard; he stuck to his guns, and you will see the record of his intervention on page 10:

> "Following a reading of the Minutes, the Delegate of Ecuador, Mr. SALVADOR LARA, requested clarification of the statement made by the CHAIRMAN concerning the concept of the dividing line, since the CHAIRMAN had not proposed recording in the Minutes the statement made by the Delegate of Ecuador but that the three countries had agreed on the concept of a dividing line of the jurisdictional sea."[164]

It was not a question simply of recording a statement, it was a question of recording an agreement.

4.21. The Ecuadorean delegate, in other words, insisted that the Minutes should not merely record the point *he* had made. He insisted that the Minutes record *the agreement between the three States*.

4.22. The Minutes go on to record that: "With this clarification, the CHAIRMAN declared the Minutes of the First Session approved."[165]

4.23. The clarification that was made was "that the three countries had agreed on the concept of a dividing line of the jurisdictional sea"[166].

4.24. Mr. President, Members of the Court, this part of the 1954 Minutes appears twice in the record, Annex 57 to Peru's Memorial, Annex 39 to Chile's Counter-Memorial. I have to say that you should rely only on Annex 39 to Chile's Counter-Memorial, and you can see on your screen why this is so.

(a) This first slide shows the first page of the 1954 Minutes as presented by Peru.

(b) On the right-hand side you now see the first page as presented by Chile. The seal appearing in the top left is that of the Peruvian Foreign Ministry, and in the top right of the Chilean Embassy in Peru. Peru's annex does not bear these official seals.

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[164]CMC, Vol. II, Ann. 39, p. 354.

[165]*Ibid.*

[166]*Ibid.*

(c) A more significant difference is that the Peruvian reproduction is missing the lower part of the page. You now see on your screens a horizontal red line superimposed across each page. The content above the line is the same in both annexes, except for the official seals and some typographical errors in the Peruvian annex, it was obviously a draft. Everything appearing below the line is absent from the annex submitted to the Court by Peru.

(d) Now you see the highlighting over the two relevant paragraphs in the authentic Minutes that are not in Peru's annex.

(e) We translated them in Annex 39 of the Counter-Memorial, and this last frame shows what they said.

4.25. The approved Minutes include the words that I have emphasized, which you can find behind tab 42: "the three countries had agreed on the concept of a dividing line of the jurisdictional sea".

4.26. That juridical fact cannot be changed no matter how enthusiastically one might take advantage of the delete function in a computer programme.

4.27. The extracts from the 1954 Minutes that we have just seen record discussions leading to the Complementary Convention, but the content relevant to the present dispute is the part of the Minutes that constitutes an agreement between the parties about the correct interpretation of the Santiago Declaration, signed two years earlier. This aspect of the 1954 Minutes records a "subsequent agreement between the parties regarding the interpretation" of the Santiago Declaration, which "shall" be taken into account in accordance with Article 31 (3) *(a)* of the Vienna Convention.

4.28. I turn now to another convention signed on the same day as the Complementary Convention. It is the Agreement Relating to a Special Maritime Frontier Zone, which is at tab 10.

5. The 1954 Agreement Relating to a Special Maritime Frontier Zone

5.1. The first thing to notice about the Agreement is its title. In the written pleadings Peru abbreviated it to the "Agreement on a Special Zone"[167]. Professor Lowe did likewise, although I

[167]MP, para. 2.6; PR, para. 2.81.

thought I saw him blush[168]. The abbreviation, of course, omits two significant words: "Maritime Frontier". Again Peru seeks to use the delete button instead of argument.

5.2. I will refer to the English translation of this agreement, beginning at page 4 of tab 10. It shows certified corrections to the translation in the United Nations *Treaty Series*. The first recital refers to "violations of the maritime frontier between adjacent States"[169]. That was not the outer edge of the zone, it was the lateral frontier.

5.3. This agreement was concluded to create a zone of tolerance for small vessels whose masters were not very good at knowing where they were. One of the things that the record discloses is that small boats did not get any better at navigation as time went on. Those vessels had already violated — and then come the significant words in the recital — "the maritime frontier between adjacent States".

5.4. On Tuesday, Sir Michael said of this treaty that: "Its limited purpose was to avert disputes involving artisanal fishermen on small vessels fishing near to the coast."[170] This was not a treaty "dealing in any sense with political matters"[171].

5.5. But the true position is in the penultimate recital. The point of granting small vessels the benefit of a zone of tolerance was to avoid "friction between the countries concerned, which may affect adversely the spirit of co-operation and unity which should at all times prevail among the signatory countries to the Santiago agreements"[172]. That was conceived as an inter-State problem not a problem relating to itinerant fisherman. And not only such a problem.

5.6. The three States were concerned with "friction between the countries", caused by boundary violations by fishermen. Consistent with the purposes of the Complementary Convention, the States wished to eliminate obstacles to their complete co-operation in defence of their maritime claims. Maritime claims which were unprecedented. Violations of the lateral maritime boundaries were such an obstacle.

5.7. Now we come to Article 1 — which Professor Lowe rather passed over. It says:

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[168]CR 2012/29, p. 21, para. 20 (Lowe).

[169]MP, Vol. II, Ann. 50, p. 276, first recital.

[170]CR 2012/28, p. 28, para. 9. (Wood)

[171]*Ibid.*, p. 29, para. 11 (Wood).

[172]MP, Vol. II, Ann. 50, p. 276, second recital.

"A special zone is hereby established, at a distance of 12 nautical miles from the coast, extending to a breadth of 10 nautical miles on either side of the parallel which constitutes the maritime boundary between the two countries."[173]

5.8. The provision uses the present tense. It refers to a maritime boundary already in existence. The first recital indicates that it was violations of that existing boundary that prompted this agreement. Matters could scarcely be clearer. Sir Michael tried to explain Article 1 away but, put simply, he could not do so.

5.9. The special maritime frontier zone applying between Chile and Peru was illustrated in *Limits in the Seas*, published by the United States Department of State. The edition on your screens, and at tab 43, is from 1979.

(a) The title in the box in the top right corner is "Maritime Boundary: Chile-Peru".

(b) The solid red line from the point where the land boundary meets the sea to the point marked P is that maritime boundary.

(c) Point C is the point on the boundary where Chile's 200-nautical-mile maritime entitlement stops.

(d) The line between point C and point P is the part of the maritime boundary that defeats Peru's claim to the area of high seas, *alta mar*, or the outer triangle. You will hear more about that from David Colson tomorrow.

(e) Relevant for us now are the areas shaded red on either side of the maritime boundary. Their caption says "10 nautical mile wide maritime frontier zones". They are the zones created by Article 1 of the Agreement Relating to a Special Maritime Frontier Zone.

(f) There is one maritime frontier zone on the Chilean side, for the benefit of straying Peruvian vessels.

(g) There is another on the Peruvian side, for the benefit of straying Chilean vessels.

(h) The area close to the shore where there is no zone of tolerance is the area within 12 nautical miles of the coast. In that inshore area even artisanal fishing vessels were expected to be able to observe the maritime boundary without the need for a zone of tolerance. When time proved that expectation to have been too optimistic, Chile and Peru concluded formal agreements to signal the maritime boundary, a point to which I will come shortly.

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[173]MP, Vol. II, Ann. 50, p. 276, Art. 1.

5.10. On your screen now you see the equivalent sketch-map from a publication from the State Oceanic Administration Policy Research Office of the People's Republic of China — tab 44. The publication from which this comes is titled *Collection of International Maritime Delimitation Treaties*, that was published in 1989.

(a) In the top right corner, we have translated the caption: "Peru-Chile maritime boundary".

(b) The heading at the top of the page identifies the delimitation treaty which is the source of the boundary: the Santiago Declaration.

(c) In the centre of the diagram you see the parallel of latitude constituting the maritime boundary and the special maritime frontier zones on each side of it.

5.11. Mr. President, Members of the Court, the parties could not have established these maritime frontier zones if they did not have a maritime frontier. Without a whisper of protest or a hint of a request for correction from Peru, that maritime frontier is exactly what *Limits in the Seas* has depicted for the last 33 years and the Chinese *Collection of International Maritime Delimitation Treaties* for the last 23 years.

5.12. Of course these publications contain the usual caveat that they do not represent official acceptance of the maritime boundaries they depict. But they serve the useful purpose of illustrating the special maritime frontier zones and they show how the Santiago Declaration and the Agreement Relating to a Special Maritime Frontier Zone were understood internationally — without dispute or query on the part of Peru.

5.13. This week, Peru attempted to draw legal consequences from minor differences in terminology. You will recall the 1952 Minutes refer to "the boundary line of the jurisdictional zone of each country"[174]. In the relevant part of the 1954 Minutes it refers to the "dividing line of the jurisdictional waters"[175]. These are differences in terminology to which the parties attached no legal significance.

5.14. What counts is that in 1952 and 1954 the parties made and then confirmed comprehensive claims of exclusive sovereignty and jurisdiction, and it was those claims of exclusive sovereignty and jurisdiction that they delimited by agreement.

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[174]MP, Vol. II, Ann. 56, p. 320.

[175]CMC, Vol. II, Ann. 38, p. 341.

5.15. But even if terminology did matter, the Agreement Relating to a Special Maritime Frontier Zone ends the argument. Its first article uses the words "maritime boundary", "*límite marítimo*" in Spanish. It is the "maritime boundary" that is constituted by the parallel of latitude. The title refers to the "maritime frontier zone", *zona fronteriza maritima.* The first recital uses just plain "maritime frontier", *frontera marítima.* In plain English, or in bad Spanish, it could not be clearer what the parties were referring to.

5.16. Conscious that there is no way to read Article 1 other than as an acknowledgment of an existing maritime boundary, Peru contended in its written pleadings that, because Article 1 of the 1954 Agreement refers to the maritime boundary between "the two countries", it refers only to a maritime boundary between Ecuador and Peru. That argument appears to have been dropped — not the only thing that was dropped earlier this week — and unsurprisingly so, but it does retain some forensic value for the Court in showing how Peru has been willing to run a line of argument that the 1952 Declaration did establish a maritime boundary, albeit only with Ecuador. And now we are told there is nothing, nothing.

5.17. For good measure, I should add that, in its written pleadings, Peru offered no plausible explanation why the parties would have limited the entire effect of the 1954 Agreement to only one pair of States, or how the language identifies Peru and Ecuador as that pair, or why Chile would have been party to the Agreement if its provisions were intended to have no effect for it.

5.18. The further difficulty for Peru, so far as concerns the 1954 Agreement Relating to a Special Maritime Frontier Zone, is that it has nothing to do with islands, and yet it refers in express terms to "the parallel which constitutes the maritime boundary between the two countries". The Agreement does not mention islands once, and of course not — perhaps it should have, perhaps the fishermen will run into the islands. It has to do with creating a zone of tolerance between adjacent States. So much for the case that Article IV is correctly interpreted as confined to islands alone.

5.19. And just so that you can see how Article 1 of the Agreement Relating to a Special Maritime Frontier Zone would have to look if Peru's arguments on its interpretation were to be accepted, we show you on the screen a redraft.

5.20. The true treaty text is shown in black. Peru asks you to delete the words with a line through them. So that it would read:

> *A special zone is hereby established, at a distance of 12 nautical miles from the coast, extending to a breadth of 10 nautical miles on either side of the parallel which constitutes ~~the maritime boundary~~ an informal and temporary line used only for the limited purposes of fisheries jurisdiction close to the shore between ~~the two countries~~ Ecuador and Peru.*

This is not to interpret the provision; it is to rewrite it.

5.21. Just as you decided in the *Territorial Dispute* between Libya and Chad, in which the 1955 Agreement was by no means unequivocal, so in the Agreement Relating to a Special Maritime Frontier Zone, "the existence of a determined frontier was accepted and acted upon" and this subsequent agreement "mention[s] 'the frontier' ... with no suggestion of there being any uncertainty about it" (*Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 35, para. 66) — nor, I would add, hesitation or diplomatic diffidence.

5.22. The ordinary meaning of the Agreement Relating to a Special Maritime Frontier Zone is so clear that reference to its drafting in the 1954 Minutes is unnecessary. But, of course, advocates when they say that reference to minutes is unnecessary then immediately go on and refer to them, and I will do that too. But I propose to take the Court to them for completeness. They are at tab 7.

5.23. We have already seen that the Ecuadorean Delegate, Mr. Salvador Lara — whose persistence is to be admired — was eager to reiterate at the 1954 Conference the agreement already reached by the parties on maritime delimitation in 1952. In the discussion on the Complementary Convention, he settled for recording in the Minutes the three States' agreement that they had already settled their maritime boundaries. When it came to the Agreement Relating to a Special Maritime Frontier Zone, he proposed that a reference to the boundary agreement be included in the treaty text. This time he was successful.

5.24. I refer you to tab 7 at page 15:

> "Upon the proposal by Mr. SALVADOR LARA, the concept already declared in Santiago that the parallel starting at the boundary point on the coast constitutes the maritime boundary between the neighbouring signatory countries, was incorporated into this article."[176]

5.25. "This Article" is Article 1 of the Agreement Relating to a Special Maritime Frontier Zone. It was deliberately drafted to incorporate the "maritime boundary" that had been "already

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[176]CMC, Vol. II, Ann. 39, p. 356.

declared in Santiago". That maritime boundary clearly applied to all "neighbouring signatory countries", not just two of them.

5.26. The next paragraph of the Minutes shows that the initial draft of Article 1 was amended to incorporate a reference to the maritime boundary, and that paragraph of the Minutes contains exactly what became the first article of the treaty. I make no apologies for repetition:

> "A special zone is hereby established, at a distance of 12 nautical miles from the coast, extending to a breadth of 10 nautical miles on either side of the parallel which constitutes the maritime boundary between the two countries."[177]

5.27. The 1952 and 1954 Minutes formally record contemporaneous agreements between the three States on the proper interpretation of Article IV. It is ineluctable.

5.28. Peru omits to translate a key part of the 1952 Minutes. It omits entirely a key part of the 1954 Minutes. And, instead, it offers the Court the witness statement of a Peruvian national, Mr. Cristobal Rosas, written in August 2010, 56 years after Santiago and six months after the Counter-Memorial.

5.29. As the Court has seen, the Santiago Declaration was drafted during the First Session of the Juridical Affairs Commission at Santiago. The 1952 Minutes record the discussion. The attendance list does not include Mr. Rosas; he was not there.

5.30. Mr. Rosas nonetheless swears in his witness statement dated August 2010 that "as an eyewitness of the discussions, I can assure that in the 1952 Conference of Santiago the issue of establishing boundaries between the maritime zones of the countries was not addressed"[178]. That "nothing about boundaries" line will now sound familiar to the Court — "nothing". But it is self-evidently wrong, as the 1952 Minutes record that the three States agreed that the Santiago Declaration be drafted on the basis that the boundary between their maritime zones was to be the parallel.

5.31. I should add that the record shows that Mr. Rosas *was* at the relevant sessions of the inter-State conference in 1954. But in his witness statement written 56 years later, Mr. Rosas is silent on every one of the multiple interventions and agreements concerning maritime delimitation recorded in those Minutes.

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[177]CMC, Vol. II, Ann. 39, p. 356.

[178]PR, Vol. II, Appendix A, p. 15.

5.32. Mr. President, Members of the Court, Mr. Rosas is to be congratulated on his longevity but not on his memory.

6. The 1954 *Aclaración*

6.1. The Final Act of the 1954 Conference contains an *Aclaración* adopted by the parties. It is at tab 8. This "clarification" recorded agreed authentic interpretation of the treaties to which it related. The relevant part is that addressing the Agreement Relating to a Special Maritime Frontier Zone, which is at page 13.

6.2. The zone of tolerance established by that treaty was available only in cases of "accidental presence" of a vessel on the wrong side of the maritime boundary. In the clarification, the parties agreed that whether a vessel's presence was "accidental" for the purposes of Article 2 was to "be determined exclusively by the authorities of the country whose maritime jurisdictional boundary would have been transgressed"[179], not whose construction line would have been transgressed, his maritime jurisdictional boundary would have been transgressed.

6.3. This clarification was assented to by the plenipotentiaries of the three States.

6.4. It constitutes further clear contemporaneous recognition that the three States — all three — had delimited their maritime zones, and that there was a "maritime jurisdictional boundary" in place. Sir Michael tried to explain this language away on Tuesday. Again, he could not do so.

7. Authentic interpretation of the Santiago Declaration

7.1. The parties to the 1952 and 1954 agreements dealt expressly with the inter-relationship between those two sets of agreements. At tab 10, page 5, you will see that in Article 4 of the Agreement Relating to a Special Maritime Frontier Zone, they agreed that all of its provisions "shall be deemed to be an integral and complementary part of, and not to derogate from, the resolutions and agreements adopted at the" Santiago Conference[180].

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[179]CMC, Vol. II, Ann. 40, p. 369.

[180]MP, Vol. II, Ann. 50, p. 277, Art. 4.

7.2. First among such agreements was the Santiago Declaration. It was the foundational treaty in which the States agreed on the sovereign character of their claims and delimited those claims.

7.3. In the Complementary Convention, they reinforced their claims and agreed to co-operate in defending them.

7.4. In a suite of five other agreements signed on the same day, they agreed on a range of other specific matters of implementation:

(a) first, sanctions for violation of each State's maritime zone[181];

(b) second, surveillance and control of each State's maritime zone[182];

(c) third, the granting of permits by each State for the exploitation of the resources in its maritime zone: all resources, not just fisheries[183];

(d) fourth, the setting of quotas for the hunting of sperm whale[184]; and, the one most relevant for our purposes

(e) the Agreement Relating to the Special Maritime Frontier Zone.

7.5. The final article of each one of the six treaties was the same. Each provided that it was deemed to be an integral and complementary part of the resolutions and agreements adopted in Santiago.

7.6. The three States made explicit that the multiple agreements they signed in 1952 and 1954 were to be considered a coherent system.

7.7. Therefore, the following parts of the Agreement Relating to a Special Maritime Frontier Zone are deemed by its parties to be an integral and complementary part of the Santiago Declaration:

(i) the reference to the "maritime frontier zone" in the title;

(ii) the reference in the first recital to "violations of the maritime frontier between *adjacent* States"; and

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[181]RP, Vol. II, Ann. 34.

[182]*Ibid.*, Ann. 35.

[183]*Ibid.*, Ann. 36, esp. Art. 1.

[184]*Ibid.*, Ann. 37.

(iii) the reference in Article 1 to "the parallel which constitutes the maritime boundary between the two countries".

7.8. None of those explicit references to the existing maritime boundary had anything to do with islands. The maritime boundary to which the parties repeatedly referred in the 1954 Agreement is the one they had agreed to in 1952.

8. Domestic approval

8.1. The Santiago Declaration and the related treaties of December 1954 were presented together to Peru's Congress for approval in May 1955. Congress duly granted that approval, but before doing so, its Foreign Affairs Committee studied and wrote a report on those agreements.

8.2. This report is another document that is multiplied in the record of this case but, again, you have to be careful which document you refer to. The Congressional Report contains 11 pages and is available at tab 12, Annex 78 to the Rejoinder [185].

8.3. I draw your attention to the passage translated in your binders at page 14, third paragraph of tab 12. In connection with the 1954 agreement the Congressional Report referred to "violations of maritime frontiers" — note the plural "frontiers" — "between the neighbouring States"[186].

8.4. In its Memorial, Peru filed three pages of the Report, but not this page. In its Reply, it filed the whole of the Report, but it did not translate this passage. The Reply states: "What is significant is that . . . the 'Report' . . . contained no reference to maritime boundaries"[187]. Well, that is simply wrong, and it is symptomatic of Peru's tendency to ignore or edit the evidence.

8.5. One of the authors of the Congressional Report was Congressman Peña Prado. He gave a speech to Congress on 5 May 1955, the day before the approval by Congress of the package of the Santiago Declaration and the 1954 treaties.

8.6. The Parties differ as to the reliability of the only verbatim record of Congressman Prado's speech that is so far available[188]. When asked, the librarians at Peru's Congressional

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[185]RC, para. 2.80.

[186]RC, Vol. III, Ann. 78, p. 472.

[187]RP, para. 3.163.

[188]See RC, paras 2.74-2.81.

Library stated that the verbatim records of the Congress for the period 1947 to 1955 are missing. They are, so to say, *inédites*. Perhaps someone pushed the delete button on them as well!

8.7. But you do not need the Congressional records, since you do have the verbatim transcript of Congressman Prado's statement as published in a Peruvian newspaper of record two days after it was delivered. It is at tab 13. Mr. Prado explained to Congress the purposes of the Santiago Conference of 1952 — this is to the Peruvian Congress. At page 7, you see that he said:

> "The purposes of these conferences held in Santiago de Chile are the declaration of the maritime zone, the Agreements [signed] for establishing the control and surveillance of our seas, for establishing the maritime boundaries between the signatory countries, for determining the sanctions, the permits and the meeting of the Permanent Commission that must take place every year."[189]

8.8. The next day Congress approved the Santiago Declaration and the 1954 treaties deemed to form an integral and complementary part of it.

9. The 1955 Protocol of Accession to the Santiago Declaration

9.1. Now, in October 1955, Chile, Ecuador and Peru signed a protocol to the Santiago Declaration by which it was made open to accession by other States in the region[190]. The protocol specified, "at the moment of accession, every State shall be able to determine the extension and form of delimitation of its respective zone"[191]. I stress the word "delimitation", and recall how Peru's counsel sought earlier in the week to suggest that this was a largely unknown concept in the 1950s, and how States were concerned only with the sideless extension of their zones out to sea.

9.2. As to the Protocol, the contemporaneous memoranda of Peru and Chile explain that the method of boundary delimitation adopted by the three original States parties to the Santiago Declaration would not necessarily apply to the States acceding to it subsequently. Tab 14 contains a memorandum written by the Peruvian Embassy in Ecuador, in June 1955. In this memorandum, Peru explained that for acceding States it was "inclined to delete" Article IV of the Santiago Declaration. The significant part of it you see is at page 3, the effect of Article IV was to "establish the frontier between the countries — inapplicable in other locations"[192].

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[189]CMC, Vol. IV, Ann. 246, p. 1469.

[190]MP, Vol. II, Ann. 52.

[191]*Ibid.*, Ann. 52, p. 291.

[192]CMC, Vol. III, Ann. 70, p. 537.

9.3. Chile concurred. Its memorandum is at tab 15. At page 3, Chile observed that it was,

> "indispensable that the possibility of making reservations to the principles on delimitation of the maritime frontier should be set out in the Protocol, due to the fact that, for example, the principle of the Parallel stipulated in the Declaration of Santiago is practically inapplicable to frontiers of other countries"[193].

9.4. Chile and Peru thought that the method by which they had delimited their own maritime boundary might not be applicable elsewhere. In doing so, they acknowledged:

(a) first, that they had delimited their own maritime boundary in Article IV;

(b) secondly, that they used a method which they deemed appropriate.

10. The Signalling Agreements of 1968 and 1969

10.1. I turn to the Signalling Agreements of 1968 and 1969. These are bilateral; they concerned only Chile and Peru. Through these agreements, Chile and Peru gave physical effect to and signalled their maritime boundary.

10.2. In April 1968, delegates met at the seaward portion of the land frontier of the two States. They jointly recorded their task in the document which is at tab 17. At page 4, you see that this was to conduct "an on-site study for the installation of leading marks visible from the sea to materialise the parallel of the maritime frontier originating at Boundary Marker number one"[194].

10.3. The next year the two States established a Mixed Commission. Its *Acta*, or Minutes, of 22 August 1969, are at tab 22. Its complete title is "The Act of the Chile-Peru Mixed Commission in Charge of Verifying the Location of Boundary Marker No. 1 and Signalling the Maritime Boundary"[195].

10.4. At page 3, the Members of the Mixed Commission recorded their purpose in the most explicit terms:

> "verifying the original geographical position of the concrete-made Boundary Marker number one of the common frontier and for determining the points of location of the Alignment Marks that both countries have agreed to install in order to signal the maritime boundary and physically to give effect to the parallel that passes through the aforementioned Boundary Marker number one . . ."[196].

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[193]CMC, Vol. III, Ann. 71, p. 541.

[194]MP, Vol. II, Ann. 59, p. 336.

[195]CMC, Vol. II, Ann. 6, p. 33.

[196]*Ibid.*, p. 35.

And for that purpose, they had established a Mixed Commission.

10.5. It is hardly a surprise that on Tuesday morning Peru passed over the agreements of 1968 and 1969 as quickly as it possibly could. To ensure that the Court is properly informed on this important series of agreements — important both for what it did and for what it signified — Mr. Paulsson will elaborate on them further tomorrow.

10.6. The simple point for now is that States do not agree to materialize or give effect to maritime boundaries that do not exist.

11. Conclusion

11.1. Mr. President, Members of the Court, on Tuesday Peru characterized Chile's case as relying on "a number of miscellaneous events"[197]. I conclude with ten brief reflections on a chronology which is characterized not by its miscellaneousness but by its consistency.

(a) First, in 1947, Chile and Peru issued concordant unilateral proclamations in which they claimed sovereignty over areas extending 200 nautical miles to sea that abutted perfectly and did not overlap.

(b) Second, in August 1952, the Parties concluded the Santiago Declaration. They agreed between themselves that each of them was sovereign over its own 200-nautical-mile exclusive maritime zone. They delimited the maritime boundaries between them at "the parallel at the point at which the land frontier of the States concerned reaches the sea".

(c) Third, in December 1954 the parties to the Complementary Convention formally recorded in the Minutes their agreement that they had already delimited the maritime boundaries in 1952. They agreed that the boundary is the parallel of latitude of the point where the land boundary of the States concerned reaches the sea. On the basis of this agreement they considered it unnecessary to reiterate the effect of Article IV in the Complementary Convention.

(d) Fourth, at the same inter-State conference in December 1954, as a supplement to the Santiago Declaration, the parties signed the Agreement Relating to a Special Maritime Frontier Zone. That Agreement created zones of tolerance on either side of the pre-existing maritime boundary

[197]CR 2012/28, p. 26, para. 1 (Wood).

and is replete with references to that boundary. Those references are an integral and complementary part of the Santiago Declaration.

(e) Fifth, in January 1955, the Peruvian Foreign Minister, together with the President of Peru, issued a Supreme Resolution concerning the correct depiction of Peru's maritime zone for the purpose of cartographic and geodesic works. You will hear more about it tomorrow from David Colson. It specified: "In accordance with clause IV of the Declaration of Santiago" the outer limit of Peru's maritime zone "may not extend beyond that of the corresponding parallel at the point where the frontier of Peru reaches the sea"[198].

(f) Sixth, on 4 May 1955 the Peruvian Congress received the report of its Foreign Affairs Committee, which referred to Peru's "maritime frontiers" in the plural.

(g) Seventh, on 5 May 1955 Dr. Peña Prado spoke to that report in the Peruvian Congress, noting that the Santiago Conference had included among its aims "establishing the maritime boundaries between the signatory countries"[199].

(h) Eighth, on that basis, the Peruvian Congress approved the Santiago Declaration, the Complementary Convention and the Agreement Relating to a Special Maritime Frontier Zone[200].

(i) Ninth, when the parties to the Santiago Declaration were opening it to accession by other States, they acknowledged that in Article IV they had delimited their maritime boundaries using parallels of latitude. They expressly dis-applied that method for acceding States.

(j) Tenth, in 1968 and 1969, Chile and Peru agreed to give physical effect to their maritime boundary by constructing two lighthouses to signal it. In doing so they expressly confirmed the existence of their agreed maritime boundary, and that it is the parallel of latitude passing through the first boundary marker of their land boundary.

11.2. Mr. President, Members of the Court, history is like life — "just one damn thing after another"[201].

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[198]MP, Vol. II, Ann. 9, p. 39, Art. 2.

[199]CMC, Vol. IV, Ann. 246, p. 1469.

[200]MP, Vol. II, Ann. 10.

[201]"Life is just one damn thing after another", E. Hubbard, *The Philistine*, Vol. 30, December 1909, p. 32.

11.3. The life of this boundary has been one of agreement, beginning with the delimitation agreement in 1952. The subsequent history has been just one affirmation after another, in 1954, in 1955, in 1968, in 1969 and on many occasions before and after that.

11.4. Now, Peru has skipped over much of this material, and has sought to fill the gaps in its case with the repeated recantation of your words in *Nicaragua* v. *Honduras* that "[t]he establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed" (case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II),* p. 735, para. 253). But *Nicaragua* v. *Honduras* was a case where there was no written agreement, with Honduras. Honduras claims that a boundary existed by virtue of a tacit agreement. That is not this case. The agreements exist here, the Court's task is to interpret these agreements, and that is the point that you made quite explicitly in *Romania* v. *Ukraine*.

11.5. I do not have time to read the relevant passage, but I refer to paragraph 68 of your very careful Judgment in *Romaina* v. *Ukraine*, where you drew a distinction between an argument based on the implied boundary and an argument placed on the interpretation of an actual agreement.

11.6. Your task before the Court is interpret the agreements between the parties. Peru's emphasis on burden of proof is misconceived — as well as notably defensive.

11.7. Mr. President, Members of the Court, on Monday afternoon Peru acknowledged, as elemental rules of international law compelled it to do, that the primary means to delimit a maritime boundary is by agreement[202]. It is common ground that if the Parties have delimited their boundary by agreement in 1952 or in 1954, then that is dispositive of this case. I have shown that there *was* such an agreement in 1952, confirmed in 1954. *Quod*, Mr. President, Members of the Court, *erat demonstrandum*. Thank you, Mr. President.

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[202]CR 2012/27, p. 34, para. 2 (Bundy).

The PRESIDENT: Thank you, Professor Crawford. This completes today's pleadings by Chile. The Court will meet again tomorrow, on Friday 7 December at 10 a.m., to hear the continuation of Chile's first round of oral argument.

Thank you. The sitting is closed.

The Court rose at 6.00 p.m.