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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2012

Public sitting

held on Friday 14 December 2012, at 10 a.m., at the Peace Palace,

President Tomka presiding,

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

VERBATIM RECORD

ANNÉE 2012

Audience publique

tenue le vendredi 14 décembre 2012, à 10 heures, au Palais de la Paix,

sous la présidence de M. Tomka, président,

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

COMPTE RENDU

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[*]Reissued for technical reasons.

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

Présents : M. Tomka, président
M. Sepúlveda-Amor, vice-président
MM. Owada
Abraham
Keith
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Mmes Xue
Donoghue
M. Gaja
Mme Sebutinde
M. Bhandari, juges
MM. Guillaume
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The PRESIDENT: Please be seated. Good morning. The sitting is open. The Court meets this morning to hear Chile begin the presentation of its second round of oral argument. I shall now give the floor to Professor James Crawford. You have the floor, Sir.

Mr. CRAWFORD: Thank you, Mr. President.

THE BOUNDARY AGREEMENT: REBUTTAL

1. Introduction

1.1. Mr. President, Members of the Court, history happens forwards. History happens day-by-day. As the English poet Philip Larkin asked:

> "Where can we live but days?
> Ah, solving that question
> Brings the priest and the doctor
> In their long coats
> Running over the fields."[1]

1.2. In this case, by contrast, Peru sees history entirely backwards. The equidistance line, introduced to international law by Commander Kennedy in 1954, is seen as already "intuitive" in 1952: Professor Lowe's entire presentation on Tuesday proceeded on a presumption of an equidistance entitlement that was entirely anachronistic. The now-standard three-part delimitation process is applied retrospectively, whereas you started on that long journey in 1969. The 1954 Agreement on a Special Maritime Frontier Zone was said to be a "provisional arrangement of a practical nature" within the meaning of UNCLOS Article 74 (4)[2], again applying UNCLOS backwards in time. Peru's case is riddled with anachronism.

2. The 1947 Proclamations

2.1. I start with the transactions of 1947-1954, and within that the 1947 Proclamations. The 1947 Proclamations provide the circumstances in which the Santiago Declaration was concluded and constitute its essential background. The Santiago Declaration aimed at their "legalization"[3].

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[1]Phillip Larkin, "Days", in *Collected Poems* (1988) 67, cited in J. Crawford & T. Viles, "International Law on a Given Day" in J. Crawford, *International Law as an Open System. Selected Essays*, 2002, p. 69.

[2]See, e.g., CR 2012/28, p. 29, para. 11 (Wood); CR 2012/29, p. 20, para. 17 (Lowe); CR 2012/33, p. 27, para. 109 (Lowe), and p. 28, para. 112 (Lowe).

[3]CMC, Vol. II, Ann. 59, p. 487.

2.2. The Chilean Proclamation was not as clear as the Peruvian on the method of measuring the 200-mile seaward projection. It referred to the "mathematical parallel". The same term was used in the Chilean draft of Article IV, but was replaced by a reference to the geographical parallel.

2.3. Peru's Supreme Decree of 1947[4] came second. Its method of projection was crystal clear. Peru has not said much about it, but it has said enough for the Court to know how it worked and that that is common ground. The significance of the method of projection — a *tracé parallèle* constructed using parallels of latitude — is that Peru had no claim south of the parallel of the point where its land boundary with Chile reached the sea, while Chile claimed up to that same parallel. There was no gap, no overlap, and Peru does not suggest the contrary. Nor did Peru's Petroleum Law of 1952 change the position as to lateral limits, as Mr. Colson will show you.

2.4. Peru attempts to superimpose the common approach between Chile and Peru to the different geographical circumstances ~~between~~ the Argentina-Chile boundary. [Graphic] No one in the 1952 negotiations raised that point. The focus was on the parties to the Declaration.

2.5. In any event, Peru's remarks on the application of the 1947 Declaration to Chile's southern coast near Argentina ignore the presence of islands there. Chile's Declaration specifically claimed a 200-mile radial maritime zone for all its islands. You can see from tab 122 [graphic], how islands affected Chile's maritime projection in the south, as delimited by agreement in 1984 [graphic], leaving a large *Alta Mar* to Chile's detriment. [End graphic]

2.6. What matters for this case is that Peru and Chile proceeded on the common basis that their 1947 Proclamations gave them abutting 200-mile maritime projections, with no overlap.

2.7. [Start text slide] Professor Lowe then turned to paragraph 3 of the Declaration (tab 123). He characterized it as establishing a "whaling and deep sea fishery" zone[5]. True, it starts by saying that "protection zones for whaling and deep sea fishery" will be established. It adds "by virtue of this declaration of sovereignty"[6].

2.8. The next sentence is not concerned just with whaling or fishing either. It says, in full, "Protection and control is hereby declared immediately over *all the seas* contained within the

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[4]MP, Vol. II, Ann. 6, p. 26.

[5]CR 2012/33, p. 23, para. 83 (Lowe).

[6]MP, Vol. II, Ann. 27, p.131, para. 3.

perimeter formed by the coast and the mathematical parallel projected into the seas at a distance of 200 nautical miles from the coasts of Chilean territory."[7] [End text slide]

3. The 1952 and 1954 Agreements

(a) 1952

3.1. I turn to the 1952 and 1954 Agreements. I am going to deal first and separately with 1952 and 1954, and then with the relation between them. Peru considers that the lateral limits of each State's maritime entitlements were not even discussed at Santiago. In effect, it says that the parties had exclusive zones of sovereignty but without lateral boundaries and therefore without a perimeter. "Perimeter" was one other term that Peru failed to confront on Tuesday: it used the word only once, without comment, in a quotation from a Chilean document[8].

3.2. Peru does say that Article IV of the Santiago Declaration limited the maritime projection of islands at the parallel of the point where the land boundary of the States concerned reached the sea. So, on Peru's own case this "whaling conference" reached agreement on lines in the sea laterally limiting maritime spaces, *at least to some extent*. But that "some extent" destroys Professor Lowe's beautifully presented rhetorical house of cards.

3.3. So there are only two questions left. First, were these lines in the sea adopted in order to protect the insular projection of the Galapagos Islands from the "intuitive" equidistance line, as Peru announced for the first time on Tuesday[9], at the last possible moment in a case which has lasted five years? Or were these lines in the sea maritime boundaries, as Chile has consistently said? That is the first question.

3.4. The second question is whether Article IV was a declaration of policy about how future delimitations should be made, as Peru says, or whether it actually effected those delimitations, as we say.

3.5. That brings us to the ordinary meaning of Article IV. In this regard, Professor Lowe announced on Tuesday his conversion to the textual approach[10]. True, he maintained that the

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[7]MP, Vol. II, Ann. 27, p. 131, para. 3; emphasis added.

[8]CR 2012/33, p. 16, para. 32 (Lowe, quoting Chile's draft Art. III).

[9]*Ibid.*, para. 27 (Lowe).

[10]*Ibid.*, p. 21, para. 69 (Lowe).

object and purpose of the Santiago Conference was whaling — it was a "whaling conference"[11]. Professor Condorelli will deal further with that. But mainly, Professor Lowe favoured textual interpretation — though when it came to 1954, it was textual interpretation in the absence of the text!

3.6. Chile has consistently made the point that in order to know whether an island is within 200 miles of a neighbouring State's general maritime zone, it is necessary to know the whereabouts of the general maritime zone. Professor Lowe did not even attempt an answer to that point. Professor Pellet did. He invoked Descartes[12], saying that he was going to discredit my simplistic logic. Descartes would have been disappointed with what followed. The point remained unanswered. Indeed, it is unanswerable — you cannot tell whether point A is within 200 miles of point B unless you know where both points are; but perhaps I am being insufficiently Descartesian.

3.7. [Start slide: 1952 Minutes] The 1952 Minutes record that Article IV started life with three paragraphs, within draft article III (tab 124)[13]. This was its first paragraph: "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." This reproduced the system of measurement used by Chile in its 1947 proclamation. Using that method, the "perimeters" of the maritime zones were delimited by parallels of latitude.

3.8. The second paragraph of draft article III granted islands a 200-nautical-mile radial projection.

3.9. The effect of the third paragraph was that if an island was less than 200 miles from the general maritime zone, as measured in the first sentence — namely by a "mathematical parallel" — then the insular zone was to stop when it reached the general maritime zone of the adjacent State.

3.10. Now we come to the intervention of Mr. Fernández, to which Professor Lowe referred on Tuesday. Mr. Fernández wished "to provide more clarity to Article 3, in order to avoid any

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[11]CR 2012/33, p. 14, para. 14 (Lowe); see also *ibid.*, p. 17, para. 42 (Lowe).

[12]CR 2012/34, p. 32, para. 29 (Pellet).

[13]MP, Vol. II, Ann. 56, p. 317.

error in the interpretation of the interference zone in the case of islands". He had a specific suggestion as to how to do this. It was "that the 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".

3.11. The delegates saw no ambiguity with respect to their general maritime zones. They were to be within the "perimeter" formed by the mathematical parallel and the coast, joined by reference lines that were parallels of latitude.

3.12. They saw no ambiguity with respect to islands further than 200 miles from the general zone of the adjacent State. These were to have a full 200-mile-radial projection.

3.13. The only need for further clarity was with respect to the overlap created by radial projections of islands within 200 miles of the adjacent general zone. The suggestion that Mr. Fernández made was that this be dealt with by the same line — the same line — that delimited the general maritime zone of the adjacent States. That was the "parallel from the point at which the frontier of the countries concerned touches or reaches the sea". The Minutes record that: "All the delegates were in agreement with that proposition." The Peruvian Chairman and the Chilean delegate then redrafted the article.

[End text slide]

3.14. This took the form of Article IV as we now know it — only too well, you might think (tab 125). [Text slide] The first paragraph of old Article III, establishing that the general maritime zones were measured, and given a perimeter, by the mathematical parallel, was deleted. But this did not involve any change in legal intent or effect. The important element was taken from the first paragraph of the draft and added to the last sentence of the final text of what became Article IV. That element was that the lateral component of the perimeter of the maritime zones, insular and general, was "the parallel at the point at which the land frontier of the States concerned reaches the sea". That was the maritime boundary, and that is why Article IV looks the way it does.

3.15. When the interpretation of Article IV was raised in Lima two years later, the Peruvian delegate specifically referred to these Minutes to clarify that on the basis of Article IV of Santiago "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"'[14]. The 1954 Minutes record agreement on that too[15].

3.16. Peru made much of the point that Article II of Santiago refers to the 200-mile zones as "a norm of their international maritime policy", suggesting that the word "policy" implies equivocation or the absence of any rule on the matter[16]. There are three points in response.

(a) First, the Declaration did reflect a "policy", a very deliberate and important one. It was a policy of action. In this respect it was like the Truman Proclamation. The Truman Proclamation declared the "*policy* of the United States with respect to the natural resources of the subsoil and sea bed of the continental shelf"[17]. It was an immediately effective international claim.

(b) Secondly, the Santiago Declaration declared a "norm" of policy — in other words, a rule to be followed.

(c) Thirdly, policy and law are not disjunctive, as this episode shows.

3.17. Peru says that the Declaration was *de lege ferenda*[18]. That is no doubt true for third States; some of them protested actively while others retained reservations about these questions. But there are, again, three key points here.

(a) The first is that the zones proclaimed in 1952 are the zones that exist today. They have never been withdrawn or abandoned. The parties maintained the zones, including their boundaries, through the "long years" to which you referred in *Romania* v. *Ukraine*[19], until they won general acceptance for them. There was no discontinuity.

(b) The second point is that from the moment the Declaration was signed it was law for the parties; it imposed obligations on them *inter se* — and it is not contested by our colleagues opposite that it was invalid.

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[14]CMC, Vol. II, Ann. 38, pp. 3-4 (see tab 6 of Chile's judges' folder, day 1).

[15]*Ibid.*, Ann. 39, p. 10 (see tab 7 of Chile's judges' folder, day 1).

[16]CR 2012/33, p. 14, para. 14 (Lowe).

[17]MP, Vol. III, Ann. 88, p. 407; emphasis added.

[18]CR 2012/33, p. 53, para. 11 (Treves).

[19]*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 87, para. 70.

(c) Thirdly, Peru in particular actively enforced the zone as an existing entity. The *Diez Canseco* fired 16 cannon shots at unarmed Chilean fishing vessels[20]. The Onassis whaling fleet was intercepted — within the zone, incidentally — arrested and fined US$3 million[21]. A United States air force plane which had not notified its overflight of the zone was fired at and a crew member killed[22]. Such attacks were all apparently *de lege ferenda*! Peru used force and it did so to defend its claim of sovereignty.

3.18. [Slide — Art. III] The Peruvian mantra is that the Santiago Declaration concerned only whales, and maybe some fish. It is as though they think that if they say this enough times the Court will be convinced not to read Article III of Santiago (tab 126). This reads: "The exclusive jurisdiction and sovereignty over this maritime zone shall also encompass exclusive sovereignty and jurisdiction over the seabed and the subsoil thereof." And, in Peru's case, also the air space. There is no trace of whaling here, unless it concerns the elusive southern burrowing whale, *balaena cunicularia australis*, or, in relation to Peru's claim to sovereignty over air space, the even rarer flying whale, *balaena citivolus*. [End slide]

3.19. This was a distance-based claim to the continental shelf. Peru just ignores it.

3.20. The Peruvian argument that the whole of the Santiago Declaration is just speculation about something that may or may not happen in the future overlooks two further crucial points. First, the Declaration gave treaty status to the claims made in 1947, and both of those clearly concerned the continental shelf to a distance of 200 nautical miles as well as the waters above it. Secondly, the Peruvian Petroleum Law of March 1952 applied to 200 miles of Peruvian continental shelf[23]. These were international claims already in 1947. The Santiago Declaration legalized them but it did not convert them into aspirational policy documents.

3.21. Mr. President, Members of the Court, on Tuesday we did not hear any meaningful attempt to grapple with the actual agreements as I have analysed them, but we did hear some

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[20]CMC, Vol. III, Ann. 122, p. 785; see also Ann. 75, p. 557 and CCM, Vol. V, Ann. 315, pp. 1864-1865.

[21]CMC, Vol. IV, Ann. 163, p. 986.

[22]*Ibid.*, Vol. V, Ann. 309, pp. 374-275; see also *ibid.*, Vol. IV, Ann. 221, pp. 1321-1322.

[23]MP, Vol. II, Ann. 8, p. 35, Art. 14 (4).

creative ideas, and we heard them for the first time[24]. You will recall this extraordinary diagram. [Graphic]

3.22. Peru's proposed interpretation of the treaty provision at the heart of this case changed just three days ago, in their second round of oral argument. In a way that tells you all you need to know.

3.23. Peru's new argument is rendered futile by its premises. Its first premise is that in 1952, using equidistance lines to delimit the maritime zones was "intuitive"[25]. That is wrong. Its second premise is that in 1952 the parties to the Santiago Declaration were using arcs of circles to measure the projection of their maritime claims. That is wrong too, as Mr. Colson will reiterate.

3.24. But let me accept those two premises for the sake of argument. Peru's new interpretation makes a mockery of Article IV. Article IV is clear that each State ~~had~~ has a "general maritime zone" and that each "island or group of islands" ~~had~~ has its own "maritime zone". Until Tuesday this was common ground. You will recall Peru's explanation in its written pleadings of the maritime zones of Ecuador's islands in the Gulf of Guayaquil — the projection of which was limited by the parallel of latitude of the point where the land boundary reaches the sea[26].

3.25. On Tuesday, Peru abandoned that idea and adopted instead an equidistance line in the Gulf of Guayaquil giving "full effect to islands". [Graphic] Full effect under modern delimitation principles, placing base points on islands and creating a unified maritime zone, but depriving islands in the Gulf of their agreed effect under the Santiago Declaration.

3.26. Professor Lowe did show you, briefly, what Santa Clara's projection would look like under Article IV [slide], but then it disappeared again, leaving a question mark over this area that I have shaded yellow. [Slide] The explanation seemed to be that Santa Clara created no maritime projection separate from the mainland coast. Only, we were told, the Galapagos did that. And so only they, it seems, are the beneficiaries of the *protection*[27] of Article IV. This is new and unjustified by the text.

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[24]See CR 2012/33 p. 15 para. 26 to p. 21 para. 68, and para. 71 (Lowe).

[25]*Ibid.*, p. 16, para. 27 (Lowe).

[26]MP, para. 2.6 and fig. 2.2; RP, paras. 4.77 and 4.103 to 4.105.

[27]CR 2012/33 p. 18, para. 44 (Lowe).

3.27. It completely ignores the first sentence of Article IV. Santa Clara, like every other island in the Gulf of Guayaquil and every other Chilean, Peruvian and Ecuadorean island, was granted its own 200-mile-radial projection by the Santiago Declaration. Where the radial projection of Santa Clara hit the parallel passing through the point where the land boundary reached the sea, it was truncated at that parallel by force of Article IV. So Peru's fresh interpretation is contradicted by the plain terms of the Santiago Declaration.

3.28. [Slide] On Tuesday Peru then postulated that the intuitive equidistance line would continue out, intuitively, through the 200-mile-radial projection of the Galapagos. Ecuador's delegate in 1952 seems to have identified the parallel as a way to protect the maritime zone of the Galapagos against the ravages of the intuitive equidistance line, and insisted on the result that you can see on your screens [slide]. He earned the praise of Professor Lowe, who called his point "a very shrewd one"[28]. Shrewd indeed if the Ecuadorean delegate foresaw equidistance, foresaw arcs of circles, and without any means to calculate an equidistance line, hypothesized where it would run through the zone of the Galapagos and determined that the parallel would be more favourable.

3.29. There is another problem. Peru's diagram from Tuesday used base points on Santa Clara to construct the equidistance line, but it does not use any in the Galapagos. Odd that these islands that Peru says Ecuador wanted to protect were ignored in the construction of the equidistance line. In Tuesday's revelation Peru just continued the equidistance line created by Santa Clara and Peru's mainland out to sea for 800 miles, ignoring the archipelago maritime zone it traversed.

3.30. Shrewd Mr. Fernández would not have made such an error. If he had taken into account base points on the Galapagos in the construction of his intuitive equidistance line, he would have seen that the Galapagos were perfectly capable of protecting themselves. [Slide] That is the equidistance line of Peru, including the Galapagos: giving full effect, of course, but that is what Article IV says.

3.31. There is yet another problem. The Santiago Declaration did not delete all the islands in the south-east Pacific. [Slide] Consider the Desventuradas islands, which are Chilean. If the

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[28]CR 2012/33, p. 18, para. 49 (Lowe).

1952 delegates had been projecting equidistance lines out beyond 200 miles — as they reserve the right to do —, and which is the basis of Peru's new hypothesis, then they would have reached these Chilean islands not long after they reached the Galapagos. When the equidistance line arrived, it would have placed that "group of islands" within 200 miles of the "general maritime zone" of the adjacent State.

3.32. It would have followed ineluctably from the text of Article IV that their maritime zone would be delimited not by the equidistance line, but "by the parallel at the point at which the land frontier of the States concerned reaches the sea". [Slide] You can see that on the slide. This is what their "protected" zone would have looked like: it may be termed the "hernia" effect. Any interpretation of Article IV which produces that result is plainly ridiculous.

3.33. The only sensible way to interpret Article IV is that the maritime boundary is the parallel of latitude and that it delimits each State's frontal projection and insular projections alike: otherwise it will not work.

3.34. We now have common ground that the delegates in Santiago in 1952 agreed *something* about the spaces in which their maritime claims of sovereignty and jurisdiction would involve. We also have common ground that whatever use they were making of the parallel they were making it well beyond 200 miles from shore. That, by the way, is the end of Peru's claim to the *Alta Mar*.

3.35. You have three alternatives before you as to what the States agreed in 1952. The first is Peru's, from Tuesday, which looks like this [slide]. The second is as modified to give Santa Clara its effect under Article IV, as Peru did before Tuesday: it would look like this [slide]. I do not know if that is more or less intuitive. The third is the line that Chile and Ecuador have consistently said, from 1952 until today, was the one settled in Article IV: it looks like this [slide].

3.36. So the question is which one of these three alternatives the delegates in Santiago in 1952 agreed, when they settled their maritime boundaries using "lines of simple and easy recognition"[29], which allowed them to co-operate in the defence of their new maritime zones against the protests of third States? With respect, that question answers itself.

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[29]RC, Vol. II, Ann. 22, p. 115.

(b) *1954*

3.37. I turn to the transactions of 1954, on which Peru spent very little time on Tuesday. Peru's approach to treaty interpretation is particularly striking in connection with the 1954 Agreement Relating to a Special Maritime Frontier Zone. Peru would have you ignore the plain meaning of the words "maritime boundary" appearing in Article I. A more conventional textual approach would start with the words "maritime boundary" and ask what their ordinary meaning is.

3.38. Mr. President, Members of the Court, the ordinary meaning of maritime boundary is maritime boundary.

3.39. [Slide] You can see Peru's departure from ordinary language visually on the screen (tab 129). Here is the Special Maritime Frontier Zone. And here is Peru's claimed boundary. The two are completely different: they do not overlap, because the frontier zone starts 12 miles offshore. A maritime frontier zone that nowhere contains a maritime frontier would indeed be special.

3.40. Peru hopes to minimize the harm that this Agreement so obviously does to its case by characterizing it as one that applies only near the shore. It specifically did *not* apply near the shore. It applied only after the first 12 miles of the boundary. There is nothing, nothing, to quote Professor Lowe, to suggest that the maritime boundary so clearly acknowledged in the Agreement was anything other than a complete maritime boundary for the full extent of each Party's maritime claim. [End slide]

3.41. Peru then seeks to characterize the 1954 Agreement as provisional, citing Article 74, paragraph 4, of UNCLOS. Well, the Court, of course, has seen a "provisional arrangement of a practical nature" before in the *Icelandic Fisheries* case. The agreement in that case expressly indicated that it was an "interim agreement relating to fisheries . . ., pending a settlement of the substantive dispute and without prejudice to the legal position or rights of either Government"[30]. There are many other examples of such provisional arrangements. The 1954 Maritime Frontier Zone Agreement looks nothing like a provisional arrangement.

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[30]Agreement of 13 November 1973, quoted in *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, pp. 17-18, para. 36.

3.42. What it does look like can be seen from the 1975 Colombia-Ecuador Agreement, which also establishes a buffer zone. The Spanish text is nearly identical to Article 1 of the 1954 Agreement[31].

3.43. On Tuesday morning[32] Professor Lowe accused Chile of finding references to the "parallel" and pretending that they meant "maritime boundary". He said: "That is the fault that runs throughout Chile's case; that is the crack that makes Chile's case fall apart."[33] Strong words: he could find just one example, but he said it was a "fine" example. It was Annex 120 to Chile's Rejoinder, a resolution of the CPPS containing a draft of the Special Maritime Frontier Zone Agreement. You will find it in tab 128 of your folders. Professor Lowe pointed out that there is an inaccurate translation, and on Chile's behalf I apologize for that. You see here the original Spanish in the resolution with an accurate translation, taken from our Rejoinder[34].

3.44. [Slide] You can see that the same document includes the words "International Maritime Boundary". It refers to "violations of the maritime frontier". But Professor Lowe is correct that when the CPPS draft went to the delegates at Lima, Article 1 referred only to the parallel , not to any maritime boundary. So far, so good. The Court will be interested to see what happened to this draft at the Lima Conference.

3.45. This is what happened, and I quote from the Minutes:

> "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 in this article."

Article I was thus amended as follows:

> "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."

Professor Lowe did mention some extracts from these Minutes, but he said not a word about this passage. The final text of Article 1 of the 1954 Agreement replicates exactly this text. [End slide]

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[31] Agreement between Colombia and Ecuador, 23 August 1975 (entered into force 22 December 1975), 996 *UNTS* 239.

[32] See CR 2012/33, p. 29, paras. 114-116 (Lowe).

[33] *Ibid.*

[34] RC, para 5.11.

3.46. Another argument Peru has now abandoned is that this agreement applied only between Ecuador and Peru. The delegate of Ecuador, Mr. Lara, intervened on a topic that had nothing to do with islands. The Agreement does not contain the word islands. The three States agreed on treaty language that made explicit what "parallel" they were referring to. It was "the parallel which constitutes the maritime boundary".

3.47. Professor Lowe asked how cartographers could have drawn a map showing the maritime boundary on the basis of Article IV[35]. The answer is: they would have done so exactly in the way that Peru instructed them to do in its Supreme Resolution of 1955. That specifically referred to Article IV of the Santiago Declaration and specified how its maritime dominion was to be depicted on maps.

3.48. Professor Lowe also asked whether the negotiators in Santiago would have thought that they had just delimited maritime boundaries[36]. We have already seen what they said in the Minutes. He showed you a report of the Peruvian Congress recording what in 1955 the Government thought had happened in Santiago and Lima. Peru put three of the 11 pages of this document in your session 2 folder on Tuesday, omitting the page that explicitly refers to Peru's "maritime boundaries"[37]. Peru showed you Mr. Peña Prado's signature[38], but it said nothing about his speech to Congress explaining that the 1952 and 1954 inter-State conferences established maritime boundaries[39].

(c) ***1952 and 1954***

3.49. Mr. President, Members of the Court, on Tuesday, Professor Lowe said that any "half-competent lawyer" would see that the Santiago Declaration did not delimit a boundary[40]. [Slide] Well, President Jiménez de Aréchaga was not half a competent lawyer. In his view, and I quote from tab 130:

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[35]CR 2012/33, p. 21, para. 70 (Lowe).

[36]*Ibid.*, p. 14, para. 16 (Lowe).

[37]Peru's judges' folder, session 2, 4 Dec. 2012, tab 31; cf. RP, Vol. II, Ann. 6; RC, Vol. III, Ann. 78 and RC, para. 2.80.

[38]Peru's judges' folder, second round, 11 Dec. 2012, tab 99.

[39]CMC, Vol. IV, Ann. 246, p. 1467.

[40]CR 2012/33, p. 30, para. 122 (Lowe).

> "That the maritime boundary is, in fact, constituted by a parallel of latitude from the mainland was *confirmed* by the parties in an agreement signed on 4 December 1954. The first article of that agreement refers to the parallel which constitutes the maritime boundary between the two countries."[41]

That is what more than a half-competent lawyer thinks.

3.50. Peru argues that if the Santiago Declaration did not vault over the high barrier it sets for delimitation agreements, then the subsequent agreements cannot do either. Peru's determination to separate the chain of events, from 1952 to 1954 to 1955, ignores the integration clause in the 1954 Agreements, and, in relation to the Agreements of 1968 and 1969, it also ignores Article 31 (3) *(a)* of the Vienna Convention on the Law of Treaties.

3.51. As to the relationship between 1952 and 1954, the Parties agreed that the 1954 Special Maritime Frontier Zone Agreement is an integral part of the Santiago Declaration. The Agreements of 1952 and 1954, taken separately and together, establish the existence of an agreed maritime boundary to the full extent of each State's maritime zone. They are to be read together, and read together they say explicitly that "the parallel which constitutes the maritime boundary between the two countries" is "the parallel at the point at which the land frontier of the States concerned reaches the sea".

Quod iterum, Mr. President, Members of the Court, *erat demonstrandum.*

Mr. President, I would ask you to call upon Mr. David Colson.

The PRESIDENT: Thank you, Professor Crawford, and I give the floor to Mr. Colson. At the same time I ask him, kindly, to move the microphone to his left, more to the centre. No. That way. Yes, thank you. You have the floor, Sir.

Mr. COLSON:

PERU'S 1955 SUPREME RESOLUTION AND THE OUTER LIMIT OF PERU'S ZONE

1.1. Thank you, Mr. President, Members of the Court. Professor Crawford has again reviewed carefully the Santiago Declaration and the 1954 Agreement on the Special Maritime Frontier Zone. And I will return to the 1955 Supreme Resolution, and respond to points made by Professor Lowe and Sir Michael Wood about the arcs-of-circles and trace parallel methods.

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[41]CMC, Vol. V, Ann. 279, p. 1647.

1. Introduction

1.2. To begin, I should say something about the differences I have with opposing counsel about the definition of the outer limit found in Peru's 1952 Petroleum Law and Professor Lowe's argument that you can only refer to a minimum distance if you use the arcs-of-circles method.

1.3. First, as to the definition of the outer limit of Peru's zone found in the 1952 Petroleum Law. It refers to the outer limit as "an imaginary line drawn seaward at a constant distance of 200 miles from the low-water line along the continental coast"[42].

1.4. It does not say how that constant distance is to be measured. It could be a constant distance of 200 miles measured along the geographic parallels or a constant distance where every point on the outer limit is measured from the nearest point on the coast. Likewise, concerning Professor Lowe's concern about a minimum distance[43], a minimum distance of 200 miles may be obtained by the trace parallel as measured along successive parallels, or by the arcs-of-circles method. The word minimum, used as we know in Article II of the Santiago Declaration, does not mean arcs of circles, although Professor Lowe would like you to believe that[44].

1.5. [Start graphic 1] The classic definition of arcs-of-circles method is found in Article 6 of the 1958 Convention on the Territorial Sea and the Contiguous Zone, which you will find at tab 132 of your folders and it is now on the screen. The same words, exactly the same words, are repeated in Article 4 of the 1982 Convention. Those words say: "The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea."[45]

1.6. As you may note, there are two elements of this definition missing from the Petroleum Law definition[46] — reference to every point on the outer limit; and reference to nearest points on the coast. It is the combination of these two elements that properly describe the arcs-of-circles

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[42]MP, Vol. II, Ann. 8, p. 35.

[43]CR 2012/33, p. 16, para. 34 (Lowe).

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

[45]Convention on the Territorial Sea and the Contiguous Zone, done at Geneva on 29 April 1958, 516 United Nations, *Treaty Series (UNTS)* 205 (entered into force 10 September 1964); see also United Nations Convention on the Law of the Sea, signed at Montego Bay on 10 December 1982, 1833 *UNTS* 3, Art. 4.

[46]MP, Vol. II, Ann. 8, p. 35, Art. 14 (4) ("Continental Shelf. There shall be the zone lying between the western limit of the coastal zone and an imaginary line drawn seaward at a constant distance of 200 miles from the low-water line along the continental coast.")

method. They are missing from the Petroleum Law and Peru's 1955 Supreme Resolution. So we stand by our view that Peru's 1952 Petroleum Law and the 1955 Supreme Resolution did not introduce the arcs-of-circles method into Peru's practice. [End graphic 1]

2. Peru's 1955 Supreme Resolution

1.7. To promote his argument that the 1955 Supreme Resolution concerned only the outer limit of Peru's zone, Sir Michael Wood put a great deal of weight on Peru's arrest of the Onassis Fleet as being the reason for Peru's promulgation of the Supreme Resolution[47]. There is no evidence in the record for this. Sir Michael Wood made no citation in his two presentations when he mentioned this point. And for the last few days we have searched materials available to us to see if we might have overlooked this point, to no avail. García Sayán does indeed mention the arrest of the Onassis fleet in his monograph, but he does not connect that event to the 1955 Supreme Resolution[48]. We have been wondering why Peru has offered no evidence of this assertion, if it is so certain about it. If there are internal documents of Peru that say this, we have not seen them, the Court has not seen them, and we wonder what else they might say.

1.8. Sir Michael Wood also asserted that the Onassis Fleet was caught whaling outside the trace parallel line but within the arcs-of-circles line as measured from Peru's coast[49]. Again, he did not cite any evidence in the record for this. [Start graphic 2] The evidence submitted by Peru however, in fact suggests to the contrary. The Report of Peru's Ministry of Foreign Affairs annexed to Peru's Memorial records the arrest of the Onassis Fleet on 15 November 1954, and that Report states that the arrest occurred 126 miles from Punta Aguja, but it does not specify the direction[50]. The graphic now on the screen and at tab 134 of your folders shows the maritime area within 126 miles of Punta Aguja — (which is of course larger than 126 statute miles, and therefore our estimate is conservative). As you can see, the entire area is inside the 200-mile trace parallel measured from Peru's coast. There is something seriously wrong with Sir Michael's account of the background of the 1955 Supreme Resolution. [End graphic 2/Start graphic 3 with call-out]

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[47]CR 2012/33, p. 39, para. 29 (Wood); see also CR 2012/28, p. 35, para. 38 (Wood).

[48]See MP, para. 4.86, citing E. García Sayán, *Notas sobre la Soberanía Marítima del Perú*, 1955, pp. 35-37.

[49]CR 2012/33, p. 39, para. 29 (Wood).

[50]MP, Vol. III, Ann. 98, p. 577.

1.9. In any event, what we do know for a fact is that Chile submitted in its Counter-Memorial a letter from the Minister of Defence of Peru to the Foreign Minister of Peru dated 21 November 2000 with the annex to that letter. This letter is at tab 133 of your folders, and you can see it now on the screen. I will not read it out, but I invite you to read it carefully. Clearly the Minister of Defence of Peru just 12 years ago did not understand the 1952 Petroleum Law or the 1955 Supreme Resolution as Peru's counsel claim today. This letter was discussed in Chile's Counter-Memorial at paragraph 2.121 and a copy of the letter with its annex is found in Annex 189 to the Counter-Memorial. I apologize for incorrectly referring to the Rejoinder rather than the Counter-Memorial last week when I mentioned this letter, but the citation in the prepared statement was correct. I noted then that we had not heard from Peru about this letter — not in the Reply and not in the first round of oral presentation — and we did not hear about it in Peru's second round, either. [End graphic 3]

1.10. Chile stands by its position that the 1955 Supreme Resolution was for the purpose of describing the limits of all of Peru's zone and it served that purpose. The 1955 Supreme Resolution was specifically mentioned — and quoted in full — in the Official Message to Congress by Peru's Foreign Minister in the Parliamentary process for ratification of the agreements of 1952 and the agreements of 1954[51]. And, as we know, the 1954 Agreement on the Special Maritime Frontier Zone was clearly concerned with the lateral limits of Peru's zone, referring to the "parallel [of latitude] which constitutes the maritime boundary"[52].

1.11. Peru has noted that I said that the Court does not need to decide the question of when Peru began to use the arcs-of-circles method. This was an observation about the nature of Peru's argument. Peru is so focused on the arcs-of-circles methodology and the picture of overlapping 200-nautical-mile zones on the screen, it has yet to understand that the argument it makes cuts against its case and is entirely supportive of the presentation of Chile before this Court.

1.12. With the Court's indulgence I would like to conduct a short demonstration to prove my point.

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[51]MP, Vol. III, Ann. 95, p. 547. Page 3 of the document is omitted from Peru's Annex but appears in the full document deposited with the Registry with Peru's Memorial, doc. 78.

[52]*Ibid.*, Vol. II, Ann. 50, Art. 1.

3. Arcs-of-circles method/trace parallel demonstration

1.13. As we said last week, the result of the fact that both States used the trace parallel method, and parallels of latitude as the geometric construction lines, meant the two zones abutted along the parallel of latitude of the land boundary and had other important consequences. This discussion was at page 37 of the transcript from Thursday afternoon's pleading. Interestingly, Peru did not really contest this. Sir Michael Wood made an offhand remark about the importance Chile attaches to this but he did not contest it[53]. We do attach importance to it. The graphic now on the screen shows the situation as it would have been in 1947 and at least up to 1952 when Peru passes its Petroleum Law.

1.14. If Peru is right and its Petroleum Law required Peru's zone to be defined by an arcs-of-circles method, with the outer limit being a line every point of which is at a distance of 200 nautical miles from the nearest point on the baseline — that being a proper definition of arcs of circles, not the formula in the Petroleum Law of "constant distance" — the situation would have been as shown now on the graphic. Since Chile maintained the trace parallel method, Chile's claimed zone would not have strayed north of the parallel of latitude of the land boundary terminus. But 200-nautical-mile arcs of circles drawn from Peru's coast would overlap Chile's 200-mile zone.

1.15. A very unhappy area of overlap would be created. This situation — if it had happened — would obviously have caused a dispute with Chile. There is no way that Chile would have convened the Santiago Conference later in 1952 if Peru had taken such an aggressive position towards Chile at that time. The energy needed to defend the 200-mile claims against the major maritime powers would have been dissipated and would have had to have been directed towards a bilateral boundary dispute. That did not happen. Chile and Peru co-operated. This is a strong indication that Peru's Petroleum Law was not understood by Peru or Chile to require the arcs-of-circles method.

1.16. Next, the Santiago Declaration is adopted. Article II, as we know, provided that any State could expand its 200-mile zone. Peru accepts that Article II applied to Chile. But if Chile were to expand its claim and exercise its rights under Article II, and Peru had an arcs-of-circles

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[53]CR 2012/33, p. 39, para. 33 (Wood).

claim at the time, the area of dispute between Chile and Peru would only have grown. The arcs-of-circles wrap-around by Peru of Chile's zone would block any opportunity for Chile to expand its claim as Chile had the right to do under Article II. It surely cannot be that way. It surely cannot be that the Santiago Declaration was intended that Articles II and IV work that way.

1.17. Turning to Article IV, Peru does not accept that Article IV created a legal boundary between Chile and Peru, although it accepts that Chile has the right to expand its zone under Article II. Thus the "narrative" — a good word used by Professor Treves[54] last week — the narrative that Peru suggests is not one of symmetrical overlapping arcs to be happily divided by an equidistance line, as suggested by Professor Lowe[55]. Instead, the logic of Peru's narrative is that, following the Santiago Declaration, there is no boundary between Chile and Peru, that Peru's zone overlaps Chile's zone, and that Peru blocks any seaward extension of Chile's zone, preventing Chile from benefiting from Article II. An unlikely scenario.

1.18. Next comes the 1954 Agreement on a Special Maritime Frontier Zone[56]. Even Peru accepts that the agreed boundary parallel is operative, at least to some extent. So now, one way or another, the parallel must enter into Peru's narrative. Reference to the parallel in the 1954 Agreement on the Special Maritime Frontier Zone means that Peru would no longer challenge Chile's 200-mile zone with its arcs of circles, nor denies Chile the right to expand its claim by blocking it with Peru's notional wrap-around. Of course, Peru says that the Agreement on a Special Maritime Frontier Zone was tentative, or provisional. This is all "after the fact" reasoning by Peru's counsel. Peru made no such reservations at the time.

1.19. What comes next? It is the 1955 Supreme Resolution[57]. And what does it say? It requires that Peru's outer limit stop at the boundary parallels. So, if Peru is using arcs of circles, and the decree requires the outer limit to stop on the parallel of latitude of the land boundary terminus, that point is as shown on the next graphic and labelled point X.

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[54]CR 2012/33, p. 54, para. 15 and p. 55, paras. 19 and 20 (Treves).

[55]*Ibid.*, pp. 15-16, paras. 26-27 (Lowe).

[56]MP, Vol. II, Ann. 50.

[57]CMC, Vol. IV, Ann. 170, p. 1025.

1.20. Chile's understanding is that by operation of Articles II and IV of the Santiago Declaration, it was understood and agreed that the boundary parallel would serve to delimit all present and prospective claims. On this basis it did not matter whether Chile or Peru or both used trace parallel or arcs-of-circles, or whether they expanded their zones beyond the 200-nautical-mile limit. Their common narrative was that they would never cross the boundary parallel because it was their common, agreed, all-purpose limit.

1.21. This is why we have said that the arcs-of-circles argument does not help Peru. In fact, when it is assessed in light of Peru's 1955 Supreme Resolution, it confirms Chile's position. Chile and Peru viewed themselves as Pacific States. As President de Aréchega said, having a "direct and linear projection of their land territories and land boundaries into the adjacent seas"[58]. Or perhaps it is as President Bustamante y Rivero said in his separate opinion in the *North Sea* cases, "obtaining shelves of a rectangular shape" (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, separate opinion of President Bustamante y Rivero, p. 61, para. 6 *(b)*). There was no conception of an arcs-of-circles overlap or of an arcs-of-circles wrap-around of the outer limit of Chile's zone, as Peru suggests today.

Thank you, Mr. President. I thank the Court for its attention and ask that you call on Professor Condorelli.

The PRESIDENT: Thank you, Mr. Colson. Je passe la parole au professeur Condorelli.

M. CONDORELLI : Merci, Monsieur le président.

REMARQUES SUR L'OBJET ET LE BUT DES TRAITÉS DE 1952 ET 1954

1. Introduction

1. La reconnaissance (tardive) par le Pérou que la déclaration de Santiago est un traité comporte la reconnaissance (tardive elle aussi, mais très bienvenue) que les critères et principes d'interprétation relatifs aux traités lui sont pleinement applicables. On ne peut que se réjouir de voir les plaideurs péruviens découvrir enfin cette vérité élémentaire et de les voir obligés à essayer de surmonter leur peur à ce sujet, et obligés par conséquent de se lancer dans des propos visant à en

[58]CMC, Vol. V, Ann. 280, p. 1655.

faire application. Un débat bien fourni a pu se dérouler finalement (et heureusement) sous les yeux de la Cour, qui pourra donc trancher en pleine connaissance des arguments pertinents exposés de part et d'autre.

2. Il y a un instant, le professeur Crawford a présenté à nouveau le point de vue chilien concernant l'interprétation qu'il faut donner aux traités en question, et a répondu comme il se doit aux objections de dernière heure formulées par la Partie adverse. Il m'incombe, quant à moi, de compléter son propos par quelques remarques concernant l'objet et le but des accords de 1952 et 1954. La Partie péruvienne, en effet, essaie de tirer l'eau au moulin de sa thèse au moyen d'une opération consistant en substance à travestir ou minimiser l'objet et le but desdits traités : ceux-ci sont présentés, en effet, comme ayant un objet et un but excluant d'emblée que les parties contractantes aient pu avoir l'intention de délimiter leurs zones maritimes respectives ou de confirmer et d'appliquer une telle délimitation. La présente plaidoirie vise à mettre en lumière cette tentative de travestissement et à la déjouer.

3. Comme le souligne la Commission du droit international dans son commentaire au point 3.1.6. du Guide de la pratique sur les réserves aux traités, l'opération interprétative visant à identifier l'objet et le but du traité (qui relève, comme le dit le professeur Pellet, de l'«esprit de finesse») doit être conduite de bonne foi «en tenant compte de ses termes et dans leur contexte»[59]. Comme en témoigne la Commission, votre Cour déduit l'objet et le but d'un traité, isolément ou de manière combinée, d'éléments variables, tels le titre du traité[60], le préambule[61], un article placé en tête du traité qui «doit être regardé comme fixant un objectif à la lumière duquel les autres dispositions du traité doivent être interprétées et appliquées» (*Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exception préliminaire, arrêt, C.I.J. Recueil 1996 (II)*, p. 814, par. 28), voire un article du traité qui démontre «le principal souci

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[59] Guide de la pratique sur les réserves aux traités, commentaire au point 3.1.6 (Détermination de l'objet et du but du traité), rapport de la Commission du droit international à l'Assemblée générale, *Soixante-troisième session*, 26 avril-3 juin et 4 juillet-12 août 2011 (doc. A 66/10/Add.1), p. 446-447.

[60] *Certains emprunts norvégiens (France c. Norvège), arrêt, C.I.J. Recueil 1957*, p. 24.

[61] *Droits des ressortissants des Etats-Unis d'Amérique au Maroc (France c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 1952*, p. 196 ; *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986*, p. 138, par. 275 ; *Différend territorial (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994*, p. 25-26, par. 52 ; et *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 652, par. 51.

de chaque partie contractante» lors de la conclusion du traité[62], ou encore les travaux préparatoires[63], ou l'économie générale du traité[64]. Je note en passant que parmi les éléments à prendre en considération la Commission ne fait pas figurer la teneur des invitations à la conférence diplomatique dont le traité à interpréter est issu ou le libellé de l'ordre du jour de celle-ci : un prétendu argument sur lequel insistent éperdument nos amis de l'autre côté de la barre. En effet, comme l'observait le professeur Crawford jeudi 6 décembre, les invitations ou l'agenda sont loin d'être déterminants : «what matters is what the States agreed when they met»[65] et, j'ajoute, ce qui compte est l'objet et le but qu'ils ont décidé d'assigner à l'accord qu'ils ont conclu.

2. L'objet et le but de la déclaration de Santiago

4. Monsieur le président, quels sont l'objet et le but de la déclaration de Santiago ? Dans ses écritures et plaidoiries, le Pérou les présente en suivant essentiellement deux approches.

5. La première met en exergue que, au moyen de la déclaration, les parties contractantes ont entendu réagir «in the face of predatory whaling and fishing by foreign fleets» — ce sont les mots de l'ambassadeur Wagner[66]. Les Parties — nous explique-t-on — ont décidé dans ce but d'étendre à 200 milles nautiques leur juridiction exclusive sur les ressources naturelles de la mer. Après l'agent du Pérou, qui a donné le ton dans son introduction du 3 décembre dernier, tous les plaideurs de l'autre côté de la barre, et spécialement les professeurs Lowe et Wood[67], ont évoqué à tour de rôle le but limité poursuivi par la déclaration, qui concernerait donc pour l'essentiel l'endiguement de la chasse à la baleine à outrance et de l'exploitation sauvage de la pêche. Tel étant le but de la déclaration, il n'avait pas de sens — nous suggère-t-on — de se soucier des frontières entre les zones maritimes des trois pays.

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[62] *Île de Kasikili/Sedudu (Botswana/Namibie), arrêt, C.I.J. Recueil 1999 (II)*, p. 1072-1073, par. 43.

[63] *Différend territorial (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994*, p. 27-28, par. 55-56 ; *Ile de Kasikili/Sedudu (Botswana/Namibie), arrêt, C.I.J. Recueil 1999 (II)*, p. 1074, par. 46.

[64] *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exception préliminaire, arrêt, C.I.J. Recueil 1996 (II)*, p. 813, par. 27 ; et *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 652, par. 51.

[65] CR 2012/30, p. 53, par. 3.47 (Crawford).

[66] CR 2012/27, p. 19, par. 10 (Wagner).

[67] CR 2012/28, p. 17, par. 28 (Lowe) ; *ibid.*, p. 18, par. 32 et p. 23, par. 54 ; *ibid.*, p. 28, par. 9 (Wood) ; CR 2012/33, p. 14, par. 16 (Lowe).

6. La deuxième approche fait valoir plutôt (mais pas nécessairement en alternative) que le but de la déclaration de Santiago «was more on maintaining a common front against third States than on creating national maritime zones» — c'est ce qu'a prétendu le professeur Lowe mardi dernier[68]. Et le professeur Pellet d'alléguer à peu près dans le même sillage : «nous ne sommes pas en présence d'un accord de délimitation, mais bien d'un manifeste, décrivant la politique que les Etats signataires entendaient suivre à l'égard du reste du monde»[69] ; en somme, une sorte de — comme il l'appelle — «acte unilatéral collectif» par lequel les trois signataires énonçaient «leur politique commune en vue de la conservation et de l'exploitation des ressources naturelles à l'égard de tous les autres Etats du monde»[70]. Dans ces conditions — vous assure le professeur Pellet — on comprend pourquoi les Etats «ne se sont ... pas souciés du détail de la délimitation des zones sur lesquelles ils proclamaient leur souveraineté et juridiction exclusives»[71].

7. Ces deux approches ont ceci de commun : elles sont façonnées de manière qu'elles semblent justifier l'injustifiable : à savoir, que l'on néglige, voire qu'on oublie carrément de prendre en compte les dispositions de la déclaration de Santiago portant sur la délimitation des zones maritimes revendiquées : c'est exactement ce qu'on a prétendu faire du côté péruvien.

8. Un point est à mettre au clair aussitôt. Le Chili ne soutient pas du tout ce que le Pérou voudrait lui faire dire, à savoir que la déclaration de 1952 ne serait qu'un accord centré sur la délimitation maritime, c'est-à-dire un traité dont la délimitation serait le seul objet et but[72]. Indiscutablement, l'objet et le but de la déclaration sont bien plus larges. Toutefois, les descriptifs qu'en présente le Pérou les amputent gravement. Le but de la déclaration de Santiago n'est de loin pas exclusivement celui mis en évidence par la première approche, à savoir d'endiguer la déprédation du patrimoine halieutique des mers baignant les côtes des Etats signataires, et des baleines en particulier, mais il est (comme le proclame haut et fort le préambule)[73] d'assurer à leurs peuples respectifs l'ensemble des ressources naturelles des zones maritimes en question en

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[68] CR 2012/33, p. 26, par. 97 (Lowe).

[69] CR 2012/34, p. 33, par. 30 (Pellet).

[70] *Ibid.*, p. 34, par. 31 (Pellet).

[71] *Ibid.* p. 34, par. 30 (Pellet).

[72] CR 2012/33, p. 19, par. 56 (Lowe).

[73] MP, vol. II, annexe 47, p. 259.

soumettant celles-ci à leur souveraineté et juridiction exclusives, y compris pour ce qui est des fonds et des sous-sols marins : or, il n'y a pas que je sache de baleines souterraines ! Quant à la deuxième approche, elle met correctement en exergue l'aspect de la déclaration concernant la politique internationale maritime commune des trois parties à l'égard du reste du monde, mais elle oublie totalement de relever le volet *inter partes* de la proclamation de souveraineté et juridiction exclusives. Pourtant la déclaration le dit explicitement de la façon la plus claire qui soit : à chacun sa zone maritime ! Autrement dit, la souveraineté revendiquée est certes proclamée par les trois Etats de façon concertée, mais elle porte pour chacun des trois sur une zone maritime dont ils conviennent qu'elle est distincte par rapport à celle des deux autres.

9. Une prise en compte adéquate de l'objet et du but de la déclaration de Santiago amène à considérer comme parfaitement conséquent et logique que l'on puisse y trouver les critères permettant d'identifier les limites de la zone maritime de chacune des trois parties par rapport à celle de l'Etat limitrophe : il aurait été étonnant qu'il en aille autrement ! L'article IV répond pleinement à cette exigence.

3. L'objet et le but des accords de Lima de 1954

10. Monsieur le président, j'en viens maintenant à l'objet et au but des accords de Lima de 1954, dont on sait bien qu'ils sont assortis tous les six d'une clause commune qui qualifie leurs dispositions comme faisant partie intégrante et complémentaire des accords de 1952, et donc en particulier de la déclaration de Santiago. Cette relation d'intégration avec la déclaration de 1952 est affichée de façon parfaitement cohérente dans les *considérants* de la *convention complémentaire à la déclaration de souveraineté sur la zone maritime de 200 milles.* Ce titre indique d'ailleurs on ne peut plus clairement quelle idée précise a présidé à l'élaboration des instruments de 1954 : ces accords ont été conclus dans le but de réaliser l'intention exprimée en 1952 de «souscrire des accords et conventions pour l'application des principes relatifs à cette souveraineté»[74]. La référence à l'article VI de la déclaration de Santiago — où figurent des mots analogues[75] — est évidente, et ceci contribue à expliquer pourquoi les accords de 1954, accords

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[74] MP, vol. II, annexe 51, p. 280 (deuxième considérant de la convention complémentaire).

[75] *Ibid.*, annexe 47, p. 259.

relatifs à l'application des principes convenus en 1952, se destinent à mettre en œuvre ces derniers en les complétant dans la mesure du nécessaire, mais en excluant d'emblée toute modification ou altération. Rien, je dis bien rien, ne justifie l'allégation péruvienne que les instruments en question seraient provisoires ou transitoires. On remarquera d'ailleurs que les principes établis par la déclaration de Santiago, dont les accords de 1954 doivent assurer l'exécution, sont conçus comme s'inscrivant dans la durée.

11. L'objet et le but des accords de 1954 ne pourraient pas être mieux précisés. Leurs références multiples aux frontières latérales entre les zones maritimes des trois Etats démontrent et confirment donc que ces frontières avaient été bien établies par la déclaration de Santiago et qu'il s'agissait en 1954 d'adopter des mesures d'application à leur sujet aussi. Ceci est d'ailleurs clairement explicité par le fait que chacun des six accords s'ouvre par la proclamation que les Etats contractants agissent en les adoptant «en conformité avec ce qui a été concordé» dans la résolution n° X adoptée le 8 octobre 1954 par la *commission permanente de la conférence sur l'exploitation et la conservation des ressources maritimes du Pacifique Sud* : il s'agit, je le rappelle, de la résolution par laquelle il a été pris acte de ce que, moyennant les accords de 1952, les trois pays «ont déterminé les zones maritimes sur lesquelles ils ont juridiction et souveraineté exclusives»[76] : ils y ont *chacun* juridiction et souveraineté exclusives !

12. La Partie péruvienne a redit mille fois par des mots variés que les références répétées aux frontières maritimes entre les parties signataires figurant dans l'*accord sur la zone spéciale frontalière maritime* dépendraient du «limited purpose», du but limité de cet instrument qui «was to avert disputes involving artisanal fishermen on small vessels fishing near to the coast»[77]. Dans ce but limité, allègue-t-on, une sorte de brève frontière spéciale pour la pêche de proximité aurait été provisoirement établie, sans que cela ait la moindre implication quant à la frontière maritime générale. C'est une explication qui ne tient pas debout, outre qu'elle ne trouve pas le moindre encrage dans les textes des accords de 1954, comme le professeur Crawford vient de le réitérer. Mais c'est de surcroît une explication qui se réfère à un seul des six accords de Lima de 1954, alors que des dispositions de tous les cinq autres font explicitement référence elles aussi aux frontières

[76] CMC, vol. II, annexe 40, p. 358.

[77] CR 2012/28, p. 28, par. 9 (Wood). Voir aussi *ibid.*, p. 31, par. 21 ; CR 2012/33, p. 27, par. 109 (Lowe).

latérales entre les zones maritimes des trois pays ou en présupposent ouvertement l'existence : ceci sans le moindre rapport avec la pêche de proximité, ainsi que j'ai eu l'occasion de le démontrer dans ma plaidoirie de vendredi dernier[78]. La Cour saura tenir compte du fait que nos amis de l'autre côté de la barre ont préféré garder sur cet argument de poids un silence impénétrable.

13. Ceci complète ma plaidoirie, Monsieur le président. Je vous remercie de tout cœur, Mesdames et Messieurs les juges, de votre patiente attention, et je vous prie, Monsieur le président, de bien vouloir inviter à la barre le professeur Dupuy, peut-être après la pause, c'est comme vous le déciderez.

Le PRESIDENT : Merci, professeur Condorelli. Vu le temps, j'invite le professeur Dupuy à se présenter et plaider au nom du Chili.

M. DUPUY :

L'INITIATIVE PRISE À SANTIAGO ET LA CONSTRUCTION D'UNE ÉQUITÉ RÉGIONALE À VOCATION UNIVERSELLE

1. Monsieur le président, Mesdames et Messieurs les juges, la question posée aux Parties par M. le juge Bennouna a le grand mérite de nous permettre de resituer la déclaration de Santiago dans son contexte historique ; elle permet aussi de cerner la portée de la déclaration pour l'affirmation de la solidarité à l'échelle régionale aux fins de promouvoir, dans une vision renouvelée des buts du droit international, la recherche de l'équité. Equité qu'il fallait bâtir tant entre les parties qu'entre eux et les autres, c'est-à-dire à cet égard entre pays parvenus à des stades différents de développement économique.

2. A n'en pas douter, les trois Etats parties à la déclaration de Santiago étaient pleinement conscients de l'audace et de la nouveauté de leur initiative pour affirmer conjointement leur «souveraineté et compétence exclusives sur la mer» jusqu'à une distance de 200 milles nautiques de leurs côtes, selon les termes de l'article II de la déclaration.

3. Dans cette brève plaidoirie, j'aborderai trois points, d'une part le contexte historique dans lequel il faut comprendre cette initiative (I) ; ensuite, la portée juridique qui en était escomptée par

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[78] CR 2012/32, p. 54 et suiv., par. 33 et suiv.

ses promoteurs (II) ; enfin, et surtout, la visée fondamentale de ladite déclaration, qui était de promouvoir un renouvellement du droit international fondé sur une reconception de l'équité entre Etats, tant à l'échelle régionale qu'universelle.

I. Contexte historique de la déclaration

4. Pour présenter en termes concis une longue histoire, je serais tenté de dire que la déclaration de Santiago est à resituer entre Harry Truman, Alejandro Alvarez, et la recherche ultérieure d'un nouvel ordre international, tant dans le domaine économique que politique et environnemental. *Truman*, parce que c'est lui qui a ouvert la voie à l'affirmation unilatérale de droits souverains sur de nouveaux espaces maritimes ; *Alvarez*, parce que, grand internationaliste chilien déjà conscient des disparités de développement et des dangers de la mainmise des grandes puissances sur un droit international de la mer qui leur devait sa formulation, il en appela inlassablement, jusqu'au soir de sa vie, à l'affirmation d'un «droit international nouveau», pour reprendre le titre du petit livre qu'il fit paraître en 1960. On trouve dans cet ouvrage testament, comme écrit à la hâte pour résumer les idées qu'il avait toujours défendues, à la fois la spécificité régionale de la tradition juridique internationale en Amérique latine et l'aspiration universelle à une revision des finalités d'un nouveau droit international, un droit qui devait désormais percevoir la souveraineté non plus seulement dans sa dimension étroitement politique mais également économique. Les idées exprimées par Alvarez n'étaient pas seulement les siennes ; elles étaient ressenties, plus ou moins confusément par tous les peuples du sous-continent américain, à la fois resté si proche de l'Europe par la culture et si exposé à l'attention prédatrice que les grandes puissances occidentales lui portaient de longue date.

5. C'est par ce dernier trait, notamment, que la déclaration de Santiago apparaît comme le premier manifeste d'une revendication à la fois politique, économique et, pour employer un vocable qui n'était pas encore à l'époque en usage, environnementale. La volonté de protéger les ressources naturelles étalées au large de leurs côtes apparaît aux Etats comme une nécessité économique pour la protection des droits de leurs «peuples», notion explicitement énoncée à l'article II de la déclaration.

6. Il y a déjà là, en germe, toute l'affirmation d'un nouveau «droit international du développement». Particulièrement étudié par l'un des membres de cette Cour[79], et appuyé sur la résolution 1803 de l'Assemblée générale des Nations Unies, on sait qu'il s'organisera, au nom du droit des peuples et à peine dix ans après la déclaration de Santiago, autour du principe de souveraineté permanente sur les ressources naturelles. J'en viens ainsi à l'examen de la portée que les trois Etats parties à la déclaration entendaient attacher à leur audacieuse initiative.

II. Portée de la déclaration

7. Le Chili, le Pérou et l'Equateur savaient qu'ils allaient s'attirer les foudres des grandes puissances maritimes. Et de fait, comme nous l'avons vu, une salve de protestations véhémentes fut tirée d'abord par le Royaume-Uni, puis par les Etats-Unis, la Norvège, la Suède, le Danemark, les Pays-Bas[80]. Bien des pavillons des Etats possédant des navires au long cours semblaient ainsi converger vers ces rives éloignées pour refuser à ces Etats côtiers de revendiquer sur la mer des droits que celui de l'époque, tout entier dominé par une conception extensive de la liberté de la haute mer, leur déniait si manifestement.

8. On peut au demeurant avoir une idée précise de l'état du droit de la mer à l'époque exactement contemporaine de la déclaration ; il suffit pour cela de consulter les tout premiers travaux que la nouvelle Commission du droit international consacra au régime et à la délimitation de la mer territoriale et de la haute mer[81] mais aussi du plateau continental. Il est très frappant, à cet égard, de constater qu'en matière de délimitation maritime, même si l'idée d'un recours à la ligne médiane se fait jour, elle inspire un manifeste scepticisme à des membres de la Commission aussi éminents que Manley Hudson ou Georges Scelle ; l'un et l'autre affirmaient alors leurs doutes quant à la possibilité d'établir un quelconque principe en la matière, au regard de la diversité des situations particulières[82].

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[79] M. Bennouna, *Droit international du développement,* Paris, Berger-Levraut, 1983, voir en particulier p. 101 et suiv.

[80] CMC, vol. III, annexe 60, p. 489 ; *ibid.*, annexe 68, p. 527 ; *ibid.*, annexe 62, p. 501 ; *ibid.*, annexe 63, p. 505 ; *ibid.*, annexe 64, p. 509 ; *ibid.*, annexe 65, p. 513 ; *ibid.*, annexe 66, p. 517.

[81] Voir en particulier le mémorandum présenté par le Secrétariat, Nations Unies, document. A/CN.4/32 (1950), *Annuaire de la Commission du droit international* 1950, vol. II, p. 67.

[82] *Annuaire de la Commission du droit international* 1951, vol. I, procès-verbaux de la troisième session, p. 287, par. 120 ; *Annuaire de la Commission du droit international* 1952, vol. I, procès-verbaux de la quatrième session, p. 184, par. 46.

9. Ce qui prévaut, en revanche, de façon manifeste, c'est la nécessité de parvenir à la délimitation *par voie d'accord.* L'entente négociée entre riverains d'une mer commune demeure la voie privilégiée sinon exclusive, le recours au juge ou à l'arbitre international n'apparaissant qu'au cas où les parties n'auraient décidément pas pu trouver une solution mutuellement satisfaisante.

10. Conscients de cet état du droit, les trois Etats ont ainsi recours à l'accord, celui constitué par la déclaration mais aussi par ceux qui l'ont accompagnée, en 1952, puis suivie, en 1954. La déclaration affirme solennellement le but de protection des ressources naturelles, en assignant à chacun sa zone spatiale de compétences, sur la base des premières délimitations déjà affirmées par le Chili et le Pérou en 1947, et en suivant la tradition régionale du recours au parallèle géographique.

11. Ainsi confrontés à l'état restrictif du droit positif international de l'époque tel qu'opposé aux visées protectrices, prospectives des trois Etats concernés, doit-on distinguer deux aspects à l'*effet* des traités conclus à Santiago en 1952, puis à Lima en 1954.

12. *Inter se*, *inter partes*, comme disait le professeur Condorelli, c'est-à-dire entre les parties, ces traités, à commencer par la déclaration, sont bien évidemment une source d'obligations réciproques, dont le régime est gouverné par le principe *pacta sunt servanda.*

13. *A l'égard des tiers*, cependant, se pose la question de leur opposabilité, en dépit du fait qu'ils appartiennent en principe à la catégorie des traités dits *objectifs* dans la mesure où ils fixent des frontières territoriales, fussent-elles maritimes.

14. Même si cette opposabilité à l'égard des Etats tiers est recherchée, elle n'est évidemment pas acquise, du moins pas dans un premier temps, comme on vient de le rappeler avec la salve des protestations à laquelle ils furent confrontés. Perçue dans la perspective historique du sort qui devait être la sienne, ne fût-ce qu'à moyen terme, on constate néanmoins dans quelle mesure la série des accords de 1952 et 1954 manifeste combien les Etats concernés avaient perçu avant bien d'autres la nécessité de revision du droit international de la mer en fonction des exigences du droit des peuples au développement.

15. Le XX^{e} siècle est, plus que tout autre avant lui, une période d'«accélération de l'histoire», et déjà en 1969, lors de l'arrêt de principe émanant de votre Cour, on sait combien les parties au différend mais aussi la majorité des juges en son sein prennent cette délimitation

trilatérale par voie de parallèles géographiques comme un fait juridique susceptible d'une prise en considération. On ne saurait dès lors s'étonner de la satisfaction exprimée par M. Bákula, un nom, Mesdames et Messieurs les juges, qui ne vous est sans doute pas totalement inconnu, lorsqu'il déclara au nom du Pérou, cette fois le 2 mai 1975, à la 48ème séance de la troisième conférence des Nations Unies sur le droit de la mer :

> «Peru had decided in 1947 to exercise full sovereignty and jurisdiction over the seas adjacent to its coasts up to a distance of 200 miles. It was not the first or the only State to do so: the right has been recognized as legitimate by the International Court of Justice. Such acts of sovereignty obviously had an influence on the development of the law of the Sea. Some 30 developing countries were already exercising their right to safeguard their natural resources, economic independence and sovereignty by similar measures.»[83]

16. Cette intervention de M. Bákula est d'autant plus remarquable que l'arrêt de la Cour auquel il se réfère est celui intervenu dans l'affaire des *Pêcheries norvégiennes,* lequel comporte une opinion individuelle du juge Alejandro Alvarez dans laquelle il commente la situation des limites maritimes en Amérique latine[84].

17. Pour conclure sur le destin de la déclaration de Santiago, Monsieur le président, Mesdames et Messieurs les juges, on pourrait dire qu'elle est l'un des premiers coups, mais il est rude, portés à la doctrine dite de «l'objecteur persistant», lorsqu'on sait que le droit de la mer contemporain reconnaît désormais sur une base coutumière l'extension des droits souverains des Etats sur une zone allant jusqu'à 200 milles nautiques de leurs côtes. Qu'est-ce que la déclaration de Santiago ? C'est, aussi, une stratégie normative qui a réussi...

18. Monsieur le président, j'en viens alors, et pour finir, toujours dans le prolongement de l'heureuse interrogation exprimée par M. le juge Bennouna, à la dimension équitable de la solution retenue par la déclaration de Santiago.

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[83] Intervention de M. Bákula, 48e séance de la troisième conférence des Nations Unies sur le droit de la mer, 2 mai 1975, document A/CONF.62/C.2/SR.48, extrait des *Official Records of the Third United Nations Conference on the Law of the Sea, Volume IV (Summary Records, Plenary, General Committee, First, Second and Third Committees, as well as Documents of the Conference, Third Session*, p. 77, par. 23, <http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1982/docs/vol_IV/a_conf-62_c-2_sr-48.pdf>.

[84] Affaire des *Pêcheries (Royaume-Uni c. Norvège), arrêt, C.I.J. Recueil 1951,* opinion individuelle de M. Alvarez, p. 147, 150.

III. La recherche d'une solution nouvelle, fondée sur l'équité

19. Le professeur Condorelli vous a rappelé il y a un instant toute l'importance qui s'attache à l'objet et au but d'un traité pour en discerner les implications. Je n'y reviendrai pas. En revanche, ce qu'il reste à souligner, c'est la dimension *solidaire* de cette action conjointe. Une initiative d'une telle nouveauté, dont ils pressentaient toutes les tempêtes qu'elle allait déchaîner, ne pouvait pas être prise isolément par l'un ou l'autre d'entre eux, quelle que soit la longueur de ses côtes.

20. Il fallait, d'un commun accord, oublier définitivement les séquelles d'une guerre désormais ancestrale à laquelle ils avaient donné jadis le nom de l'océan qui les bordait, et affirmer ainsi cette solidarité des riverains occidentaux du sous-continent latino-américain face aux convoitises hauturières des pavillons étrangers. Les trois signataires de la déclaration de Santiago partageaient non seulement la culture, l'histoire et l'héritage bolivarien mais aussi le même niveau de développement. Surtout, ils étaient également exposés au danger des prédations venant des tiers. Il était indispensable d'établir un front commun, chacun agissant à l'intérieur de sa circonscription maritime pour la réalisation d'une identique finalité.

21. Du reste, si leur initiative conjointe a connu le succès qu'on évoquait, c'est précisément parce qu'elle s'appuyait sur cette conjonction de revendications partagées et l'on sait comment ils réaffirmèrent encore au début de la troisième conférence sur le droit de la mer cette solidarité agissante et prospective[85].

22. Aux fins de parvenir au succès de cet effort commun pour repousser vers le large les navires de pêche étrangers, le Chili, le Pérou et l'Equateur ont alors recouru au système le plus simple et le mieux connu à l'échelle régionale, dont la tradition fut rappelée notamment par le président Jiménez de Aréchaga[86]. Ce système, c'est, comme vous le savez, celui des parallèles géographiques que vous voyez réapparaître à l'écran[87].

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[85] MP, vol. III, annexe 108, p. 631 et voir onglet n° 138 du dossier de plaidoiries du Chili (jour 3).

[86] CMC, vol. V, annexe 279, p. 1647.

[87] Voir onglet n° 139 du dossier de plaidoiries du Chili (jour 3).

23. Ainsi que vous pouvez le voir, la série des parallèles qui se succèdent entre les trois Etats, bientôt rejoints par la Colombie et le Panama[88] est le moyen quasi spontané choisi par eux pour affirmer solidairement l'extension de leurs «souveraineté et compétences» sur les mers, chacun sachant ainsi immédiatement à l'intérieur de quelle zone il devra veiller au respect des ressources communes, communes du moins pour ce qui concerne en particulier les ressources halieutiques, car les baleines et les poissons méconnaissent volontiers les frontières maritimes !

24. Comme l'Equateur le dira dans une note adressée à l'Argentine, les trois Etats parties aux accords de 1952 et 1954, bientôt réunis au sein de la commission permanente du Pacifique Sud pour renforcer leur coopération, ont employé des lignes de délimitation «à la fois simples et aisément reconnaissables»[89]. Face au péril croissant d'appauvrissement des ressources naturelles, il fallait agir vite et avec toute l'efficacité requise.

25. L'impératif de coopération ainsi dégagé est du reste mentionné dans les minutes de la convention complémentaire de 1954 précisément destinée à l'organisation de la coopération entre les Etats membres[90].

26. Ainsi, voit-on s'affirmer de façon particulièrement marquante le fait que, loin d'être contraire à l'équité, le choix des parallèles de latitude en fut le véhicule et le garant. Il établissait, sur une base considérée comme égalitaire, les fondements comme les moyens de la solidarité active contre un danger qui menaçait chacun individuellement et tous à la fois.

27. C'est, au demeurant, ce qui est illustré par la conduite d'un homme dont le Pérou s'est bien gardé de prononcer le nom lors de son second tour de plaidoiries : le président Bustamante y Rivero, successivement maître d'œuvre de la délimitation péruvienne en tant que président de la République, puis président de la Cour internationale de Justice. Je ne reviendrai pas sur l'arrêt de la Cour sur le *Plateau continental de la mer du Nord.* Est-il besoin ici de rappeler qu'il est l'arrêt de principe précisément en matière d'équité dans le droit de la délimitation des frontières maritimes ?

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[88] CMC, vol. IV, annexe 214, p. 1273, 1277 et traité relatif à la délimitation des zones marines et sous-marines et à des sujets connexes entre la Colombie et le Panama, 20 novembre 1976, Nations Unies, *Recueil des Traités,* vol. 1074, p. 221 (onglet n° 64 du dossier de plaidoiries du Chili (jour 2)).

[89] DC, vol. II, annexe 22, p. 115.

[90] CMC, vol. II, annexe 38, p. 339.

28. Si la Cour se tourne à présent vers ce que donnerait la remise en cause du partage équitable et solidaire que constituait dès 1952 le recours aux parallèles en lui substituant par exemple des délimitations fondées sur l'équidistance entre tous les pays concernés, elle constatera que le seul pays à en tirer parti serait précisément le Pérou[91]. En affirmant aujourd'hui qu'il faut substituer l'équidistance aux frontières établies par voie d'accord en 1952 et 1954, le Pérou prétend, dans une posture individualiste, rompre avec l'esprit même qui présida à cette alliance régionale contre l'appauvrissement des ressources naturelles.

29. Cette prétention est néanmoins intenable, comme du reste le manifeste la concession que le Pérou a dû faire à l'Equateur en revenant avec lui à la ligne de parallèle qui n'avait au demeurant jamais cessé d'exister.

30. Décidément, Monsieur le président, Mesdames et Messieurs de la Cour, on ne saurait construire l'équité sur les décombres de la solidarité ! Je vous remercie.

The PRESIDENT: Merci Monsieur Dupuy. The sitting is suspended for 20 minutes.

The Court adjourned from 11.35 to 11.55 a.m.

The PRESIDENT: Please be seated. The hearing is resumed and I invite Professor Paulsson to address the Court. You have the floor, Sir.

Mr. PAULSSON:

THE 1968/1969 MIXED COMMISSION

1. Peru's attempt to trivialize the 1968/69 Mixed Commission

1. The subject of the 1968/1969 Commission is a very important one but I will spend no more than five or six minutes on it because what needs to have been said has been said. Peru has attempted to trivialize the 1968/1969 events. As he did in the first round, Sir Michael Wood spent, it seemed, less than just a few minutes on what he called — dismissively — "the 1968/69 coastal lights". That is all he would like you to think it was — coastal lights.

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[91] Voir onglet n° 140 du dossier de plaidoiries du Chili (jour 3).

2. He took you to only one set of documents, namely an Exchange of Notes, first an anonymous Note from the Peruvian Ministry of Foreign Affairs dated 6 February 1968[92], to the Chilean chargé d'affaires, and then to the chargé d'affaires' answer[93].

3. He said that these Notes were "the key instruments", and "not those referred to by Chile"[94]. That dispensed him, he seemed to think, from even mentioning — let alone discussing — the many formal high-level documents I reviewed with you at some length in the first round.

4. This is the single-page Peruvian Note Sir Michael showed you — it is at tab 142. It is hardly impressive. You can just look at it; the original version in Spanish on the left. We do not see what department it came from; we do not know who signed it; it is described generically as coming "from the Ministry".

5. Sir Michael was eager to make the point that there is no reference in this Note to materializing the maritime boundary. That may be so. But when he paraphrased the text and referred to the leading marks as being "for fishermen", it must be said that those words do not appear in the Note either — nowhere; read it as long as you like — they were introduced by him.

6. And that is all he said, totally neglecting the voluminous agreements and related correspondence in 1968/1969, between high officials of the two States. What he showed you was an unremarkable lower level exchange that took place before the serious events started.

7. I reviewed the high-level instruments last Friday[95]. Just to recall a few: following the communications in February and March, the Parties' delegates met in April 1968. As you see on your screens now, also at tab 143, they were given the task "to materialise the parallel [you will remember these words] of the maritime frontier originating at Hito No. 1"[96]. They carried out field work on the ground and at sea[97], and proposed the construction of two leading marks along the parallel of Hito No. 1. In an Exchange of Notes in August 1968, the Parties confirmed their

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[92]MP, Vol. III, Ann. 71.

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

[94]CR 2012/33, p. 43, para. 42 (Wood).

[95]CR 2012/31, p. 22, para. 16; p. 24, para. 25; p. 26, para. 24; and p. 28, para. 28 (Paulsson).

[96]MP, Vol. II, Ann. 59, first para.

[97]*Ibid.*, second para.

acceptance of the delegates' proposal in its entirety[98]. This was an international agreement, Mr. President, creating obligations for both sides to respect them in good faith. The Notes repeated the phrase "to materialise the parallel of the maritime frontier". The Peruvian Note of 5 August is now shown on your screens, also at tab 144; you will recall, it was signed by Mr. Pérez de Cuéllar[99].

8. In the same Exchange of Notes, the Parties agreed to ask the Mixed Commission to "verify the position of Hito No. 1 and indicate the definitive location of the towers or leading marks"[100]. And the Mixed Commission conducted elaborate field work in August 1969, including topographically determining the parallel that runs through Hito No. 1 and fixing the location of the leading marks. As you see now on your screens, and also at tab 145, on 22 August 1969, the heads of the delegations submitted to their governments a formal joint report recording the Commission's work, entitled "Act of the Chile-Peru Mixed Commission in Charge of Verifying the Location of the Boundary Marker No. 1 and Signalling the Maritime Boundary"[101].

9. So you see, time and time again the senior officials of both States repeat that they were materializing the maritime boundary. Time after time. Sir Michael disciplined himself never once to acknowledge these repeated statements of the purpose of the Mixed Commission. He bravely told you to the contrary that the purpose was "the avoidance of incidents between artisanal fishermen . . . in the early 1960s"[102]. Where did he get this? Certainly not in any single line of any single page of any single document from 1968/1969. It is pure invention. That this was felt necessary tells you something about the merits of the argument.

10. Given the documents that we have just looked at, it is no wonder that Peru has been looking hard for ways to attempt to trivialize the agreements of 1968/1969. Peru thinks it has found two. I will start with the first — this is Peru's contention that these agreements had the sole effect near the shore, and so are not significant for the course of the boundary further out to sea.

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[98]MP, Vol. III, Ann. 74, first para; *ibid.*, Ann. 75, second para.

[99]*Ibid.*

[100]*Ibid.*, second para. See also MP, Vol. II, Ann. 75, third para.

[101]CMC, Vol. II, Ann. 6.

[102]CR 2012/34, p. 15, para. 37 (Wood).

2. Materialization of the full boundary

11. It was agreed that the lights were to be visible for approximately 15 miles[103]. To achieve that, it was also agreed that they would each be more than 20 metres tall[104]. The materialization of the parallel of the maritime boundary went beyond the beams of light. We know this because the two States agreed to install a "radar reflector" on each tower[105], to be used for navigation by larger vessels equipped with radar. Fishermen in the 1960s were not generally equipped with radar. Peru insists on referring to "coastal lights". This is not a term ever used by the States in 1968/1969. They called them "leading marks"[106], and that included radar reflectors.

12. Leading marks are used by some other States to allow mariners to identify the maritime boundaries precisely. For example, the 1980 Protocol, between the Soviet Union and Turkey, of their Joint Commission concerning leading marks signalling the maritime boundary[107].

13. In any event — and this is the important point — obviously the length of a boundary that is signalled is not determined by the range of the lights.

3. The boundary materialized a pre-existing division of the Parties' maritime zones

14. That brings us to Peru's second attempt to downgrade the obvious significance of the agreements between the Parties in 1968/1969. They deny the evidence of an all-purpose maritime boundary — they insist it was just a practical arrangement concerned only with artisanal fishing. But what the representatives of the Parties said in 1969 was that they were signalling "the maritime boundary" — *el límite marítimo*[108]. They were not ignorant of the significance of the word "boundary". The head of the Peruvian delegation, Mr. President, was an Ambassador. Peru's delegation included representatives of the Navy. The Head of Chile's delegation was the Secretary-General of the Directorate of International Boundaries. Mr. Pérez de Cuéllar certainly

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[103]MP, Vol. II, Ann. 59, para. 2 *(c)*.

[104]CMC, Vol. II, Ann. 6, p. 41; MP, Vol. II, Ann. 59, paras. 2 *(a)* and 2 *(b)*.

[105]MP, Vol. II, Ann. 59, paras. 2 *(a)* and 2 *(b)*.

[106]*Ibid.*; MP, Vol. III, Ann. 74; *ibid.*, Ann. 75.

[107]CMC, Vol. V, Ann. 310, p. 1840.

[108]*Ibid.*, Vol. II, Ann. 6, p. 35.

knew the significance of the word "frontier" when he wrote to Chile concerning "the installation of leading marks to materialise the parallel of the maritime frontier"[109].

15. Those are words; how about actions? You will recall the *Diez Canseco* incident. Sir Michael said that in connection with that incident, Peru "referred to 'the frontier line', not to any international maritime boundary"[110]. We see that the two States used *boundary* and *frontier* interchangeably. If it is Peru's case that frontier does not mean boundary then I do not think we have very much more to say. Or perhaps just one thing about the *Diez Canseco*. According to Peru's own report of the incident — Peru's own report — on 22 March 1966, the *Diez Canseco* fired 16 canon shots "to intimidate" two Chilean fishing vessels that had transgressed "the frontier line"[111], or *línea fronteriza*. Using force in defence of a State's frontier cannot be explained away by linguistic quibbles constructed 45 years later. The two States materialized and signalled a maritime boundary, a real one, as made emphatically clear in the Act of the Mixed Commission of 22 August 1969[112].

NON-PERTINENCE OF THE LAND BOUNDARY

1. I turn now to my second presentation which concerns the non-pertinence of the land boundary for your Court. My essential aim in this presentation is to persuade you of something that can be said in fewer words than a Tweet. I can say it in exactly 12 words: this Court need not and cannot concern itself with the land boundary.

2. This conclusion follows from two propositions which I will deal with in order.

1. This Court does not have jurisdiction to determine the location of the land boundary terminus

3. First, this Court does not have jurisdiction to determine the location of the land boundary terminus. Mr. Bundy told you that "Peru simply requests the Court to adjudge and declare that the maritime boundary between the Parties starts at Point Concordia as defined in the 1929-1930 legal

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[109]MP, Vol. II, Ann. 74, p. 435.

[110]CR 2012/28, p. 39, para. 51 (Wood).

[111]CMC, Vol. III, Ann. 75.

[112]*Ibid.*, Vol. II, Ann. 6.

instruments"[113]. That however is not the wording of Peru's submission. The submission adds that Point Concordia is "defined as the intersection with the low-water mark of a 10-kilometre radius arc"[114]. But, the low-water mark is not mentioned anywhere in the "instruments" of 1929 and 1930. Peru interprets those instruments as though there were an agreed point on the low-water line but, if there is one thing we all know, it is that there is no such agreement. This did not stop Professor Pellet, in the last moment of his final presentation, from referring to "le point Concordia tel qu'il a été défini conventionnellement en 1929 et 1930 [the Point Concordia as it had been defined by agreement in 1929 and 1930]"[115].

4. Since the question whether there is such a point and, if so, where it is, are both questions concerning the proper interpretation of the 1929 Treaty of Lima, the Court has no jurisdiction over either of them. And in fact Peru does not, it seems, contest that absence of jurisdiction.

5. Another way of saying this is as follows. Peru insists on applying the 1929 Treaty and insists in particular that the completion of the land boundary requires a Punto Concordia at the low-water mark. Chile does not accept that this is the effect of the 1929 Treaty. The Treaty has already definitively settled the land boundary question and contains its own specific provisions on demarcation. Peru in fact seeks to put this dispute before you, although it does not concern this Court. This case, not incidentally, is formally entitled "Maritime Dispute (Peru *v.* Chile)". The 1929 Treaty settles the question of how disputes under that Treaty are to be resolved. The Bogotá Pact does not allow settled matters to be questioned. I will not repeat the detailed references I gave you in the first round[116].

6. Be this as it may, Peru insists that the land border terminates at 18° 21' 08" S as depicted on this slide (tab 147), which Peru likes, and which was showed to you during each of Mr. Bundy's presentations.

7. But how does that one map disprove that the land boundary does follow the Hito No. 1 line, as the many Peruvian sources I referred you to last week indicate[117]? One example. Here is

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[113]CR 2012/34, p. 18, para. 48 (Bundy).

[114]*Ibid.*, p. 44, para. 12 (Wagner).

[115]*Ibid.*, p. 38, para. 40 (Pellet).

[116]CR 2012/31, p. 39, paras 24-27 (Paulsson).

[117]*Ibid.*, p. 34, para. 14 (Paulsson).

Peru's Law of January 2001 defining the administrative boundaries of Peru's southernmost province — Tacna. You can find it in tab 148. This Law provided that, on the inland side, Tacna's boundary followed the international boundary down to Hito No. 1. Between Hito No. 1 and westward to the Pacific Ocean, it was necessarily the parallel of Hito No. 1 for the simple reason that Article 3 of that Law defines the scope of the territory and in so doing reveals that there is no Peruvian territory south of the Hito No. 1 parallel[118].

8. Peru amended this 2001 Law[119], on 17 January 2008. Mr. President, when did Peru make its Application in this case? The day before.

9. The difference between these two different endpoints, as best as we can determine it by looking at Peru's large-scale charts, is 46 metres of beach (tab 149). Peru surely did not bring this case to argue about 46 metres of beach.

10. Peru wants to convince you that since the land boundary terminus should be 46 metres to the south of the maritime boundary, the entire maritime boundary at the Hito No. 1 parallel is now to be seen as a legal impossibility.

11. On Tuesday Peru said that the Parties "agree that the intersection of the land boundary with the low-water line is a matter that has been fully settled"[120]. It would be more accurate to say that the Parties agree that the land boundary has been fully settled. Peru has recently started to say that the land boundary ends at the low-water line, at Point 266. That, let me be very clear, is something Chile does not accept. Last Friday I explained, as we did in our written pleadings, that the Court has no jurisdiction over that matter, which belongs to the Treaty of Lima.

12. At any rate, the Mixed Commission, after having determined and marked the 196 km-boundary, consciously stopped at a stable position on the shore — Hito No. 1. Peru now says that the fact that they did not take a few more steps, into a mix of sand and water, depending on the time of day and month, from that moment on it was impossible to fix the maritime border anywhere except at the precise spot on the low-water line they should have gone to, even if by

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[118]CMC, Vol. IV, Ann. 191, Art. 3.

[119]RP, Vol. II, Ann. 16.

[120]CR 2012/34, p. 12, para. 27 (Bundy).

1952/1954 or 1968/1969 that spot would be out to sea, or up on the shore. This is nonsense. Let us consider the highlights of the land-boundary story.

13. In 1928, Members of the Court, Peru and Chile put an end to nearly half a century of estrangement by re-establishing diplomatic relations. The next year, they concluded the Treaty of Lima, an historic document duly acknowledged and praised by the League of Nations. An emblematic feature of that Treaty was of course the boundary agreement. Let us recall Article 2 (tab 150): "the frontier between the territories of Chile and Peru, shall start from a point on the coast to be named 'Concordia'"[121].

On "the coast" you see — *la costa* — not "at the low-water line". In paragraph 2.1 of its Reply, Peru flatly denied that Hito No. 1 is "on the coast". That is surely surprising. Some of us have houses which we describe as being "on the coast" without meaning that one of its walls is always wet.

14. The Ministries of Foreign Affairs of the two countries gave their delegates identical instructions to determine and mark the border on the coast. Here is the instruction given by the Peruvian Ministry[122] (tab 151).

15. Note the heading. I hope you see it better than I: Hito Concordia. Not Punto Concordia, as Mr. Bundy would have liked. And it identifies it as the "starting point, on the coast, of the borderline". This is a formal instruction of the Government of Peru. It says the Hito Concordia is the starting point. Note that the line to be traced goes westward "running to intercept the seashore".

"Starting point, on the coast" . . . "line running to intercept the seashore".

16. These lines are so simple that you would think that they might be quoted just the way I read them to you. But no, the first time Peru mentioned this document, in its Memorial[123], it preferred to paraphrase, and this is what Peru wrote: "Point Concordia was to be the point of intersection between the Pacific Ocean and an arc with a radius of 10 km . . . ". Thus Peru, with no textual basis, introduced the notion of intersecting with "an ocean", and not with "the seashore".

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[121]MP, Vol. II, Ann. 45, Art. 2.

[122]*Ibid.*, Vol. III, Ann. 87.

[123]MP, para. 1.36.

And it referred to Point Concordia instead of Hito Concordia, which was Hito No. 1. Peru had the audacity to write in paragraph 2.7 of its Reply, that Hito No. 1 was — I am quoting now — "no more than one of a number of boundary markers created at various places along the boundary". But you cannot do this by taking liberties with your paraphrasing. We can all read the official instruction: the Hito Concordia is the "punto inicial de la línea fronteriza".

17. This formal governmental instruction was perfectly in accord with the 1929 Treaty, where you will not find the expression "low-water line" anywhere.

18. The third document in this sequence is the Final Act of the 1930 Mixed Commission, which recorded that it had concluded its work in accordance with the joint instructions (tab 152). This Final Act describes the "demarcated boundary line" as starting from "un punto en la orilla del mar" — "a point on the seashore". The Act also confirmed that markers had been "positioned or established" in order to "definitively fix the said frontier line between Chile and Peru on the land"[124]. Hito No. 1 is described as being on the *orilla del mar*, the shore, and on the 18° 21' 03" latitude[125].

19. I emphasize, Mr. President, the words *definitivamente* as applying to the whole border, and the location *orilla del mar* for Hito No. 1.

20. So, this Final Act of the 1930 Mixed Commission was also perfectly in accord with the 1929 Treaty, where you will not find the expression "low-water line" anywhere.

21. One looks, Members of the Court, in vain for a "Punto Concordia" seaward of Hito No. 1. In fact it was not only decided to give this symbolic name "Concordia" to one of the hitos, at first Hito No. 1, but at the end it was decided to give that name to Hito No. 9.

22. This was confirmed — I will not show it to you but if you like you can look at it at tab 153 — by a further Act which was signed two weeks later by the Minister for Foreign Affairs of Peru and the Chilean ambassador to Peru acting as plenipotentiary[126] (tab 153). It describes Hito No. 9 — perhaps something new for you — as totally different ~~than~~ from H all other hitos — "a monument

[124]MP, Vol. II, Ann. 54, p. 308, second and third paras.

[125]*Ibid.*, p. 309.

[126]MP, Vol. II, Ann. 55.

of reinforced concrete measuring seven metres high"[127]. There is no mystery here. The local people did not walk around the lonely sand dunes around the coast. On the average day, it is safe to say that there are zero visitors to Hito No. 1, which is really not much to look at. Hito No. 9, on the other hand, which has been called Hito Concordia since 1930, is placed alongside the railroad from Arica to Tacna, and hundreds of Peruvian and Chilean passengers can until now every day see this imposing monument from their windows — Hito Concordia — with the engraved likenesses of the two countries' presidents of the time.

23. Stability had been the purpose of selecting Hito No. 1 as the most seaward of the 80 boundary markers of the 196-km land boundary. We have seen that the 1930 demarcation exercise had the objective of fixing such a point *on the coast* as close as possible to the sea without endangering stability. As Ecuador explained to Argentina in 1969 — you will remember — the parties to the Santiago Declaration adopted parallels of latitude as their maritime boundaries because they were "lines of easy and simple recognition"[128]. Using Hito No. 1 as the reference point to materialize the operative parallel by constructing two leading marks to signal it gave further effect to that objective. No one on either side ever uttered a word about the need for a point on the low-water line until Peru decided to go to court.

24. For anyone to hear of Peru's ghostly Point 266, wherever it may be, we had to await the year 2005.

25. On Tuesday, Mr. Bundy chided us for having used an updated Peruvian chart showing that Peru's Point 266 is 180 m outdated. In fact if Peru's large-scale charts are outdated that is Peru's problem; it is for them to respect the requirement of UNCLOS Article 5. Mr. Bundy certainly did not help his case when he showed you this chart, which he said was updated[129]. This is what he showed you, it is at tab 154, Point 266, Point Concordia, appearing to be very close to the shore indeed. But what he did not tell you was that he was now using a chart with a scale of 1:500,000 — ten times smaller than the "outdated" one and certainly not in compliance with UNCLOS Article 5. With this minuscule scale, the size of Peru's fictional Point 266 is 500 m in

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[127]MP, Vol. II, Ann. 55, p. 315.

[128]RC, Vol. II, Ann. 22, p. 199.

[129]CR 2012/34, p. 18, para. 46.

diameter. In other words, Point 266 is not only off the low-water mark, but when one locates its centre it is situated 250 m out to sea. This was pure smoke and mirrors. *Un tour de passe-passe; un juego de masse.* I am sure there is no harm; it will mislead no one.

26. Peru's Punto Concordia is a pure invention. We can of course understand what Peru was really saying, which I imagine is something like this:

> The Mixed Commission in 1930 should have followed the arc down to the low-water line. When they got there, they should have baptized that spot the Punto Concordia. And if they had done so, according to Peru, the impostor Punto Concordia would have been at the parallel of 18° 21' 08". And so that is where Punto Concordia should be.

27. But Chile and Peru never did that. They never baptized a Punto Concordia. They rather adopted the stable Hito No. 1 as the *punto inicial de la linea fronteriza.* And in so doing, they were in perfect compliance with the terms of the 1929 Treaty.

28. Mr. Bundy complains that Chile did not go along with Peru's invitation, in 2005, that the two States should now agree to the location of a phantom point which the Mixed Commission in 1930 plainly dispensed with. There was no reason for Chile to accept this invitation in 2005. On the contrary, there was every reason for Chile not to do so, because this is Peru's invitation: Peru's invitation to participate in this exercise was on the premise that there exists no maritime boundary, as you can see in this letter now shown on the screen, tab 155. This was not mentioned by Mr. Bundy.

29. I come to the end of my first proposition. My purpose has not been to start an argument here as to the terminus of the land boundary. The point was only to make you see that there could be significant controversy about the proper understanding of the two States' purportedly *definitive* settlement of the land boundary. That matter would be subject to the jurisdictional régime of the Treaty under which that purportedly definitive settlement was reached: the Treaty of Lima of 1929. That reality does not affect the task of your Court.

The second and shorter of my two propositions:

2. In any event, the validity of a sea boundary does not depend on its meeting the land boundary at the low-water mark

30. Peru has advanced a theory of a fatal rendezvous: when a maritime boundary reaches the low-water line, it must always find the land boundary waiting for it at that spot. If this were so, the maritime border *will always be unstable* if the shore is unstable. So if the shoreline advances or recedes a few metres, a 200-mile-long maritime border must be relocated (tab 156). This is a very unattractive proposition.

31. Is it true that coastlines change? To answer that question I cannot improve on Mr. Bundy's own demonstration, perhaps unintentional. As I just said, he showed you a map — the one with the 1:500,000 scale — which he said — I quote — was "up-to-date" and "accurate". That's interesting. Why do coastal maps need to be updated? Mr. Bundy gave you the answer: to replace charts — I quote again — that "use outdated coastal geography"[130]. And Mr. Bundy's concern about keeping up with "geography" — he may have meant "geomorphology" — is certainly appropriate in the present context. These are very long, flat beaches. This is a desert environment — hardly any vegetation, no rain to speak of, and much space for strong winds to move the dry sand. And there are earthquakes.

32. So it is nonsense to suggest that the maritime boundary could only have originated from a low-water line on the land boundary as fixed in 1930. That would bizarrely either force the terminus of the land boundary into the water, or the terminus of the maritime boundary onto the land — depending on the movement of the shore.

33. Peru says "the land dominates the sea". This expression is the kind of general maxim which can seldom provide the solution to any legal dispute. In *North Sea Continental Shelf*, that maxim had the general and uncontroversial effect of supporting the importance of closely examining — and now I quote the words of the Court — the "geographical configuration of the coastline . . . whose continental shelves are to be delimited" (*North Sea Continental Shelf* cases, *(Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), I.C.J. Reports 1969*, p. 51, para. 96). That does not assist Peru. In fact, when he attempted to summarize the case law regarding "the land dominates the sea" Mr. Bundy said this: "It is thus the coast that

[130]CR 2012/34, p. 18, para. 46 (Bundy).

generates maritime entitlements."[131] Who can disagree with that? But this reference to the significance of the "coast" is a long way from saying that there is some kind of weird *jus cogens* duty to rendezvous at the low-water line.

34. In fact the principle of the land dominating the sea was perfectly well respected by both Peru and Chile. The 1930 Commission had fixed the most seaward of the 80 hitos at Hito No. 1. This was a location which in accordance with their instructions as you have seen was "on the shore" — "a la orilla del mar", "sur le littoral". So when the two States materialized the maritime boundary some 20 years later, they referred themselves to the first land boundary marker on the shore — *a la orilla del mar* — as the point which would determine the maritime boundary[132]. So you see, they indeed allowed the land to dominate the sea.

35. Incidentally, Peru finds itself embarrassed today to explain its own straightforward acceptance of the parallel of Hito No. 1 in the important *Diez Canseco* incident, as well as in the entire 1968-1969 sequence, and furthermore, in every one of the multiple instances reviewed by Mr. Petrochilos on the first round. If Point 266 was the right answer, why wasn't there any insistence by Peru — or even a whisper of a hint of a suggestion — that the Hito No. 1 parallel was wrong? Or that it was necessary to agree to Point 266 or some other point to the south-west of Hito No. 1?

36. The truth is that for half a century Peru saw nothing wrong with Hito No. 1. The fiction of the required rendezvous at the low-water line did not emerge until Peru had decided to go to Court — just as no one had ever heard of Point 266 until 2005.

37. Peru is fixated on low-water lines. Peru does not seem to understand the utility of a fixed point above the low-water line to serve as a stable reference point for the maritime boundary. We could only be perplexed at Mr. Bundy's attempt to dismiss Chile's account of the significant international precedence confirming that maritime boundary agreements are not subject to some kind of *jus cogens* obligation to rendezvous on the beach. His discussion of *Guyana-Suriname*, for example, at paragraph 41, was as strange as if he was talking about some other unknown case.

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[131]CR 2012/29, p. 42, para. 32 (Bundy).

[132]MP, Vol. II, Ann. 59; CMC, Vol. II, Ann. 6.

38. There were two inland reference points in Guyana that, when aligned, created an azimuth which resulted in a 10° line that was the historical boundary. Both of these reference points were on Guyana territory. With modern methods it was possible to use one of these pillars — this is pillar No. 61 — as the reference point from which to extend a 10° azimuth into the sea.

39. This is exactly our situation. There is a reference point — Hito No. 1 — and a precise line — the parallel of latitude — just as there was in *Guyana-Suriname*.

40. The tribunal's award in that case was very careful; the maritime boundary is described to start on the low-water line on the 10° azimuth from the inland point 61.

41. You have the same situation in all of our other examples that Mr. Bundy breezily dismissed without any analysis[133].

42. Incidentally, in *Guyana-Suriname* too, a jurisdictional issue arose and the tribunal responded to it with a degree of prudence which Chile believes will commend itself to your Court. In paragraph 308 of its award, the tribunal wrote this:

> "The Tribunal recalls that Suriname argued that it does not have jurisdiction to determine any question relating to the land boundary between the Parties. The Tribunal's findings have no consequence for any land boundary that might exist between the Parties, and therefore . . . this jurisdictional objection does not arise."

43. A perfect precedent, Mr. President.

44. As for our examples of dry coasts, they stand unrebutted. Dry coasts do not offend international law, and are consistent with significant State practice. There is no *jus cogens* rule against them. The only issue is whether the Parties agreed to the Hito No. 1 parallel as their maritime boundary. The records of 1968-1969 answer that question with a compelling yes.

Members of the Court, Mr. President, thank you very much. Mr. Petrochilos stands ready.

The PRESIDENT: Thank you, Professor Paulsson. I give the floor to Mr. Petrochilos. You have the floor, Sir.

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[133]CR 2012/34, p. 16, para. 42 (Bundy).

Mr. PETROCHILOS: Thank you, Mr. President, Members of the Court.

ADDITIONAL RELEVANT PRACTICE OF THE PARTIES*

A. Peru does not grapple with the evidence

1. The Parties' practice is before the Court. The evidence is extensive. The Parties agree that their practice evidences an agreement between them; they disagree only as to what agreement that was.

2. Peru says there was an undocumented, informal practice about a fisheries line, which was also applied in a range of non-fisheries contexts.

3. Peru's theory breaks down at two levels. The first is that the boundary which the Parties observed could not have been a fisheries line, because Peru never had a fisheries zone to delimit by a fisheries line. We heard no disagreement from Peru with that straightforward proposition in the first round. In fact, Peru's all-encompassing 200-mile "maritime dominion" covers the waters, the sea-bed, the subsoil, and also the air space. That is the zone Peru had, that is the zone Peru enforced: it enforced it vis-à-vis Chile, it enforced it vis-à-vis the world. That zone cannot be delimited by a fisheries line.

4. Secondly, Peru's argument breaks down on the evidence. I opened last week by referring to 15 official documents. The first of the three slides I used is now on your screens, and you will also find it under tab 158. These 15 documents are either official Peruvian texts, which were communicated to Chile, or documents that Chile and Peru created jointly, mostly in the 1960s. Now you may recall what Peru had to say about them. To borrow my friend's phrase: "Nothing, absolutely nothing."

5. The documents stand, and their plain terms make the case of Chile better than an advocate can. As you can see, they speak of "the maritime frontier of Peru", Peru's "maritime frontier", the Parties' "maritime boundary", and other all-encompassing, unqualified, and unreserved terms.

6. I will say this again, Mr. President: the ordinary meaning of the words "maritime boundary" is *maritime boundary*. But Peru it now says it means — and I quote from Peru's

*Abbreviations: MP= Memorial of Peru; CMC = Counter-Memorial of Chile; RP = Reply of Peru; RC = Rejoinder of Chile.

opening speech — it means "partial arrangements of a provisional nature for specific purposes in the sea areas lying close to [the Parties'] coasts" [134].

7. Mr. Lowe had something to say about the documentary record, but wisely he kept a safe distance from it. He said that Chile latches on to any reference to a "parallel"[135]. Well, that is not what these documents say: they speak of a maritime boundary, they speak of a maritime frontier.

8. Counsel for Peru also suggested that the references to a maritime boundary were "without prejudice" to a future delimitation[136]. With respect, the documents — which are Peruvian documents, which you will find under tab 158 — are emphatically *with* prejudice. Peru was asserting jurisdiction over Chilean nationals, it was arresting them, it was fining them, it was shooting across their bows: these are matters of international responsibility of States, and a State is expected to give a legal basis for its action. And Peru did. It referred to the maritime boundary.

B. The record evidences the Parties' agreement on their maritime boundary

9. I now turn to address the evidence. To refresh memories, we have plotted on a chart the data on record that can be plotted. With your indulgence, I will be able to show you only a sample of Peru's practice, but a similar diagram for Chile's practice will also be under tab 159.

10. So, on your screens, here is our canvas

— now you see the positions from the boundary at which Peru's navy corvette, *Diez Canseco*, was pursuing Chilean boats, in 1966 — you see the little dots;

— and now the positions from the boundary at which Peru arrested, and then fined, Chilean boats in 1989 and 2000;

— and here you see Peru's model reporting point of entry into its maritime dominion — the little triangle;

— and now you see the point of authorized entry into Peru's air space;

— and now you have the endpoint of Peru's authorization of the submarine cable;

— and finally you have the points of entry into and exit from Peru's maritime dominion, as were reported to Peru to comply with its regulations.

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[134]CR 2012/27, p. 19, para. 12 (Wagner).

[135]CR 2012/33, p. 28, para. 112 and p. 29, para. 115 (Lowe).

[136]CR 2012/28, p. 29, para. 11 (Wood).

And if you connect the dots — that will be a straightforward exercise — you will see the course of the maritime boundary.

11. Peru's arguments about individual pieces of evidence are limited. The Court may find it helpful to have a checklist of the evidence to which both Parties make reference in this hearing. This you will find at tab 160: and there you will see that most entries on the list are in normal typeface on a white background. These are the elements of practice that Peru has not taken issue with in this hearing; they are uncontested. The highlighted entries indicate evidence by Chile whose meaning Peru contests, or evidence advanced by Peru. I will be addressing the contested issues, the highlighted entries: and you may even wish to take out the checklist from your folders and use it as a guide to the points that I will address.

1. Bolivia's proposed maritime corridor would have been bounded by the Chile-Peru maritime boundary

12. I start with the Bolivian proposed land corridor and maritime zones; item 1 on the checklist.

13. What Chile proposed in 1975 is now on your screens, and also under tab 161. Chile said: "[T]he cession will include the land territory thus described and the maritime territory between *the parallels of the extreme points of the coast* that will be ceded (territorial sea, economic zone and continental shelf)." (Emphasis added.) Plainly, Chile's proposal applied the pre-existing boundary parallel between Chile and Peru.

14. Now to Peru's position on the issue, also on your screens. Peru accepted "[e]xclusive sovereignty of Bolivia over the sea adjacent to the coast of the territory under shared sovereignty". While, as Sir Michael pointed out, Peru's agreement was needed on the territorial cessions[137], the fact of the matter is that Peru *did* take a position on the maritime zones for Bolivia.

— Did Peru say that it was for Peru, and not for Chile, to grant the proposed maritime zone to Bolivia? No.

— Did Peru say that the maritime parallel with Chile could not have served as the boundary for the Bolivian maritime zone? No.

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[137]CR 2012/33, p. 45, para. 50 (Wood).

— But would Peru, and should Peru, have raised such concerns if it believed it had claims to the south of the parallel? Of course it would and of course it should.

15. Counsel opposite referred to the records of discussions between Chile and Peru. I submitted last week to the Court that these records confirmed the following: "In a meeting between Chile and Peru in July 1976, it was common ground that their maritime boundary had been established; and also that the 1954 Special Maritime Frontier Zone Agreement was applicable between them."[138] That is what I said. My friend did not say otherwise. He said, however, that "unilateral records are inherently unreliable"[139]. With respect, they are not. Chile and Peru had no difficulties with their maritime boundary in 1976. Chile could not have been preparing a record for a dispute that was yet to be conceived by Peru and was submitted only decades later. And, ultimately, it was open to Peru, if it wished, to provide its own records, along with additional documents that it submitted to the Court before this hearing.

16. Counsel also suggested that the records submitted by Chile were incomplete[140]. Well, he will find the complete documents in the documentation that Chile deposited with the Registry in July 2011[141].

2. Sovereign control by navies: Peru's maritime district No. 31 conforms with the maritime boundary

17. And now to item 3.1 on the checklist. Last week, I used a diagram to show that in defining the areas of sovereign control by their navies, in 1987 and 1988, both Parties respected their maritime boundary. The diagram is now on your screens, and also at tab 162.

18. Peru took issue with this. It says that its Maritime District 31 — now highlighted — was of "necessity" left undefined because there was no maritime boundary[142]. But District 31 was not left undefined. Its upper limit is the parallel of 16° 25' S; its lower limit is defined "as the frontier

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[138]CR 2012/31, p. 44, para. 16 (Petrochilos).

[139]CR 2012/33, p. 46, para. 51 (Wood).

[140]*Ibid.*.

[141]Record of the fourth Meeting of the second round of Chile-Peru Discussions, 8 July 1976, deposited with the Registry, 11 July 2011, as doc. No 7.

[142]CR 2012/33, p. 41, para. 36 (Wood).

boundary *[límite fronterizo]* between Peru and Chile"[143]. If Peru wished to leave the lower limit undefined, it would have said that the District extends "to the maximum extent of Peru's waters", or "to an area to be defined by international agreement", or something of the sort. But the law is definite; it speaks of a "frontier boundary". It was also open to Peru to include words of reservation in its law, as Nicaragua had done in similar circumstances in the *Nicaragua* v. *Honduras* case[144]. But it did not.

19. Last week, I pointed out that Peru's present reading would have made its navy's task unfeasible; and that it also conflicts with the Peruvian navy's actual enforcement record of the boundary parallel. And we received no answer.

20. Peru's account of this law was thought up for this litigation and cannot be credited. Maritime District 11, which is in the north — now highlighted — was defined in the 1987 law as extending up to "the maritime frontier with Ecuador"[145]. Peru acknowledged this last Tuesday[146], but in the same breath, Peru tells the Court that there was no boundary with Ecuador until last year[147]. I leave it there.

3. Co-operation between navies in enforcing the maritime boundary

21. I turn now to item 5.4, which is on page 2 of your checklist — co-operation between the Chilean and Peruvian navies in enforcing the boundary. The navies concluded an agreement in 1995. The agreement requires that boats arrested be taken to "the international political boundary" and then handed over to the other State's navy. Last week, I also described the record of the implementation of this agreement[148].

22. Peru has now said that the 1995 agreement "remained a proposal"[149]. The document is at tab 163 of your folders for review at an appropriate time. It is entitled "Final Minutes of

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[143]RC, Vol. III, Ann. 90, p. 558, Art. A-020301 *(f)*.

[144]*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), I.C.J. Reports 2007*, para. 254.

[145]RC, Vol. III, Ann. 90, p. 557, Art. A-020301 *(a)*.

[146]CR 2012/33, p. 41, para. 36 (Wood).

[147]CR 2012/28, p. 64, para. 38 (Bundy).

[148]CR 2012/31, pp. 57-58, para. 63 (Petrochilos).

[149]CR 2012/33, p. 42, para. 37 (Wood).

Understanding" and it is signed by two Admirals — one for Chile, one for Peru. It is an agreement. And in 2003, when Peru asked that the 1995 agreement be "set aside" — these were Peru's words "set aside" — Peru itself described it as being an "agreement[] in force"[150].

4. Records of Chile's arrests south of the boundary parallel

23. Turning to item 5.6 on the checklist, on page 2; a few words about the records of Chile's arrests of Peruvian fishermen. Counsel stated that "all of [the] arrests [in 1984] took place just offshore, and all but one took place south of the equidistance line"[151].

24. Once more, my friend chose not to take account of Chile's formal complaint to Peru in 1965 about Peruvian vessels found in waters 15 miles south of the boundary and 45 miles to the west of the city of Arica[152]. This location is well offshore and it also happens to be 10 miles to the north of the equidistance line. And there is every reason to believe that Chile continued to enforce the boundary parallel in the same way, well offshore, between 1965 and 1984.

5. Peru never authorized scientific research south of the boundary parallel

25. Now item 7 — marine scientific research. This is a subject that hardly causes excitement among lawyers. Well, Sir Michael changed all that. He came armed with a website extract, which has behind it reams of new data. Last Tuesday, he submitted these extracts from the website of a United States Government research agency, NOAA, and he suggested that these showed that "Peruvian vessels conducted scientific research regarding fisheries and other matters south of the parallel line between 1961 and 1965"[153]. The website in fact says that this was oceanographic research — nothing to do with fisheries — but that is hardly the problem.

26. Chile addressed marine research in its Counter-Memorial in March 2010. Peru replied that such activities are irrelevant to prove a boundary agreement[154]. It seems Peru now thinks marine research does matter after all, and Sir Michael's speech last Tuesday was Peru's first substantive response.

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[150]CMC, Vol. II, Ann. 29, para. C.1.

[151]CR 2012/33, p. 42, para. 38 (Wood).

[152]MP, Vol. III, Ann. 68, p. 407, paras. 1 and 2; CR 2012/31, p. 54, para. 52 *(b)* (Petrochilos).

[153]CR 2012/33, p. 47, para. 57 (Wood).

[154]See RP, para. 4.26.

27. But tardiness is not the only problem with Peru's arguments.

— First, Peru has not provided any record at all of Peruvian authorizations for research south of the boundary parallel at any time. These extracts do not provide you any authorizations.

— Secondly, the official Peruvian reports that we were able to find in the very little time available since last Tuesday indicate that, in 1964 and 1965, the two Peruvian vessels mentioned by my friend were involved in multinational research organized jointly by Colombia, Ecuador, Peru and Chile. In fact, we also found a Press report from Arica in April 1965, which says that one of the two Peruvian vessels was participating in "studies that both countries carr[ied] out off their respective coasts". Chile will make these reports, which are in Spanish, available to the Registry.

— Thirdly, the data on the United States website were submitted by Peru in 2003, but they were updated or revised about a year ago — although, of course, they concern 40-year old research.

It is impossible to accept these data in the circumstances.

28. Mr. President, Chile stands by its submission. There is no evidence that Peru has purported to authorize any research project south of the boundary parallel at any time.

6. Official texts which did not require explicit reference to the maritime boundary

29. Now to item 9.2 on the checklist, which is at page 4. Mr. Colson has already addressed item 9.1, which is Peru's 1955 Supreme Resolution. On Tuesday, Sir Michael put up a slide entitled "no reference to a lateral maritime boundary with Peru in Chilean legislation"[155]. He listed five Chilean texts, and his argument is not that Chile's laws and regulations do not refer to the boundary — we know that many Chilean laws in fact do — but that these five did not, and that this was somehow significant.

30. His list includes the message from Chile's Government to Congress on the approval of the agreements reached in Santiago in 1952[156]. It also includes the Decree which ratified these agreements after congressional approval[157]. The role of such a Decree is simply to reproduce the

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[155]CR 2012/28, pp. 41-42, paras. 61 and 64 (Wood).

[156]Message from the Chilean Executive to the Congress for the Approval of the 1952 Agreements, July 1954, MP, Vol. III, Ann. 92.

[157]Supreme Decree No. 432 of 23 September 1954, MP, Vol. II, Ann. 30.

treaty text and confirm its approval. In the same manner, the Decree ratifying the 1984 Treaty with Argentina[158] does not state that this was a delimitation agreement, although of course it was. So there is no point for Peru here.

31. As to the remaining three texts[159], the answer is common. The 200-mile zone of sovereignty and exclusive jurisdiction under the Santiago Declaration became part of Chile's law upon ratification[160]. Subsequent laws and regulations that act upon the 200-mile zone need not in every case set out every particular of that zone. In fact, the last two of the texts that Peru invoked refer in express terms, or by citation to legal instruments, to Chile's 200-mile zone as established by the Santiago Declaration[161].

32. And that, I submit, is the key point here — and it is a point that Peru fails altogether to grapple with — these laws and regulations concerned the Chilean 200-mile zone, established and defined by the Santiago Declaration. They proceeded on the premise that Chile had a zone, and that this was separate and distinct from the Peruvian and Ecuadorian zones.

7. Chile did confirm the maritime boundary with Peru in the context of ratification of UNCLOS

33. I turn now to item 10, which is on page 4 of the checklist. Peru said that Chile's declaration upon ratification of UNCLOS — this was in 1997 — mentions the 1984 Treaty with Argentina but not the Santiago Declaration. You are asked to infer from this that Chile considered it had a maritime boundary with Argentina, but not with Peru[162]. As Peru did not take you to the document, we included it in your folders under tab 164. It is a lengthy declaration which, in due course, may merit a careful read.

34. The background to the text is as follows. A difficulty had arisen with Argentina, since 1982 in the Third Conference on the Law of the Sea, in respect of the legal status and navigation

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[158]RP, Vol. II, Ann. 22.

[159]Decree No. 292 of 25 July 1953, MP, Vol. II, Ann. 29; Decree No. 130 of 11 February 1959, MP, Vol. IV, Ann. 117; Decree No. 432 of 4 June 1963, MP, Vol. II, Ann. 31.

[160]MP, Vol. II, Ann. 30.

[161]CMC, Vol. III, Ann. 117; MP, Vol. II, Ann. 31.

[162]CR 2012/33, p. 14, para. 13 (Lowe).

régime of the Strait of Magellan and other channels[163]. Argentina stated its position in a declaration upon ratifying UNCLOS, that was in 1995[164]. Then further objections and responses followed but failed to resolve the issue[165]; and Chile felt it necessary to record its position in its own declaration upon ratification of UNCLOS, two years later, in 1997. Paragraph 2 of the declaration introduces the 1984 Treaty. The following paragraphs address the issue that had arisen with Argentina, in terms of the application of Part II and Part III of UNCLOS.

35. So, in short, Chile's declaration was responsive to Argentina's, and it was not a trivial listing of Chile's delimitation agreements.

36. But there is one more point: in 1994, the President of Chile had advised Congress that the UNCLOS provisions on delimitation were "absolutely compatible with the agreements in force between Chile and its neighbouring countries, Peru and Argentina"[166]. And that too was a public statement, and three years before the UNCLOS declaration. But Peru chooses to ignore it. This important document is at also at tab 164.

8. Boundaries of functional zones agreed to coincide with the maritime boundary

37. The last item on the checklist is No. 11, also on page 4, and it concerns functional zones, such as Search and Rescue Zones, SAR, and Flight Information Regions, FIRs.

38. On the diagram on your screens and also tab 165, you see that the Parties' maritime boundary also forms the border between (i) the SAR zones of Chile and Peru[167], (ii) their navigational warning areas, also called NAVAREAs[168], and (iii) the FIR of Lima, of Peru, and FIR of Antofagasta of Chile[169].

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[163]Statement by the Delegation of Argentina, 1 April 1982, A/CONF.62/WS/17 and Statement by the Delegation of Chile, 7 April 1982, A/CONF.62/WS/19.

[164]Law of the Sea Information Circular No. 5, March 1997, p. 32.

[165]Note verbale No. 107/96 of Chile to the United Nations of 9 September 1996, Law of the Sea Bulletin No. 33, 1997, p. 83; Note verbale of Argentina to the United Nations of 14 May 1997, Law of the Sea Bulletin No. 35, 1997, p. 101.

[166]RC, Vol. II, Ann. 68, p. 383.

[167]*Ibid.*, Vol. III, Ann. 133, p. 832; and Ann. 134, p. 851.

[168]RC, Vol. V, fig. 77.

[169]CMC, Vol. IV, Ann. 243, p. 1453.

39. The record shows that these limits of these functional zones were fixed, not without prejudice to boundaries, which is the general position, but they were fixed on the specific basis that they would coincide with a maritime boundary.

(a) So, starting with NAVAREAs, in 1975 Chile and Peru agreed, within the IMO process, that these zones should be divided along "the latitude of the border between Chile and Peru"[170]. Peru does not dispute that the latitude of the border between Chile and Peru means the maritime boundary[171].

(b) And as for the Parties' FIRs, as you see on the screen now, these were modified in 1962 — Peru's FIR became smaller in 1962 — and that was in order to follow the maritime-boundary parallel[172]. This was recorded in the relevant Chilean Decree, which was of course published; and Peru did not object.

(c) Lastly, when Chile's maritime SAR was defined by a decree, and this was in 1976, the parallel of Hito No. 1 was fixed as the limit of that zone, and it was referred to there as "the Northern Boundary parallel"[173]: and again, Peru lodged no protest[174].

C. The relevant practice spans the period to August 2007

40. I come now, Mr. President, to the third and final set of my observations, which will be brief, and they concern the life, or the time-span of the relevant evidence. Earlier in these proceedings it had been suggested that the Bákula Note of 1986 was a significant event in that regard. This has been quietly abandoned by Peru in its closing argument. They were right to do so, for three reasons.

41. The first reason is that, as I showed the Court last week, the Bákula Note was — and was regarded in Peru — as an "isolated event". The conduct of both Parties — not only Chile, but also Peru — continued after 1986 much in the same way as before[175]. I described that Peru did much that confirmed the boundary. And I also showed that Peru did not oppose Chile's continuing

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[170]RC, Vol. III, Ann. 125, p. 3, para. 16.

[171]CR 2012/28, p. 60, para. 24 (Bundy).

[172]RC, Vol. II, Ann. 48.

[173]CMC, Vol. III, Ann. 132, Title II, para. 1.

[174]RC, Vol. III, Ann.126.

[175]CR 2012/31, p. 67, para. 98 (Petrochilos).

affirmation of the boundary, including the three Chilean nautical charts in 1992, in 1994, and in 1998 which were met with no reservation by Peru until 2000[176].

42. The second reason is that immediately after the Bákula Note, the Minister of Foreign Affairs of Peru confirmed the existence of the maritime boundary with Chile; confirmed that this was a boundary under the Santiago Declaration; and confirmed that Peru had sought a renegotiation of an existing boundary. That is to say, in 1986, Peru raised no dispute about the existence or the legal source of the Parties' boundary.

43. The Minister's statements are at Annexes 141 and 142 to Chile's Rejoinder. Peru does not take issue with them. And so, like the ministerial statements that the Court relied upon in the *FYROM* v. *Greece* case very recently[177], they are key evidence of Peru's position. And in fact we heard from Ambassador Wagner that after 1986 Peru had other priorities than renegotiating the boundary with Chile[178]. And we respect this; but it carries legal consequences.

44. The third reason for which the evidential clock does not stop in 1986 — and in fact continues to run until today — is a legal one. It is clear on the authorities, including your jurisprudence, that an invitation to negotiate a boundary, as the Bákula Note was, does not create a cut-off date for the evidence. What is required is an affirmative claim to a maritime area, which is then resisted by the other side. Until such time there is no legal dispute. No legal dispute has crystallized and the evidential clock runs[179].

45. And, as I explained last week, Peru asserted no such claim to waters south of the boundary parallel until August of 2007[180]. And even after this time, continuation of the Parties' practice, to the extent that it is a continuation of their practice, remains relevant.

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[176]*Ibid.*, p. 68, para. 99 (Petrochilos).

[177]*Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece)*, Judgment of 5 December 2011, para. 81.

[178]CR 2012/34, pp. 41-42, para. 6 (Wagner).

[179]*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), I.C.J. Reports 2007 (II)*, p. 659, paras. 48-53, 121-122, 130-131; *Guinea/Guinea-Bissau Maritime Boundary Delimitation, International Legal Materials*, Vol. 25, 1986, p. 252, paras. 31-32.

[180]See MP, Vol. II, Ann. 24 and Vol. IV, fig. 2.4.

46. Now, Mr. President and Members of the Court, this concludes my pleading. I am grateful for your attention. Mr. Wordsworth will continue with Chile's presentation after the *pause-déjeuner*.

The PRESIDENT: Thank you, Mr. Petrochilos. The Court will meet again this afternoon between 3 p.m. and 5 p.m. to hear the conclusion of Chile's second round of oral argument and its final submissions. Thank you. The sitting is adjourned.

The Court rose at 1.00 p.m.