INTERNATIONAL COURT OF JUSTICE

MARITIME DISPUTE
(PERU *v.* CHILE)

COUNTER-MEMORIAL OF THE GOVERNMENT OF CHILE

VOLUME I

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TABLE OF CONTENTS

GLOSSARY OF PRINCIPAL DEFINED TERMS, ABBREVIATIONS AND ACRONYMS

1929-1930 Mixed Commission	Mixed boundary commission comprising delegates of Chile and Peru, constituted in 1929 pursuant to Article 3 of the Treaty of Lima
1930 Final Act	Final Act (*Acta Final*) signed on 21 July 1930 by the Chilean and Peruvian delegates to the 1929-1930 Mixed Boundary Commission
1947 Chilean Declaration	Official Declaration by the President of Chile, of 23 June 1947
1947 Peruvian Supreme Decree or **Supreme Decree of 1947**	Peruvian Supreme Decree No. 781 of 1 August 1947
1952 Conference	Conference on Exploitation and Conservation of the Maritime Resources of the South Pacific, held in Santiago in August 1952
1952 Minutes	Minutes of the meetings of the 1952 Conference
1954 CPPS Meeting	Meeting of the Permanent Commission of the Conference on Exploitation and Conservation of the Maritime Resources of the South Pacific, held in Santiago, Chile in October 1954, to prepare the 1954 Inter-State Conference

1954 Inter-State Conference	Second Conference on Exploitation and Conservation of the Maritime Resources of the South Pacific, held in Lima in December 1954
1955 Supreme Resolution	Peruvian Supreme Resolution No. 23 of 11 January 1955
1968 Minutes	Minutes of the meeting of the Chilean and Peruvian delegates at the Chile-Peru frontier, of 26 April 1968, recording their joint proposal to build two alignment markers on the parallel of Hito No. 1, subsequently approved by an exchange of notes between Peru and Chile on 5-29 August 1968
1968-1969 Mixed Commission	Mixed commission comprising delegates of Chile and Peru, charged by the Parties with verifying the location of Boundary Marker No. 1 and with signalling the maritime boundary
1969 Act	Act (*Acta*) of 22 August 1969 by the 1968-1969 Mixed Commission
Accession Protocol	Protocol of Accession to the Declaration of Santiago on "Maritime Zone", signed at Quito on 6 October 1955
Act of Plenipotentiaries	*Acta* signed on 5 August 1930 by the Chilean Ambassador to Peru and the Minister of Foreign Affairs of Peru pursuant to Article 4 of the Treaty of Lima
CPPS	Permanent Commission of the South Pacific (*Comisión Permanente del Pacífico Sur*)
EEZ	Exclusive Economic Zone
FIR	Flight Information Region

Hito No. 1	Boundary marker made of concrete on the Chile-Peru land boundary, the astronomical coordinates and characteristics of which were determined by the 1929-1930 Mixed Boundary Commission and recorded in the Act of Plenipotentiaries; the astronomical latitude of Hito No. 1 was recorded to be 18° 21' 03" S. This latitude corresponds to 18° 20' 47" S (otherwise notated as 18° 20'8 S, 18° 20.8' S or 1820.8S) when referred to PSAD56, 18° 20' 58" S when referred to SAD69, and 18° 21' 00" S when referred to WGS84 Datum.
ILC	International Law Commission
Lima Agreement	Agreement Relating to a Special Maritime Frontier Zone (*Convenio sobre Zona Especial Fronteriza Marítima*), concluded by Chile, Ecuador and Peru at Lima on 4 December 1954, 2274 *UNTS* 528
LPI	*Límite político internacional* (international political boundary)
M	Nautical mile(s)
PSAD56	Provisional South American Datum 1956
Santiago Declaration	Declaration on the Maritime Zone (*Declaración sobre Zona Marítima*), concluded by Chile, Ecuador and Peru at Santiago on 18 August 1952, 1006 *UNTS* 324
SHOA	Hydrographic and Oceanographic Service of the Navy of Chile (*Servicio Hidrográfico y Oceanográfico de la Armada de Chile*), formerly called the Hydrographic and Oceanographic Institute (*Instituto Hidrográfico y Oceanográfico*)

SISPER	System of information on position and security in the maritime dominion of Peru (*Sistema de información de posición y seguridad en el dominio marítimo del Perú*)
SAD69	South American Datum 1969
Treaty of Lima	Treaty for the Settlement of the Dispute regarding Tacna and Arica, concluded by Chile and Peru at Lima on 3 June 1929, [1929] League of Nations, *Treaty Series* 406
UNCLOS	United Nations Convention on the Law of the Sea, signed at Montego Bay on 10 December 1982, 1833 *UNTS* 3
UNTS	United Nations, *Treaty Series*
Vienna Convention	Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969, 1155 *UNTS* 331
WGS84	World Geodetic System 1984

LIST OF FIGURES IN VOLUME I

CHAPTER I
INTRODUCTION

1.1. By Order of 31 March 2008 the Court fixed the dates for the filing of the Memorial and the Counter-Memorial in this case. The Republic of Chile (***Chile***) submits this Counter-Memorial pursuant to the Court's Order. In accordance with Article 49(2) of the Rules of the Court, Chile sets out in this Counter-Memorial the propositions of fact and law on which the disposition of this case rests. Chile also responds to the statements of fact and law made by the Republic of Peru (***Peru***) in its Memorial, so far as a response is called for in the circumstances of this case.

Section 1. The Principal Issues

1.2. Peru commenced these proceedings by unilateral Application, invoking Article 36(1) of the Statute of the Court in conjunction with Article XXXI of the American Treaty on Pacific Settlement of 1948 (the ***Pact of Bogotá***)[1]. The case instituted by Peru comprises two claims. First, Peru contends that "[t]he maritime zones between Chile and Peru have never been delimited by agreement or otherwise"[2], and that a delimitation is to be effected by the Court in accordance with customary international law. Secondly, as a separate claim, Peru contends that Chile is required to recognize "Peru's sovereign rights in a maritime area situated within the limit of 200 nautical miles from its coast (and outside Chile's exclusive economic zone or continental shelf)"[3].

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1 Pact of Bogotá, signed on 30 April 1948, 30 United Nations, *Treaty Series* (***UNTS***) 55, **Annex 46 to the Memorial**.

2 Peru's Application, para. 2.

3 *Ibid.*, para. 3.

1.3. In Chile's respectful submission, Peru's claims fail. The Parties have already delimited their maritime boundary by agreement, in the Declaration on the Maritime Zone (the ***Santiago Declaration***)[4]. This is a tripartite international agreement between Chile, Peru and Ecuador, which was concluded in August 1952. The maritime-boundary line between Chile and Peru, and between Ecuador and Peru, is "the parallel at the point at which the land frontier of the States concerned reaches the sea"[5]. This agreement followed, and was consistent with, concordant unilateral proclamations made by Chile and Peru in 1947[6] in which each State claimed a maritime zone of at least 200 nautical miles.

1.4. The agreed maritime boundary between Chile and Peru is a long-standing reality in international relations. It has been fully implemented in law — international treaties and domestic laws — and applied in practice, and remains in full force today. The Agreement Relating to a Special Maritime Frontier Zone of 1954 (the ***Lima Agreement***)[7] is one notable example, among many, of the practice confirming and implementing the boundary. This Agreement was also between Chile, Peru and Ecuador. It is expressed to be an integral part of the Santiago Declaration[8]. It establishes zones of tolerance in which accidental transgressions of the maritime boundary by local vessels will not be punished. Those zones exist "on either side of the parallel which

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4 Declaration on the Maritime Zone, concluded by Chile, Ecuador and Peru at Santiago on 18 August 1952, 1006 *UNTS* 323, **Annex 47 to the Memorial** (the ***Santiago Declaration***).

5 *Ibid.*, Art. IV.

6 See Official Declaration by the President of Chile of 23 June 1947, **Annex 27 to the Memorial** (the ***1947 Chilean Declaration***); Peruvian Supreme Decree No. 781 of 1 August 1947, **Annex 6 to the Memorial** (the ***1947 Peruvian Supreme Decree*** or the ***Peruvian Supreme Decree of 1947***).

7 Agreement Relating to a Special Maritime Frontier Zone, concluded by Chile, Ecuador and Peru at Lima on 4 December 1954, 2274 *UNTS* 528, **Annex 50 to the Memorial** (the ***Lima Agreement***).

8 *Ibid.*, Art. 4.

constitutes the maritime boundary between the two countries"[9]. Another example is the Parties' agreement in 1968 physically to give effect (*materializar*) to the boundary by signalling the precise course of the boundary parallel with two alignment lighthouses[10].

1.5. The Santiago Declaration was instrumental in the formation of the modern principles of the continental shelf and EEZ[11]. Its terms have proved their enduring longevity, and remain valid today.

1.6. In the Santiago Declaration, Chile, Ecuador and Peru set forth a specific vision of maritime zones and maritime projection. Each of the States parties claimed "exclusive sovereignty and jurisdiction over the sea along the coasts of their respective countries to a *minimum distance* of 200 nautical miles from these coasts"[12] (emphasis added). The States parties used as the lateral limits of their respective maritime zones the parallels of latitude "at the point at which the land frontier of the States concerned reaches the sea"[13]. The States parties conceived each State's continental coastline as generating a maritime zone, which the Santiago Declaration termed a "general maritime zone"[14] and, also, each island (or group of islands) as generating its own maritime zone projected radially for 200 nautical miles[15]. In these circumstances, as well as delimiting the "general" maritime zones, the States parties also had to deal with

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9 Lima Agreement, **Annex 50 to the Memorial**, Art. 1.

10 The course of the agreed boundary was recorded in the minutes of the meeting of the delegates of Chile and Peru on 25 and 26 April 1968 (the ***1968 Minutes***), **Annex 59 to the Memorial**. Alignment lighthouses were put into operation in 1972.

11 See paras 2.72-2.73 below.

12 Santiago Declaration, **Annex 47 to the Memorial**, Art. II.

13 *Ibid.*, Art. IV.

14 *Ibid*.

15 *Ibid*.

the delimitation of one State's insular zone against another State's "general" zone. They did so by agreeing that if an island was within 200 nautical miles (or, for short, ***M***) of the parallel of latitude constituting the boundary between the general zones of the relevant adjacent States, then the insular maritime zone would also be delimited by that boundary[16].

1.7. In 1952, claims to 200M maritime zones of "exclusive sovereignty and jurisdiction" were novel. The Santiago Declaration was the first international-law instrument to claim such zones. The main purpose of the Santiago Declaration was to "legalize" on the international plane (as it was put in the relevant diplomatic correspondence[17]) earlier unilateral claims to 200M zones made by Chile and Peru in 1947. At the time, there was no established practice on delimitation of large ocean expanses. The primary rule was, as it remains, that maritime delimitation was to be effected by agreement. Several methods were in use at the time for the delimitation of territorial seas. Those methods included the use of parallels of latitude. Crucially, since 1947, Peru's 200M maritime zone was defined as a seaward projection "following the line of the geographical parallels"[18]. In the Santiago Declaration five years later, the States parties adopted Peru's own conception, using geographic parallels of latitude as their lateral boundaries.

1.8. Since the Santiago Declaration, parallels of latitude have been agreed as all-purpose maritime boundaries along the west coast of South America between Panama, Colombia, Ecuador, Peru and Chile. This pattern is illustrated in **Figure 1**. The agreed boundary between Chile and Peru is the only one of these boundaries that has been challenged — by Peru or anyone else.

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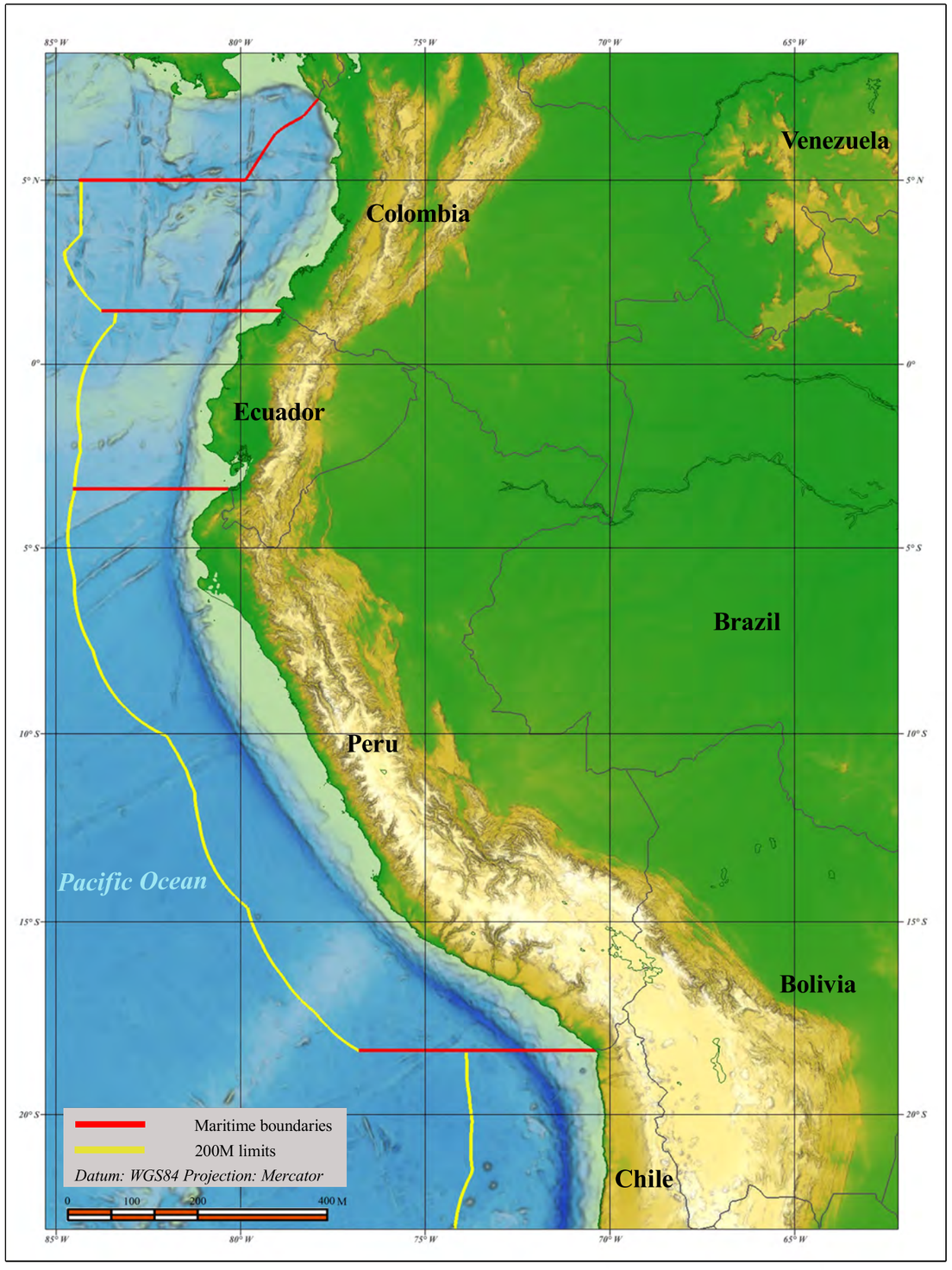
16 See Santiago Declaration, **Annex 47 to the Memorial**, Art. IV.

17 See para. 2.53 below.

18 1947 Peruvian Supreme Decree, **Annex 6 to the Memorial**, Art. 3.

Figure 1

Use of parallels as agreed maritime boundaries on the west coast of South America



Prepared by the Ministry of Foreign Affairs of Chile

The boundaries shown in this diagram are depicted according to the following treaties:

Treaty on the Delimitation of Marine and Submarine Areas and Related Matters between the Republic of Panama and the Republic of Colombia, signed at Cartagena on 20 November 1976, 1074 UNTS 222 (entered into force on 30 November 1977);

Agreement concerning Delimitation of Marine and Submarine Areas and Maritime Co-operation between the Republics of Colombia and Ecuador, signed at Quito on 23 August 1975, 996 UNTS 237 (entered into force on 22 December 1975);

Declaration on the Maritime Zone, signed at Santiago on 18 August 1952 and entered into force upon signature, 1006 UNTS 323.

1.9. The agreement on maritime boundaries in the Santiago Declaration has four chief consequences for the present case. First, that agreement covers all zones of "exclusive sovereignty" or "jurisdiction" that each of the States parties may adopt. And thus, in fact, the Santiago Declaration does cover the maritime zones actually claimed by the Parties today. There is continuity between Peru's zonal entitlement under the Santiago Declaration and the maritime zone which Peru actually claims today. Peru has one unitary 200M maritime zone called the "maritime dominion". Peru relies on the 1947 Supreme Decree and the Santiago Declaration in justification of its "maritime dominion". Peru is not party to the United Nations Convention on the Law of the Sea (***UNCLOS***). For its part, Chile ratified UNCLOS in 1997. In the maritime area off its continental territory, since 1986 Chile has a 12M territorial sea, a 24M contiguous zone, and a continental shelf and an exclusive economic zone (***EEZ***) extending to 200M[19]. Peru's "maritime dominion" and Chile's UNCLOS zones are all zones of "sovereignty" or "jurisdiction" within the meaning of the Santiago Declaration[20]. The maritime boundary agreed in the Santiago Declaration constitutes a comprehensive and complete boundary between the Parties.

1.10. The second consequence follows from the fact that, as a former President of the Court observed, the maritime zones and delimitation method used by the Parties in the Santiago Declaration represented "the logical corollary to the fundamental argument invoked in support of their maritime claims, namely, the direct and linear projection of their land territories and land

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[19] In May 2009, Chile submitted to the United Nations Commission on the Limits of the Continental Shelf preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles from its baselines.

[20] As will be seen (see footnote 742 below) Ecuador claims a 200M territorial sea. Ecuador is not party to UNCLOS.

boundaries into the adjacent seas"[21]. As between these three States parties, the continental maritime zone of each of them is bounded laterally by "the parallel at the point at which the land frontier of the States concerned reaches the sea"[22]. That line operates as a limit throughout the seaward extent of a continental maritime zone, regardless of whether another State party claims an abutting zone on the other side of the line or, if there are abutting zones on either side of the line, whether these zones are of different jurisdictional content. In consequence, under the Santiago Declaration, a continental maritime zone may not wrap around the continental maritime zone of another State, so as not to cut off that State's "direct and linear projection" into the sea. This permitted each State party to exercise the right, under the Santiago Declaration, at any time unilaterally to extend its own maritime zone farther seaward than the "minimum distance" of 200 nautical miles.

1.11. The third consequence flows from the two above. The maritime boundary under the Santiago Declaration cannot be severed from the zonal entitlements which the States parties mutually recognized in the same instrument. The zonal entitlements and the delimitation component are inseparable elements of the same treaty. Peru has derived considerable economic, diplomatic, and political benefits from the recognition of its zonal entitlement under the Santiago Declaration. It cannot now resile from the maritime-boundary component while preserving the benefits that it has already accrued and will continue to accrue from the Santiago Declaration.

1.12. The fourth consequence follows from the fact that, as noted, the parallel of latitude agreed in the Santiago Declaration limits all seaward

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[21] E. Jiménez de Aréchaga, "Chile-Peru", in J. I. Charney and L. M. Alexander (eds), *International Maritime Boundaries, Vol. I*, 1993, **Annex 280**, p. 794.

[22] Santiago Declaration, **Annex 47 to the Memorial**, Art. IV.

extensions of the States parties' maritime zones. Peru's claim and submission to the Court are formulated in a way that is inconsistent with this effect of the Santiago Declaration. As may be seen from Figure 7.5 in Peru's Memorial (at page 265), Peru lays claim to a maritime area within 200 nautical miles of its coast, which area Peru says is to be delimited by a line of equidistance with Chile. Part of that area (38,324 km^2) is within 200 nautical miles of Chile's coast. Another part of the area claimed by Peru is beyond 200 nautical miles from Chile's coast (28,356 km^2, or approximately 42% of Peru's aggregate claim) and is treated by Peru separately. In its Memorial, Peru has labelled that latter part of its claim "the outer triangle"[23]. Chile calls it the "*alta mar* area" to denote its high-seas status. It is depicted in **Figure 2**.

1.13. Peru asks the Court to declare that Peru is "entitled to exercise exclusive sovereign rights"[24] in the *alta mar* area. The area that Peru wishes to subsume into its "maritime dominion", and in which it wishes to exercise sovereignty, is an area of high seas open to all States. Peru seeks to bring within its "maritime dominion" an area of the high seas roughly equal in size to the territory of Albania. The sovereignty exercised by Peru in its "maritime dominion" includes control over airspace to a distance of 200 nautical miles[25].

1.14. Peru's claim to the *alta mar* area seeks to expand its "maritime dominion" in such a way that it would wrap around Chile's continental shelf and

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[23] Memorial, paras 7.2 *et seq*. The maritime area now claimed by Peru was first depicted in an official chart attached to its Supreme Decree No. 047-2007-RE of 11 August 2007, only five months before its Application to the Court of 16 January 2008: see **Annex 24 to the Memorial** and **Figure 2.4 of the Memorial** (p. 51). Chile protested this depiction in Note No. 1415/07 of 12 August 2007 from the Minister of Foreign Affairs of Chile to the Peruvian Ambassador to Chile, **Annex 109**.

[24] Memorial, p. 275, Submission (2).

[25] On the nature of Peru's "maritime dominion", including control over airspace, see paras 2.166-2.176 below.

EEZ for a length of approximately 110M (in a North-South direction) and to a maximum breadth of 165M (in an East-West direction) (see **Figure 2**). Peru's proposed expansion would very considerably curtail practical access to the high seas from the significant Chilean port of Arica, which lies directly to the east of the *alta mar* area.

1.15. Peru's formulation of its claim to the *alta mar* area "[b]eyond the point where the common maritime border [of Chile and Peru] ends"[26] is inconsistent with its own primary position that there is no agreed boundary with Chile. If Peru's primary position were correct, the equidistance line which Peru submits should be drawn would delimit the full extent of Peru's total claim, including the *alta mar* area: there could be no "outer triangle". That can be seen very clearly in Figure 7.5 of Peru's Memorial (at page 265), which shows that Peru's proposed maritime boundary would give to Peru the *alta mar* area as well as the area claimed by Peru which lies within Chile's 200M limit. Yet Peru also asks the Court to declare that Peru has "exclusive sovereign rights" in the *alta mar* area "[b]eyond the point where the common maritime border ends"[27].

1.16. Thus Peru's claim to the *alta mar* area proceeds on an assumption by Peru that the Court will find that the parallel of latitude is the agreed maritime boundary, but that the Parties' agreement covers only the area within 200 nautical miles of the point where their land boundary reaches the sea. Hence, as is explained at paragraphs 2.110-2.112, logically Peru's claim to the *alta mar* area could only be regarded as a claim in the alternative to its primary claim. Peru's alternative claim also fails. Under the Santiago Declaration, the parallel of latitude operates as a limit for the entire seaward extent of the Parties' maritime zones, regardless of whether the other Party has an abutting zone.

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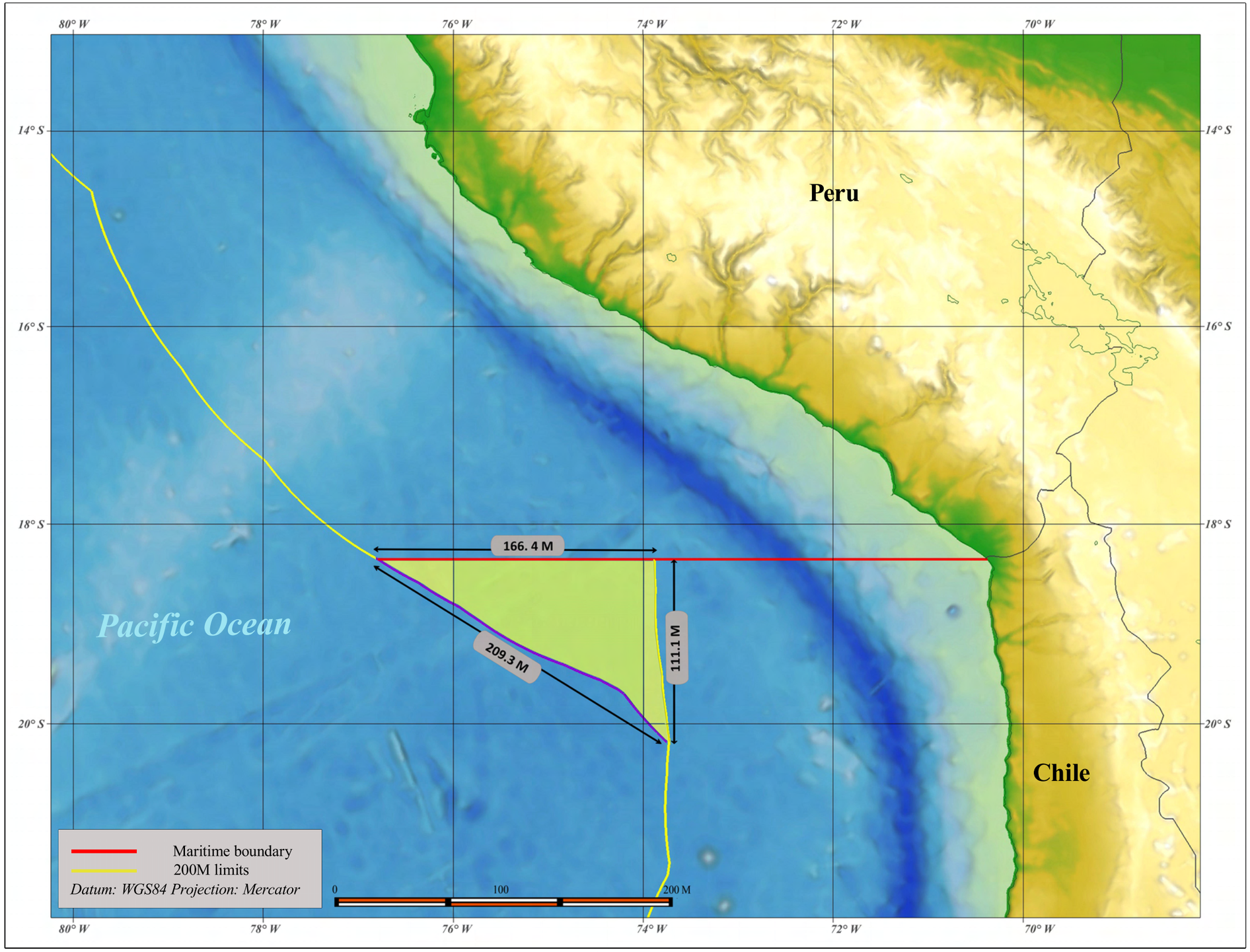
26 Memorial, p. 275, Submission (2).

27 *Ibid*.

Figure 2

Sketch-map showing Peru's *alta mar* claim



Prepared by the Ministry of Foreign Affairs of Chile

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1.17. There is long-standing recognition, by Peru, Chile, Ecuador and in the international community, that the Chile-Peru maritime boundary has been fully delimited by agreement. Elementary considerations of good faith, consistency and justified reliance would of themselves suffice to preclude Peru from now disputing the boundary that it has previously recognized as a juridical fact[28].

1.18. Until Peru agitated its present claims very recently, there was a long-standing uninterrupted pattern of quiet possession on both sides of the maritime boundary. On the strength and stability of the boundary, fishing and fisheries-related industry have flourished at the port of Arica, just 15 kilometres to the south of Chile's land boundary with Peru. That industry is one of the principal sources of income and economic growth in the region, and it relies on both artisanal fishing and long-range trawler fishing in Chile's territorial sea and EEZ.

1.19. Permits in the waters off Chile's coast, now claimed by Peru, are issued by Chile's authorities in Arica, not Peru's authorities in Ilo. Ilo is the major Peruvian port closest to the waters to which Peru now lays claim in this case. It is some 140 kilometres away from Arica. The waters which Peru now claims are in fact policed by Chile's Navy, not Peru's. Fisheries-management schemes in those waters have been adopted and implemented by Chile, not Peru.

1.20. Arica is not only a significant commercial port and fishing centre in its own right, it is also a port which serves the interests of Peru and Bolivia and

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[28] See *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906* (*Honduras v. Nicaragua*), *Judgment, I.C.J. Reports 1960*, pp. 213-214; *Case concerning the Temple of Preah Vihear* (*Cambodia v. Thailand*), *Merits, Judgment, I.C.J. Reports 1962*, pp. 32-33; *Fisheries Case* (*United Kingdom v. Norway*), *Judgment, I.C.J. Reports 1951*, pp. 138-139; *Territorial Dispute* (*Libyan Arab Jamahiriya/Chad*), *Judgment, I.C.J. Reports 1994*, pp. 34-35, para. 66.

provides key facilities to those countries. Arica serves as the port of the Peruvian city of Tacna, some 50 kilometres to the north. In fulfilment of its obligations under the Treaty of Lima, Chile constructed in Arica a quay (managed by a Peruvian State-owned enterprise), a building for the Peruvian Customs office and a terminal station for the railway to Tacna[29]. Peru enjoys port facilities comprising "the most complete freedom of transit for persons, goods and arms to Peruvian territory and from Peruvian territory through Chilean territory"[30]. Arica is also the main transit port for Bolivian cargo. Free-transit rights have been granted by Chile to Bolivia in perpetuity under the Treaty of Peace, Friendship and Commerce of 1904[31]. A pipeline from Bolivia lands at Arica, permitting both imports and exports of petroleum. Bolivia has also been granted by Chile the necessary concession for a segment of the pipeline in the sea, which permits ships to on-load and off-load petroleum. This rich pattern of economic activity, which is centred on Arica, is dependent on unimpeded access to the sea, including the *alta mar* area now claimed by Peru.

1.21. The Parties have agreed on a maritime boundary. So, ultimately this case turns on fundamental rules of *pacta sunt servanda* and stability of boundaries. Article 38(1) of the Court's Statute requires the Court to give effect to the agreement between the Parties. Peru, as any State which has undertaken an

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29 See the Treaty for the Settlement of the Dispute regarding Tacna and Arica, signed at Lima on 3 June 1929, 94 League of Nations, *Treaty Series* 401 (entered into force on 28 July 1929) (the ***Treaty of Lima***), **Annex 45 to the Memorial**, Art. 5. These facilities and the zones, as well as the area between them which has a railway connection, "are found under Chilean sovereignty and, as a consequence of this, are subject to its legal ordinance and to the jurisdiction of its courts, considering the full observance of the Treaty of 1929 and its Additional Protocol, as well as the present Act of Execution": Act of Execution, signed at Lima on 13 November 1999, **Annex 60 to the Memorial**, Art. 13.

30 Supplementary Protocol to the Treaty of Lima, **Annex 45 to the Memorial**, Art. 2.

31 Treaty of Peace, Friendship and Commerce, signed at Santiago on 20 October 1904, Art. VI.

international obligation, "being bound, cannot escape from the international obligation merely by denying its existence"[32]. Hence, Peru's emphasis in its Memorial on its "sovereignty" and a supposed "cut-off" of sovereign entitlements by the boundary parallel is misplaced[33]. Peru itself acknowledges, as it must, that the space within which its maritime entitlements exist is "[s]ubject to the application of the rules relating to the delimitation of maritime areas between States with adjacent coasts"[34]. There is an agreement between the Parties, which delimits their maritime zones using a parallel of latitude. As the Permanent Court observed, "[n]o doubt any convention. . .places a restriction upon the exercise of the sovereign rights of the State. . . But the right of entering into international engagements is an attribute of State sovereignty"[35]. And as the Court recently held: "A treaty provision which has the purpose of limiting the sovereign powers of a State must be interpreted like any other provision of a treaty, i.e. in accordance with the intentions of its authors as reflected by the text of the treaty and the other relevant factors in terms of interpretation"[36].

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1.22. Following this outline of the principal issues in this case, this introductory Chapter continues with a summary of the existence and implementation of the Parties' agreed maritime boundary (in Section 2). This Counter-Memorial provides a comprehensive account, not only of the Parties' agreement on the maritime boundary, but also of the circumstances that led to

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32 Separate opinion of Sir Gerald Fitzmaurice, *Case concerning the Temple of Preah Vihear* (*Cambodia v. Thailand*), *Merits, Judgment*, *I.C.J. Reports 1962*, p. 63.

33 See Memorial, e.g., para. 6.66.

34 *Ibid.*, para. 3.20.

35 *Case of the S.S. Wimbledon*, *1923, P.C.I.J., Series A, No. 1*, p. 25.

36 *Case concerning the Dispute Regarding Navigational and Related Rights* (*Costa Rica v. Nicaragua*), *I.C.J. Judgment, 13 July 2009*, pp. 24-25, para. 48.

that agreement and the State practice acknowledging and implementing the boundary since it was agreed.

1.23. Peru's Memorial does not grapple with that evidence — on the theory, it seems, that the existence of a delimitation agreement requires "the clearest evidence and proof"[37], and that such evidence is for Chile to adduce. Peru chooses to concentrate its efforts on attempting to show that as a matter of abstract grammatical construction it is possible to read the Santiago Declaration and Lima Agreement as not providing for the delimitation of the Parties' maritime zones. That is an attempt to demonstrate that there is linguistic support for a thesis already arrived at. It is not an exercise in treaty interpretation, because it is severed from the context and the history of those two treaties and ignores the evidence relating to their implementation in practice — in short, it is not aimed at ascertaining and giving effect to the Parties' intent. The relevant context, history and evidence are presented in this Counter-Memorial. Taken together, that material is explicable only on the basis that the Parties have fully delimited all of their maritime entitlements by agreement.

1.24. Section 3 of this Chapter then turns to Peru's cultivation of the present claim, which is an artefact of recent vintage. Peru's denial of the maritime-boundary component of the Santiago Declaration is simply an *ipse dixit*. This recent denial is contradicted by more than 50 years of State practice, including Peruvian practice. Significantly, when Peru first proposed to Chile, in 1986, to renegotiate the existing "maritime demarcation", Peru did so on the (wrong) assumption that the maritime zones newly recognized in UNCLOS called for the

[37] Memorial, para. 4.141(a).

existing delimitation to be revisited[38] — not on the basis that there was no agreed maritime boundary in place.

1.25. Following this démarche in 1986, Peru did not renew its request to renegotiate the boundary. Rather, it continued to acknowledge the existence of a maritime boundary and to observe the boundary and enforce it. Indeed, in connection with the completion of port facilities at Arica for Peru's benefit in the late 1990s, Peru affirmed that there was no outstanding boundary issue with Chile[39]. If the maritime boundary were outstanding, as Peru now claims, one would have expected at the very least a reservation to that effect.

1.26. It was in 2000 that Peru changed its position, and began to challenge the existence of a boundary. Chile stood firm: given the existence of an agreed maritime boundary and the long-standing practice giving effect to that boundary, no good-faith dispute could fairly be said to exist. Chile maintains that position today.

1.27. Section 4 of this introductory Chapter describes briefly the international-relations context in which the Santiago Declaration is properly to be understood. Peru's Memorial devotes considerable space to the War of the Pacific in the late 1800s and to events following that war early in the 1900s[40]. That is not the proper historical context of the present case. The Santiago Declaration and the Parties' maritime boundary arose from their co-operation and solidarity on matters of the law of the sea. That is only one of the several areas where the two States have co-operated on the international plane since they

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38 See Memorandum annexed to Note No. 5-4-M/147 of 23 May 1986 from the Embassy of Peru in Chile to the Ministry of Foreign Affairs of Chile (the ***Bákula Memorandum***), **Annex 76 to the Memorial**, sixth paragraph.

39 See para. 1.41 below.

40 See Memorial, paras 1.14-1.31.

conclusively resolved all outstanding land-boundary issues in 1929[41]. Presenting the 1929 Treaty of Lima to the Council of the League of Nations, the Chilean delegate stated that "the way of co-operation and conciliation. . .was the most certain road to peace and prosperity"[42]. The Santiago Declaration was a pillar of this co-operation in the years that followed.

1.28. After Section 5, which indicates issues of jurisdiction and admissibility arising from Peru's claim, this Chapter concludes with Section 6, which outlines the legal and factual issues that are dealt with in each subsequent Chapter.

Section 2. The Agreed Maritime Boundary

1.29. In 1947 the Parties issued concordant unilateral proclamations, each claiming sovereignty to a distance of 200 nautical miles[43]. These two proclamations were among the first 200M claims to be based exclusively on distance from the coast (rather than claiming zones to a depth of 200 metres). Both proclamations referred to the perimeter of the zone claimed, and the 1947 Peruvian Supreme Decree in particular made clear that Peru's zone was to be measured using parallels of latitude. This meant that Peru's zone was laterally limited by parallels of latitude, both to the North (with Ecuador) and to the South (with Chile). Neither Chile nor Ecuador objected to or protested the zone proclaimed by Peru[44]. Chile accepted that its own zone was laterally bounded by

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41 Treaty of Lima, **Annex 45 to the Memorial**.

42 League of Nations, *Official Journal*, July 1929, **Annex 225**, p. 1004.

43 See the Chilean Declaration, **Annex 27 to the Memorial**; and the 1947 Peruvian Supreme Decree, **Annex 6 to the Memorial**.

44 See para. 2.41 below on the mutual acknowledgement by Chile and Peru of each other's proclamation.

the parallel of latitude that bounded Peru's zone in accordance with Peru's Supreme Decree.

1.30. Against this background, lateral delimitation was dealt with succinctly and without controversy in 1952, when Chile and Peru joined together to defend their previous unilateral proclamations and set them forth in a multilateral treaty instrument, the Santiago Declaration. Ecuador joined with Chile and Peru in the Santiago Declaration which, as the 1947 unilateral proclamations of the Parties, also set forth an exclusively distance-based 200M claim. In Article IV of the Santiago Declaration the Parties agreed that their maritime boundary was the parallel of latitude passing through the point at which their land boundary reached the sea.

1.31. Until Peru sought to unsettle the maritime boundary in recent years, there was never a dispute about the location of that point for Article IV purposes. The two States had delimited their land boundary in the 1929 Treaty of Lima and, in accordance with Article 3 of that Treaty, proceeded to "determine and mark" the land boundary in 1930. The determination and demarcation covered the entire length of the boundary and were done by agreement of the Parties. In this agreement, in 1930, the first boundary marker (***Hito No. 1***) was recorded as having been placed on the "seashore [*orilla del mar*]". Its astronomical latitude was agreed to be 18 degrees, 21 minutes and 3 seconds south of the Equator (18° 21' 03" S). Later, Hito No. 1 was identified by the Parties as the reference point for the purposes of Article IV of the Santiago Declaration, that is, to define "the parallel at the point at which the land frontier of the States concerned reaches the sea".

1.32. In 1954 Chile, Ecuador and Peru concluded the Agreement Relating to a Special Maritime Frontier Zone, i.e. the Lima Agreement. It is "deemed to be

an integral and supplementary part of, and not in any way to abrogate, the resolutions and agreements adopted. . .in August 1952"[45]. First and foremost among those "resolutions and agreements" is the Santiago Declaration. In its title, in its recitals and in its first operative article, the Lima Agreement acknowledged that at the time of its conclusion, a maritime boundary already existed between the Parties. Notably, in its Article 1 the Lima Agreement refers to "the parallel which constitutes the maritime boundary between the two countries".

1.33. The minutes of the inter-state conference at which the Lima Agreement was agreed explicitly record the agreement between Chile, Ecuador and Peru that the Santiago Declaration had already delimited their maritime boundaries. The Ecuadorean delegate had moved for a provision expressly clarifying the maritime-boundary agreement contained in Article IV of the Santiago Declaration. The proposed provision was to be included in another international agreement then being prepared (and ultimately signed at the end of the same conference by Chile, Ecuador and Peru)[46]. But the delegates of Peru and Chile considered that "Article 4 of the Declaration of Santiago is clear enough and, therefore, does not require further explanation"[47]. Instead of a new treaty provision, all three parties to the Santiago Declaration agreed formally to record in the minutes that–

> "the three countries deemed the matter on the dividing line of the jurisdictional waters settled and that said line was

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45 Lima Agreement, **Annex 50 to the Memorial**, Art. 4.

46 See the Complementary Convention to the Declaration of Sovereignty on the Two-Hundred-Mile Maritime Zone (the ***Complementary Convention***), signed at Lima on 4 December 1954, **Annex 51 to the Memorial**.

47 Minutes of the First Session of Commission I of the 1954 Inter-State Conference, 2 December 1954 at 10.00 a.m., **Annex 38**, p. 3.

> the parallel starting at the point at which the land frontier between both countries reaches the sea."[48]

Peru did not produce with its Memorial the part of the 1954 minutes in which that agreement was recorded, nor did it mention in its Memorial the common understanding of Article IV of the Santiago Declaration which this agreement reflects.

1.34. In Supreme Resolution No. 23 of 12 January 1955 (the ***1955 Supreme Resolution***) Peru recognized that its maritime zone as "referred to in the Supreme Decree of 1 August 1947 and the joint Declaration signed in Santiago on 18 August 1952 by Peru, Chile and Ecuador"–

> "shall be limited at sea by a line parallel to the Peruvian coast and at a constant distance of 200 nautical miles from it;
>
> . . . In accordance with clause IV of the Santiago Declaration, the said line may not extend beyond that of the corresponding parallel at the point where the frontier of Peru reaches the sea."[49]

1.35. This 1955 Supreme Resolution was provided to the United Nations by the Peruvian Minister of Foreign Affairs in a note verbale of 22 August 1972, and was reproduced in a United Nations *Legislative Series* publication of 1974[50]. Thus, Peru's acknowledgement in 1955 that the Santiago Declaration delimited Peru's maritime boundaries was hardly an error. In 1972 Peru transmitted to the

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48 Minutes of the First Session of Commission I of the 1954 Inter-State Conference, 2 December 1954 at 10.00 a.m., **Annex 38**, p. 3.

49 1955 Supreme Resolution, **Annex 9 to the Memorial**, operative paragraphs.

50 See United Nations Legislative Series, *National Legislation and Treaties Relating to the Law of the Sea*, 1974, **Annex 164**, pp. 27-28.

United Nations the 1955 Supreme Resolution without any reservation about its scope or ongoing applicability.

1.36. In 1968 and 1969 Chile and Peru jointly took practical measures to signal the precise course of their agreed maritime boundary. They identified Hito No. 1 as the reference point for the parallel of latitude constituting the maritime boundary[51], and instructed a mixed commission "physically to give effect [*materializar*] to the parallel that passes through the aforementioned Hito No. 1" in order to "signal the maritime boundary"[52]. The Parties' representatives proposed the construction of two lighthouses which, when aligned by mariners, indicated the parallel of latitude followed by the maritime boundary[53]. That was agreed by the Parties. Lighthouses commenced operation in the early 1970s and continued to signal the boundary until 2001, when the Peruvian lighthouse was destroyed by an earthquake. Peru has not heeded Chile's request to rebuild the lighthouse.

1.37. These are just a few prominent examples of acknowledgement of the agreed maritime boundary. Numerous other examples are given in Chapter III of this Counter-Memorial.

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51 See 1968 Minutes, **Annex 59 to the Memorial**.

52 Act of the Chile-Peru Mixed Commission in Charge of Verifying the Location of Boundary Marker No. 1 and Signalling the Maritime Boundary, 22 August 1969 (the ***1969 Act***), **Annex 6**. In this Counter-Memorial, the Spanish term *materializar* is in most instances translated as "physically to give effect to", instead of "to materialize" as in Peru's Memorial. This is done for clarity of meaning. Nothing of substance in this case turns on this difference in translation.

53 See 1968 Minutes, **Annex 59 to the Memorial**, first recital and first paragraph.

Section 3. Inconsistencies in Peru's Recent Positions

1.38. Peru now claims that it has "constantly reiterated its unwavering position"[54] that there is no maritime boundary with Chile. In fact, Peru has only recently challenged the existence of the maritime boundary, and has raised several mutually inconsistent arguments as purported justifications for its new position. Chile is bound to point out these inconsistencies, not only for the sake of the record but also because they illustrate how Peru has manufactured a dispute where none ought to have arisen.

1.39. In 1986 Peru dispatched Ambassador Bákula to Santiago with a personal message from its then Foreign Minister, Dr. Allan Wagner, to his counterpart in Chile. Peru sought Chile's "immediate attention" to the "formal and definitive delimitation of the marine spaces"[55]. The message is recorded in the Bákula Memorandum submitted by Peru to Chile subsequent to that meeting. Peru stated that this document was its "first presentation" to Chile by diplomatic channels of the "problem" discussed in the memorandum[56]. Peru considered that the "new circumstances", namely the conclusion of UNCLOS in 1982, made the presentation necessary[57]. Peru argued the position that the "definition of new maritime spaces" in UNCLOS meant that Chile and Peru should agree a specific treaty to delimit those "new" zones[58]. Peru asserted that "an extensive interpretation" of existing agreements between the Parties "could generate a notorious situation of inequity and risk, to the detriment of the legitimate interests of Peru, that would come forth as seriously damaged"[59]. Peru referred to

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54 Memorial, para. 22.

55 Bákula Memorandum, **Annex 76 to the Memorial**, fourth paragraph.

56 *Ibid.*, ninth paragraph.

57 *Ibid.*, third and sixth paragraphs.

58 *Ibid.*, sixth paragraph.

59 *Ibid.*, fifth paragraph.

the desirability of "preventing the difficulties which would arise in the absence of an express and appropriate maritime demarcation" and of avoiding a maritime boundary with "some deficiency therein"[60]. Peru's diplomatic language does not obscure the essential point: Peru acknowledged that there was a boundary in place, which Peru wished to renegotiate.

1.40. Peru claims that "Chile had acknowledged in 1986 that the maritime delimitation with Peru was a matter which remained to be examined"[61]. In fact, Chile never agreed to Peru's proposed revision of existing agreements following the meeting with Ambassador Bákula. The Foreign Ministry of Chile simply noted the interest of the Peruvian Government in "future conversations between the two countries on their points of view regarding maritime delimitation" and stated that "studies on this matter shall be carried out in due time"[62]. That was hardly an acknowledgment that no maritime boundary was in place; and indeed Chile took no further action. Nor, significantly, did Peru raise any issue regarding the agreed maritime boundary until another 14 years had passed. The "immediate" need to revisit the maritime boundary, which Peru had said to have arisen from the conclusion of UNCLOS and "the [potential] incorporation of its principles into the domestic legislation of countries"[63], disappeared. Peru neither signed nor ratified UNCLOS, nor did it change its domestic law and "maritime dominion" in accordance with UNCLOS.

1.41. The next event of interest occurred in 1999. The Foreign Affairs Committee of the Peruvian Congress noted that the final agreement with Ecuador in 1998 on the land boundary and the 1999 Act of Execution with Chile, which

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60 Bákula Memorandum, **Annex 76 to the Memorial**, eighth paragraph.

61 Memorial, para. 21.

62 Official Communiqué of 13 June 1986 by the Ministry of Foreign Affairs of Chile, **Annex 109 to the Memorial**, para. 2.

63 Bákula Memorandum, **Annex 76 to the Memorial**, sixth paragraph.

concluded the process of Chile's putting into service port facilities for Peru at Arica under the 1929 Treaty of Lima, "end[ed] any pending possible conflict with [Peru's] neighbouring countries"[64]. Similarly, on the solemn occasion of the conclusion of the 1999 Act of Execution with Chile, the Foreign Minister of Peru stated that this agreement ended the "last consequences of the conflict between Peru and Chile"[65]. In 1999 Peru did not consider maritime delimitation with Chile to be pending.

1.42. It therefore comes as little surprise that in its treaty relations with Chile, Peru has not sought to formulate boundary-delimitation reservations or to include a "without prejudice" clause in respect of delimitation issues. Without-prejudice clauses are normal practice in treaties which may affect either a party's entitlement to a disputed or undelimited maritime zone or the nature of the rights of a party in such a zone[66]. Chile and Peru have concluded a number of agreements under the auspices of the Permanent Commission of the South Pacific (***CPPS***, in its Spanish-language acronym) which relate to the management of the maritime zone of each State party and the resources therein.

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64 Peruvian Congress, Foreign Affairs Committee, *Congreso y Gestión Externa*, Part I, Chap. IX "Congress and External Issues of the 1990s", **Annex 183**, sixth introductory paragraph. The document does not bear a date but it is included in the part of the official website of the Congress which summarizes the activities of its Foreign Affairs Committee in 1999: <http://www.congreso.gob.pe/comisiones/1999/exteriores.htm>.

65 Statement by the Minister of Foreign Affairs of Peru on 13 November 1999, **Annex 182**.

66 See, e.g., Agreement between the Government of Japan and the Government of the Union of Soviet Socialist Republics on Co-operation in the Field of Fisheries, signed at Moscow on 12 May 1985, 1402 *UNTS* 302, **Annex 16**, Art. VIII; Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the Kingdom of Norway and the Government of the Union of Soviet Socialist Republics on the Regulation of the Fishing of North-East Arctic (Arcto-Norwegian) Cod, signed at London on 15 March 1974, 925 *UNTS* 3, **Annex 8**, Art. VI; Reciprocal Fisheries Agreement between the Government of the United States of America and the Government of Canada, signed at Washington D.C. on 24 February 1977, 1077 *UNTS* 55, **Annex 10**, Art. XVII.

In particular, since the 1986 Bákula Memorandum, there have been three such CPPS agreements[67]. Peru did not make any declaration or reservation, either upon signing or ratification; nor did it seek to include a without-prejudice provision in respect of any outstanding maritime-boundary issue. Only the "Galápagos Agreement" of August 2000 contained a generic "savings clause"[68], but it was not specifically directed to issues of delimitation between the Contracting States[69]. What is more, the Chile-Peru bilateral investment treaty, also concluded in 2000, contains no without-prejudice clause, although its territorial scope explicitly includes the maritime zones of the two States[70].

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67 Protocol for the Conservation and Administration of the Protected Marine and Coastal Areas of the South-East Pacific, signed at Paipa on 21 September 1989, **Annex 18**; Protocol for the Protection of the South-East Pacific against Radioactive Contamination, signed at Paipa on 21 September 1989, **Annex 19**; Protocol on the Programme for Regional Study of the Phenomenon "El Niño" in the South-East Pacific, signed at Callao on 6 November 1992, **Annex 20**.

68 Full name: Framework Agreement for the Conservation of the Living Marine Resources on the High Seas of the South-East Pacific, signed at Santiago on 14 August 2000, **Annex 25**. Art. 15 of this Agreement reads:

> "None of the provisions of this Agreement will prejudge, affect or modify the positions of the States Parties with respect to the nature, the limits or the extent of their respective zones under national jurisdiction, or their positions in relation to international instruments on these matters."

Original Spanish text reads:

> "Ninguna de las disposiciones de este Acuerdo prejuzgará, afectará o modificará las posiciones de los Estados Partes con respecto a la naturaleza, límites o alcances de sus respectivas zonas bajo jurisdicción nacional, ni sus posiciones acerca de los instrumentos internacionales que versan sobre estas materias."

69 *Ibid*., Art. 15. In March 2005, almost two years after it had already ratified the Galápagos Agreement, Peru communicated a refusal to "participate" in this Agreement "because if the outer limit of Peru was not recognised, there would be a possibility for third countries to consider part of this outer limit as belonging to the high seas": Memorandum of 9 March 2005 from the Ministry of Foreign Affairs of Peru to the Ambassador of Chile to Peru, **Annex 82 to the Memorial**.

70 See Agreement between the Government of the Republic of Peru and the Government of the Republic of Chile for the Reciprocal Promotion and Protection of Investments, signed at Lima on 2 February 2000, **Annex 24**, Art. 1(3).

Similarly, the Chile-Peru Free Trade Agreement of 2006 is again stated to apply in the maritime and aerial spaces of the two States, but the Agreement is not subject to any reservation or without-prejudice clause[71].

1.43. The absence of boundary-delimitation reservations and without-prejudice clauses in Peru's treaty practice must indicate that Peru saw no need to reserve or protect its position. The position was already settled. There was an agreed boundary in place with Chile.

1.44. In 2000, 14 years after the Bákula Memorandum, Peru's Foreign Ministry objected to the depiction of the maritime boundary in an official Chilean chart which had been published two years earlier, in 1998. In the relevant diplomatic note, Peru did not suggest that the Santiago Declaration had not effected a maritime delimitation. Peru's position was that there was no applicable "specific treaty" on delimitation. The maritime boundary had also been depicted in earlier official Chilean charts, published in 1992 and 1994. These charts did not elicit any protest at all[72].

1.45. In September 2000, when Chile deposited with the United Nations charts showing its maritime boundaries, in accordance with the relevant provisions of UNCLOS, Peru did protest Chile's depiction of a maritime boundary with Peru. The basis of Peru's objection was, again, that there was no "specific maritime delimitation treaty pursuant to the relevant rules of

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71 See the Free Trade Agreement between the Government of the Republic of Peru and the Government of the Republic of Chile, signed at Lima on 22 August 2006 (entered into force on 1 March 2009), **Annex 31**, Art. 2.2.

72 See the three Chilean charts of 1992, 1994 and 1998, annexed to Peru's Memorial as Figure 7.3 (Vol. IV, p. 113), Figure 5.24 (Vol. IV, p. 79) and Figure 5.25 (Vol. IV, p. 81) respectively.

international law"[73]. Peru understood that the Santiago Declaration effected a maritime delimitation between Chile and Peru. Peru's position was that this delimitation was not "specific" to maritime zones under UNCLOS.

1.46. As Peru never signed UNCLOS, it needed to find a different basis on which to seek to unsettle the existing delimitation. Its attempts to do so have resulted in a number of inconsistent positions since 2004.

1.47. In 2004, the Foreign Minister of Peru stated that the agreements between Chile and Peru used the parallel of latitude solely for marking the boundary of their fishing zones, and that these agreements did not delimit the territorial seas, contiguous zones and continental shelves of the two States[74] (which is puzzling, given that Peru claims a unitary 200M "maritime dominion"). He went on to say that this "demarcation" of fishing zones was provisional only. By November 2005, Peru's position had changed yet again. Peru denied that the Santiago Declaration and the Lima Agreement concerned any delimitation of any kind[75]. By then Peru's position was that not even a provisional delimitation of fishing zones was in place.

1.48. In its Memorial in 2009, Peru's position became that the Santiago Declaration effects a delimitation between Ecuador's insular zone and Peru's

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73 Statement by the Government of Peru concerning parallel 18° 21' 00", referred to by the Government of Chile as the maritime boundary between Chile and Peru, reproduced in United Nations, *Law of the Sea Information Circular*, No. 13 (2001), **Annex 78 to the Memorial**, para. 1.

74 See the transcript of an interview on 5 April 2004 with the Minister of Foreign Affairs of Peru by *El Comercio*, reproduced at the website of the Ministry of Foreign Affairs of Peru, accessed on 5 September 2007 (since withdrawn), **Annex 197**.

75 See Note RE (GAB) No. 6-4-A/157 of 11 November 2005 from the Minister of Foreign Affairs of Peru to the Chilean Ambassador to Peru, **Annex 108**; Official Communiqué RE 14-05 of 1 December 2005 issued by the Ministry of Foreign Affairs of Peru, **Annex 200**.

general zone, but effects no delimitation at all between Chile and Peru[76]. As will be seen in Chapter II[77], this most recent interpretation of the Santiago Declaration does not account for the full delimitation that exists between the general maritime zones of Ecuador and Peru. Peru has recently acknowledged that there is no outstanding maritime-boundary delimitation issue between Ecuador and Peru[78]. The only reading of Article IV of the Santiago Declaration which accounts for the full delimitation of the maritime boundary between Ecuador and Peru is that the Santiago Declaration delimited the general (i.e., continental), as well as the insular, zones of the States parties. That reading, which in Chile's submission is correct, explains the full delimitation between Ecuador and Peru, and, equally, the full delimitation between Chile and Peru.

1.49. The series of inconsistent assertions, over a short period of time, described above, simply manifests Peru's dissatisfaction with its agreed maritime boundary with Chile. Neither Peru's present dissatisfaction, nor the recent unilateral assertions motivated by it, has any legal effect on the validity of the agreed maritime boundary or the scope of the Parties' agreement.

Section 4. The Broad Historical Context

1.50. As already noted, the historical materials relevant to the present case span more than half a century. As also noted, Peru's Memorial pays scant attention to those materials. Nonetheless Peru has provided an account of much earlier events which on no view can be relevant to this case.

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76 See, e.g., Memorial, para. 4.77.

77 See paras 2.88-2.91 and **Figure 7** below.

78 See Official Communiqué RE/13-05 of 25 November 2005 by the Ministry of Foreign Affairs of Peru, **Annex 199**.

1.51. In Chapter I of its Memorial[79] Peru presents a version of historical events relating to the War of the Pacific (1879-1883) and the years preceding the 1929 Treaty of Lima[80]. The Treaty of Lima definitively closed all land-boundary issues between the Parties and, as will be seen in Chapter II, it is relevant in this case only for one specific issue of fact. That issue is the location of Hito No. 1 of the land boundary, which was later identified by the Parties as the reference point for the parallel of latitude constituting their maritime boundary in accordance with Article IV of the Santiago Declaration.

1.52. Events pre-dating the Treaty of Lima fall outside the compass of the present case. It is of course for Peru to choose how to put its case. For its part, Chile believes that no useful purpose can be served by responding to Peru's incomplete account of complex events which occurred in the late-19th and early-20th Centuries. Those events were part of a protracted and often conflictual process through which nation-states came into being in Latin America[81]. In that process, Chile, jointly with Argentina, contributed to Peru's struggle for independence from Spain: José de San Martín of Argentina took the lead, and was strongly supported by Chile's Supreme Director Bernardo O'Higgins. Later, in 1837-1839, Chile campaigned alongside part of Peru's army to defeat the hegemonic aspirations of Andrés de Santa Cruz, the Bolivian leader of the Peru-Bolivia Confederation. The campaign resulted in Peru's separation from the Confederation. In 1865-1866, Chile supported Peru in battles against Spain and, as a consequence of its solidarity with Peru, Chile's major port (Valparaíso) was attacked by the Spanish Armada. Thus, Peru's account of the War of the Pacific does not properly describe the complex historical context of the relevant period.

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79 See Memorial, paras 1.14-1.31.

80 Treaty of Lima, **Annex 45 to the Memorial**.

81 C. Aljovín de Losada and E. Cavieres F., "Reflexiones para un Análisis Histórico de Chile-Perú en el siglo XIX y la Guerra del Pacífico", in E. Cavieres F. and C. Aljovín de Losada (eds), *Chile-Perú; Perú-Chile en el siglo XIX*, 2005.

Such matters are, however, among those which are outside the jurisdiction of the Court[82]. The conflicts and differences about land boundaries to which Peru refers have long been settled.

1.53. Chile does wish, however, to say a few words about the proper historical context of the present case, which may be of assistance to the Court. The first point to note is the significance of the Treaty of Lima of 1929. That Treaty was hailed by Peru's President in presenting it to Congress in the ratification process as one which "gathers the best of any other treaty, the deepest and most positive benefits present and future to the Republic"[83]. When the Treaty of Lima was presented to the Council of the League of Nations, by Chile, the representative of Chile noted that "the agreement rendered impossible any future conflict between the two nations"[84]. The Council "noted with the utmost satisfaction an event which has put an end to an old dispute" and that "cordial relations were again assured between two important States in Latin America"[85]. As late as 1987, Dr. Ulloa, a distinguished Peruvian diplomat and jurist, acknowledged that "the Treaty [of Lima] of 1929 was a good settlement for our country"[86].

1.54. The Treaty of Lima was fully executed. Chile has complied with all of its provisions, including Article 5 which requires the construction of facilities for Peru's use and benefit at the Chilean port of Arica. That Article provides that:

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82 See Pact of Bogotá, **Annex 46 to the Memorial**, Art. IV; also see paras 1.61 *et seq.* below.

83 "El Tratado de Tacna y Arica ante el Congreso Pleno Peruano", *El Diario Ilustrado*, 27 June 1929, **Annex 245**, p. 16.

84 League of Nations, *Official Journal*, July 1929, **Annex 225**, p. 1003.

85 *Ibid.*, p. 1003.

86 A. Ulloa, *Para la Historia Internacional y Diplomática del Perú: Chile*, 1987, **Annex 312**, p. 369.

> "For the use of Peru, the Government of Chile shall, at its own costs, construct within one thousand five hundred and seventy-five metres of the Bay of Arica a landing stage for fair-sized steamships, a building for the Peruvian Customs office, and a terminal station for the Tacna railway. Within these zones and establishments the transit traffic of Peru shall enjoy the freedom that is accorded in free ports under the most liberal régime."[87]

1.55. The technical studies and other preparatory work for the relevant facilities were conducted with co-ordination between the Parties in the 1950s and 1960s. Work followed on the system of administration of those facilities, completed in the 1980s, again in co-operation with Peru. The entire process was concluded in the 1990s, and an Act of Execution was solemnly signed in 1999[88].

1.56. As the Foreign Minister of Peru acknowledged on the occasion of the signing of the Act of Execution[89], there has been increasingly close co-operation between Chile and Peru since 1929. That has been the case especially in the law of the sea, as will be seen in detail in Chapters II and III. The two States formulated concordant unilateral proclamations of 200M maritime zones in June and August of 1947. In 1952, together with Ecuador, they established the CPPS. They are also party to the several international agreements which have been concluded over time under the auspices of the CPPS. The Santiago Declaration is the primary foundation of those CPPS agreements.

1.57. Also, Chile and Peru were part of the "CEP" group (Chile, Ecuador, Peru) which defended and promoted 200M maritime zones in many regional and

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87 Treaty of Lima, **Annex 45 to the Memorial**, Art. 5.

88 See Act of Execution, 13 November 1999, **Annex 60 to the Memorial**.

89 See Statement by the Minister of Foreign Affairs of Peru on 13 November 1999, **Annex 182**.

universal diplomatic conferences, including the Third United Nations Conference on the Law of the Sea. Both Chile and Peru (as well as other States and independent observers) noted that the concepts of the EEZ and a distance-based continental shelf in UNCLOS owe much to the Santiago Declaration[90].

1.58. Chile has also actively supported Peru in its application to obtain the status of Consultative Party under the Antarctic Treaty and in securing admission to the Asia-Pacific Economic Cooperation (APEC) forum.

1.59. As a long-standing principle of its foreign policy, Chile has pursued peaceful and cooperative international relations. As is well known, all land- and maritime-boundary questions which have concerned Chile have been resolved either by agreed recourse to arbitration or directly by international treaties. Moreover, Chile joined with other countries of the Americas in bringing about a mediated close of the "Chaco War" between Bolivia and Paraguay in 1938. Chile has also contributed to the termination of the two armed conflicts in which Peru has been involved with Ecuador, over land-boundary disputes, in 1941 and 1995. Together with Argentina, Brazil and the United States of America, Chile is one of the guarantor States under the 1942 Rio de Janeiro Protocol which terminated the 1941 conflict[91]. In that capacity, Chile also contributed to the peace process which followed the 1995 Peru-Ecuador conflict. That process resulted in the 1998 Presidential Act of Brasilia[92]. As the Foreign Minister of Peru stated in

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90 See paras 2.72-2.73 below.

91 See Protocol of Peace, Friendship and Boundaries between Peru and Ecuador, signed at Rio de Janeiro on 29 January 1942, **Annex 3**, Art. V.

92 Act of Brasilia, signed by the Presidents of Peru and Ecuador at Brasilia on 26 October 1998, **Annex 23**.

1999, "Chile has played an important role as Guarantor of the Protocol of Rio de Janeiro, a role that Peru recognizes and appreciates"[93].

Section 5. Issues of Jurisdiction and Admissibility: Peru's Pleaded Case Seeks to Reopen Matters Agreed in Treaties

A. Peru has Contrived a Dispute

1.60. As noted, Peru's application to the Court in the present case is the culmination of Peru's recent attempts to unsettle an agreed maritime boundary. Chile has difficulty with the notion that the principal judicial organ of the United Nations should be seised of a dispute that is manifestly contrived. There is no *bona fide* dispute here. Peru simply willed a controversy into being by unilaterally denying that an agreed delimitation has been effected by the Santiago Declaration and confirmed by the Lima Agreement.

B. The Pact of Bogotá Explicitly Excludes Issues Concerning the Agreed Land Boundary from Reference to the Court

1.61. Peru's pleaded case requires the Court to pronounce on one matter which the States parties to the Pact of Bogotá did not intend to include within the jurisdiction of the Court, and which the Pact expressly excludes from reference to the Court. That matter is the Parties' agreed land boundary. As Peru pleads its case, and formulates it in its submissions to the Court, a determination by the Court of what Peru alleges is the seaward terminus of the Parties' land boundary is a necessary component of Peru's claimed equidistance line.

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[93] Statement by the Minister of Foreign Affairs of Peru on 13 November 1999, **Annex 182**.

1.62. In its Application Peru asks the Court to begin the delimitation of the maritime boundary at "a point on the coast called Concordia, *the terminal point of the land boundary* established pursuant to [the Treaty of Lima], the coordinates of which are 18° 21' 08" S and 70° 22' 39" W"[94] (emphasis added). Peru's reliance on a unilaterally-held and recently-announced view of the land boundary is continued in its Memorial. There Peru refers to "Point Concordia", with coordinates 18° 21' 08" S and 70° 22' 39" W, as the point "where the Peru-Chile land boundary meets the sea"[95]. Peru now asserts that "the point where the land boundary meets the sea, according to what was agreed between the Parties in 1929-1930. . .is known as Point Concordia, having the co-ordinates 18° 21' 08" S, 70° 22' 39" W WGS84."[96] Peru asserts that it "is from this point that the delimitation of the maritime zones between the Parties starts"[97]. Yet no point corresponding to those co-ordinates has ever been agreed between the Parties as part of their land boundary, and Chile does not recognize Peru's new Point Concordia. The agreement that was reached by the Parties in 1929 and 1930 about their land boundary is discussed in Section 2 of Chapter II of this Counter-Memorial.

1.63. In 2005 Peru enacted a baselines law pronouncing that its southernmost basepoint was Point 266, having the same coordinates as the point which, in connection with the land boundary, Peru calls "Point Concordia"[98]. Peru's 2005 baselines law specifically refers to Point 266 as a "[p]oint in the Peru-Chile international land border"[99]. As is explained at paragraphs 2.20 and

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94 Peru's Application, para. 11.

95 Memorial, para. 2.13. Also see paras 2.8 and 6.21 of the Memorial.

96 *Ibid*., para. 6.46.

97 *Ibid*., para. 6.46.

98 *Ibid*., para. 2.13.

99 Law No. 28621 of 3 November 2005: Maritime Dominion Baselines Law, **Annex 23 to the Memorial**, p. 115 of Vol. II of Peru's Annexes.

3.46-3.47 below, Point 266 was unilaterally announced by Peru, and Chile has protested it. The demarcation of the Parties' land boundary in 1930 was agreed to be complete and to have started at "the Pacific Ocean"[100]. The most seaward boundary marker was agreed to be on the "seashore"[101]. That boundary marker is Hito No. 1. In 1930 the Parties agreed that Hito No. 1 had an astronomical latitude of 18° 21' 03" S[102]. It has a latitude of 18° 21' 00" S when referred to the WGS84 Datum.

1.64. Peru's assertions about the land boundary are puzzling. As recently as 1996 and 1999, Peru formally stated that no land-boundary issues were outstanding[103]. Peru's assertion, for the first time in its Application in 2008, that the terminal point of the land boundary is not, after all, the one that was agreed and demarcated in 1930, i.e. Hito No. 1, serves one purpose only. The purpose is to cast doubt on Hito No. 1 as the proper reference-point for the maritime boundary. In this way Peru hopes to frustrate the Parties' agreement that the maritime boundary is "the parallel at the point at which the land frontier of the States concerned reaches the sea"[104]. That is transparently a stratagem. It is also illogical, because seeking to unsettle the Parties' agreement on a maritime boundary following a geographic parallel by challenging its reference point, Hito No. 1, is to put the cart before the horse.

1.65. The fact is that the Parties wished to use and in fact did use Hito No. 1 as the reference point for the relevant parallel of latitude. Whether Point 266 is or is not closer to the present low-water mark than Hito No. 1 is a purely factual

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100 See the Act of Plenipotentiaries, **Annex 55 to the Memorial**, first paragraph.

101 1930 Final Act, **Annex 54 to the Memorial**; see the description of the first *hito*.

102 *Ibid*.

103 See para. 2.18 below.

104 Santiago Declaration, **Annex 47 to the Memorial**, Art. IV.

question. It need not be answered in these proceedings, because it can have no effect on the Parties' agreement to use Hito No. 1 as the operative reference-point for the parallel which is the maritime boundary.

1.66. There is, furthermore, a jurisdictional problem with Peru's proposed reliance on its Point 266. In order to make a case for Point 266, Peru asserts that it corresponds to "the terminal point of the land boundary established pursuant to [the Treaty of Lima]"[105]. Hence Peru's further assertion about a new "Point Concordia". However, Peru's assertions cannot find any jurisdictional basis in the Pact of Bogotá. Article VI of the Pact provides that the dispute-resolution procedures under the Pact, including recourse to the Court under Article XXXI–

> "may not be applied to matters already settled by arrangement between the parties, . . .or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty"[106].

1.67. The "date of. . .conclusion" envisaged in Article VI is April 1948[107].

1.68. Peru was the lead promoter of Article VI. The Peruvian delegate at the Bogotá conference, the distinguished diplomat Ambassador Belaúnde, insisted on the present capacious formulation of Article VI on the grounds that "it would be very dangerous to attenuate the formula. In the first place, it would be very difficult to attenuate it; secondly, it would open the door to provoke a dispute, which is exactly what we want to avoid"[108]. In later writings, Ambassador

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105 Peru's Application, para. 11.

106 Pact of Bogotá, **Annex 46 to the Memorial**, Art. VI.

107 See *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, I.C.J. Judgment, 13 December 2007*, para. 81.

108 Minutes of the Third Session of the Third Commission of the Ninth Inter-American Conference, 27 April 1948, **Annex 33**, p. 135. Dr. Belaúnde's statement was made in

Belaúnde said that Article VI "prevented revisionism, establishing the respect for *res judicata* and the preference for the procedures agreed by the parties"[109].

1.69. Indeed, Peru was so attached to the principle enshrined in Article VI of the Pact of Bogotá that upon signature it lodged the following reservation:

> "Reservation with regard to Article XXXIII and the pertinent part of Article XXXIV, inasmuch as it [Peru] considers that the exceptions of *res judicata*, resolved by settlement between the parties *or governed by agreements and treaties in force*, determine, in virtue of their objective and peremptory nature, the exclusion of these cases from the application of every procedure."[110] (Emphasis added.)

1.70. This reservation sought to exclude the Court's power to determine the scope of its own jurisdiction, including the Court's power to determine for itself whether an Article VI jurisdictional impediment was extant. That indicates Peru's strong attachment to the rule in Article VI that the jurisdictional effect of the Pact of Bogotá was only forward-reaching: matters "governed by agreements and treaties in force" at the time of the Pact are not subject to the dispute-resolution procedures provided for in the Pact. Peru notified the Organization of American States of the withdrawal of its reservation in February 2006[111], after Peru's Congress had authorized the commencement of these proceedings. The

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response to a concern expressed by Ecuador that the formulation supported by Peru would exclude from the scope of the Pact any dispute regarding subsequent "performance" of an existing treaty.

109 V. A. Belaúnde, *Trayectoria y Destino – Memorias Completas*, *Vol. II,* 1967, **Annex 252**, p. 864.

110 Reservations made by Peru to the Pact of Bogotá in 1948, 30 *UNTS* 110, **Annex 160**, second reservation.

111 Peru's withdrawal of its reservation is recorded at the official website of the Organization of American States, **Annex 201**.

authorization came only five months after the Peruvian Foreign Minister had proposed to his Chilean counterpart, in July 2004, that negotiations start within a fixed period of 60 days[112], as a preliminary step to bringing maritime-boundary issues before the Court.

1.71. To conclude, the Parties' land boundary, including issues regarding what Peru now calls "Point Concordia", are "matters which are governed by agreements or treaties in force on the date of the conclusion of the [Pact of Bogotá]" within the meaning of Article VI. The land boundary was agreed in 1929[113] and was fully determined and marked in 1930[114], well before 1948. The Pact of Bogotá does not permit Peru to agitate these long-closed matters before the Court.

1.72. In any event, to dispose of this case, the Court need not reach any decision about Peru's unilateral assertions concerning the point which, in connection with the land boundary, Peru calls "Point Concordia" and, as a basepoint for its maritime zone, Peru calls "Point 266". Again, the Parties have agreed to use Hito No. 1 as the reference point for the parallel of latitude constituting the agreed maritime boundary between them in accordance with Article IV of the Santiago Declaration. That is the end of the matter.

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112 See Note (GAB) No. 6/43 of 19 July 2004 from the Minister of Foreign Affairs of Peru to the Minister of Foreign Affairs of Chile, **Annex 79 to the Memorial**, eighth paragraph.

113 See Treaty of Lima, **Annex 45 to the Memorial**, Art. 3.

114 1930 Final Act, **Annex 54 to the Memorial**; Act of Plenipotentiaries, **Annex 55 to the Memorial**.

C. INADMISSIBILITY OF PERU'S PLEADED CLAIMS

1.73. Peru requests the Court to effect a delimitation between the "respective maritime zones" of the Parties[115]. As the basis for this request Peru invokes Articles 74 and 83 of UNCLOS, to which Peru is not party, as reflective of customary international law. Articles 74 and 83 concern the delimitation of EEZs and continental shelves, respectively. Yet the maritime zone which Peru actually claims, first and foremost in its Constitution, is a unitary 200M "maritime dominion". It covers the sea-bed, water column and also the airspace above those waters[116]. Peru cannot rely on UNCLOS Articles 74 and 83 as the legal basis for a delimitation of its "maritime dominion", because this is not a zone that can be delimited by application of those provisions. Those provisions do not concern the delimitation of unitary 200M zones of exclusive sovereignty over waters, subsoil and airspace.

1.74. The difficulty with the admissibility of Peru's claim takes a more particular form in respect of the *alta mar* area now claimed by Peru. There Peru does not ask the Court to delimit its "maritime dominion" as against Chile's maritime zones. Rather, Peru seeks to expand its "maritime dominion", which is more than the aggregation of an EEZ and continental shelf, into an area of high seas immediately seaward of Chile's EEZ and continental shelf. Peru's claim would result in its "maritime dominion" wrapping around Chile's EEZ and continental shelf and curtailing access to the high seas from Chile's maritime zones and the international airspace above them. This aspect of Peru's claim is inadmissible because it asks the Court to enlarge Peru's "maritime dominion", in which it purports also to control overflight, into an area of high seas, to which all

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115 Memorial, p. 275, Submission (1).

116 The characteristics of Peru's "maritime dominion" are described at paragraphs 2.166-2.176 below.

members of the international community, including Chile and Peru, have equal access. Peru asks the Court to do so on the basis of Articles 74 and 83 of UNCLOS, as reflective of customary international law. Yet Articles 74 and 83 do not permit Peru to appropriate an area of the high seas in which it would exercise forms of jurisdiction that are not compliant with UNCLOS. That Convention provides only for the delimitation of zones that are compliant with its substantive provisions.

1.75. In Chile's respectful submission, any entitlement of Peru to a "maritime dominion" vis-à-vis Chile may be founded only in the Santiago Declaration, in which the States parties agreed that "they each possess exclusive sovereignty and jurisdiction. . .to a minimum distance of 200 nautical miles"[117]. The Santiago Declaration has also effected a delimitation between the respective maritime entitlements of Chile and Peru. The articles of UNCLOS invoked by Peru as reflective of customary international law provide no basis for the delimitation of Peru's "maritime dominion". Peru's "maritime dominion" can only be delimited by agreement with other States. Such an agreement was reached with Chile in the Santiago Declaration and has been confirmed on numerous occasions since.

1.76. To be clear, should Peru's "maritime dominion" ever be converted into a series of UNCLOS-compliant zones, the agreed maritime boundary with Chile would remain applicable. This follows from fundamental rules of customary law respecting the stability of agreed boundaries, which rules are also given effect to in UNCLOS itself[118].

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117 Santiago Declaration, **Annex 47 to the Memorial**, Art. II.

118 See Chapter IV, Section 7, below.

Section 6. Structure of this Counter-Memorial

1.77. The next chapter of this Counter-Memorial, Chapter II, is devoted to a chronological account of the legal and factual matters relevant to the agreement reached by the Parties in 1952 to delimit their maritime boundary. By way of necessary context, the circumstances in which the Santiago Declaration was concluded are explained, notably the definitive settlement of all outstanding land-boundary issues between the Parties in 1929-1930, and the concordant unilateral proclamations of maritime zones made by the Parties in 1947. Chapter II then focuses on the Santiago Declaration and the delimitation agreement contained within it. As explained in Chapter II, this agreement also bars Peru's new claim to the *alta mar* area. Chapter II also describes the Lima Agreement, in which the Parties acted upon their existing maritime boundary by creating zones of tolerance on either side of it. This Chapter also includes references to the considerable body of evidence demonstrating the long-established understanding in the international community and among "the most highly qualified publicists of the various nations" of the existence and course of the maritime boundary between the Parties.

1.78. Chapter III sets forth the considerable body of evidence demonstrating the Parties' acknowledgement and implementation of their agreed maritime boundary in subsequent agreements and in practice over a long period. These include, for example, the Parties' 1968 agreement to signal their maritime boundary by constructing two lighthouses to mark the parallel of latitude of Hito No. 1, and Peru's incorporation in its domestic law of the lateral delimitation agreed with Chile in Article IV of the Santiago Declaration. The concrete measures taken by the Parties in acknowledgement and implementation of the agreed maritime boundary detailed in Chapter III show that Peru's new interpretation of the Santiago Declaration seeks to depart from a maritime boundary that is a long-settled juridical fact.

1.79. Chapter IV of this Counter-Memorial follows the steps of the interpretive process mandated by Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969 (the ***Vienna Convention***) and applies these rules of interpretation to the legal and factual matters described in the previous chapters. Chapter IV demonstrates that the Parties have agreed an all-purpose maritime boundary by treaty, and that there is no legal basis for Peru's attempt to unsettle it.

1.80. Chapter V is a concise summary of the principal aspects of Chile's reasoning. This Counter-Memorial concludes with Chapter VI, which contains Chile's submissions.

CHAPTER II
THE PARTIES' MARITIME BOUNDARY AGREEMENT AND ITS CONTEXT

Section 1. Introduction

2.1. This Chapter contains a factual account of the legal developments and instruments which are central to the disposition of this case. It recounts how the Parties:

(a) fully delimited and demarcated their land boundary in 1929 and 1930;

(b) proclaimed concordant zones of national maritime jurisdiction to a seaward distance of 200 nautical miles in 1947, both referring to the zone claimed as falling within a perimeter, and in the case of Peru explicitly "measured following the line of the geographic parallels";

(c) concluded a regional multilateral agreement, the Santiago Declaration, in 1952, providing international-law endorsement of the maritime zones already claimed unilaterally and effecting an agreed delimitation of those zones; and

(d) as part of their efforts on a multilateral level, in 1954, confirmed the delimitation of their maritime boundary in a separate but related international agreement, which was stated to be an "integral and supplementary" part of the Santiago Declaration of 1952.

2.2. The Chapter concludes by describing the long-established understanding of other States, the United Nations and publicists from numerous and diverse legal traditions that there is an agreed maritime boundary between Chile and Peru, and that the boundary line follows the parallel of latitude of the point at which the land boundary of the Parties reaches the sea.

2.3. The land boundary between Chile and Peru was delimited by the Treaty of Lima of 1929. In 1930 the land boundary was "determined and marked" by a mixed boundary commission created under the same Treaty. The importance of the demarcation of the Chile-Peru land boundary for present purposes lies in the fact that when, in the Santiago Declaration of 1952, Chile and Peru delimited their maritime zones using the parallel of latitude passing through "the point at which the land frontier of the States concerned reaches the sea"[119], they had already agreed that their "demarcated boundary line starts from the Pacific Ocean at a point on the seashore [*línea de frontera demarcada parte del océano Pacífico en un punto en la orilla del mar*]"[120] and that Hito No. 1 was on the "seashore [*orilla del mar*]"[121].

2.4. In 1952 Chile and Peru were defending the concordant unilateral claims that they had made in 1947, in the face of opposition from several maritime powers. Ecuador joined with Chile and Peru to create a regional instrument. Both of the 1947 national proclamations addressed the issue of the perimeter of the area that was being claimed. Peru's zone, under its 1947 Supreme Decree, was "measured following the line of the geographic parallels". Peru's zone had been extant for five years, without opposition from Chile or Ecuador, before the Santiago Declaration was concluded in 1952. In the Santiago Declaration the three States parties adopted the same straightforward method of delimitation. The Santiago Declaration provided for general maritime zones extending to a minimum seaward distance of 200 nautical miles. It also authorized unilateral seaward extensions of those zones in the future. The

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119 Santiago Declaration, **Annex 47 to the Memorial**, Art. IV.

120 1930 Final Act, **Annex 54 to the Memorial**, second paragraph.

121 *Ibid*., first entry in the table of *hitos*; repeated in Act of Plenipotentiaries, **Annex 55 to the Memorial**, first entry in the table of *hitos*.

delimitation method of geographic parallels of latitude had the additional advantage of accommodating that possibility of further extension.

2.5. The agreement of the Parties concerning the lateral delimitation of their respective maritime zones is contained in Article IV of the Santiago Declaration, which reads as follows:

> "In the case of island territories, the zone of 200 nautical miles shall apply to the entire coast of the island or group of islands. If an island or group of islands belonging to one of the countries making the declaration is situated less than 200 nautical miles from the general maritime zone belonging to another of those countries, the maritime zone of the island or group of islands shall be limited by the parallel at the point at which the land frontier of the States concerned reaches the sea."[122]

2.6. Both the ordinary meaning of the text, considered in its context, and the *travaux préparatoires* of the Santiago Declaration reflect the common understanding of the three States that the parallel of latitude of the point at which the land boundary reaches the sea constitutes the lateral maritime boundary for all maritime zones between Chile and Peru and between Ecuador and Peru. The focus on islands in the text of Article IV, as a specific application of the general rule which had been agreed, is explained by Ecuador's participation in the Declaration and the potential for overlap between the maritime zones generated

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[122] Santiago Declaration, **Annex 47 to the Memorial**, Art. IV. The original Spanish text reads as follows:

> "En el caso de territorio insular, la zona de 200 millas marinas se aplicará en todo el contorno de la isla o grupo de islas. Si una isla o grupo de islas pertenecientes a uno de los países declarantes estuviere a menos de 200 millas marinas de la zona marítima general que corresponde a otro de ellos, la zona marítima de esta isla o grupo de islas quedará limitada por el paralelo del punto en que llega al mar la frontera terrestre de los estados respectivos."

by Ecuador's islands and Peru's continental territory — particularly if either Ecuador or Peru were to extend its maritime claim beyond 200 nautical miles, as States parties were free to do under the Santiago Declaration.

2.7. When, in 1954, a further suite of multilateral maritime agreements was concluded at the Second Conference on Exploitation and Conservation of the Maritime Resources of South Pacific, Chile, Ecuador and Peru agreed that the lateral maritime boundaries of their general maritime zones had been settled in the Santiago Declaration. As the minutes of the 1954 diplomatic conference record, although express confirmation of those boundaries had been suggested, the Parties saw no reason to deal again with the subject. This agreed position was reflected in the text of the Lima Agreement of 1954. The Lima Agreement created a zone of tolerance on either side of each maritime boundary established by the Santiago Declaration, for the benefit of local fishermen with limited navigational aids. This Agreement expressly acknowledged that a parallel of latitude "constitutes" — in the present tense — the maritime boundary between the adjacent States[123]. This acknowledgement is contained in an international agreement that was deemed to be "an integral and supplementary part of" the Santiago Declaration. The full title of the Lima Agreement, "Agreement Relating to a Special Maritime Frontier Zone [*Convenio sobre Zona Especial Fronteriza Marítima*]", makes it plain that the "special zone" was attendant upon the "maritime frontier".

2.8. In confirming the existence of lateral maritime boundaries in this way, it is clear that the three States were acting in a manner which they believed to be concordant with the Santiago Declaration; indeed, they were acting upon, and giving effect to, the maritime delimitation set forth in the Santiago Declaration.

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[123] Lima Agreement, **Annex 50 to the Memorial**, Art. 1.

Section 2. Delimitation and Demarcation of the Land Boundary (1929-1930)

2.9. In 1929, Peru and Chile agreed on the land boundary between the areas of Tacna and Arica, by entering into the Treaty of Lima. This was a definitive settlement of all outstanding land-boundary issues. The Treaty of Lima remains in full force and effect. Article 2 of the Treaty of Lima sets out the entire land boundary between Chile and Peru. In so far as relevant to this case, that article describes the boundary in the following terms:

> "The territory of Tacna and Arica shall be divided into two portions of which Tacna, shall be allotted to Peru and Arica to Chile. The dividing line between the two portions, and consequently the frontier between the territories of Chile and Peru, shall start from a point on the coast to be named 'Concordia', ten kilometres to the north of the bridge over the river Lluta."[124]

2.10. Chile and Peru also agreed to establish a mixed commission (the ***1929-1930 Mixed Commission***), comprising delegates of each of the two States. The 1929-1930 Mixed Commission was charged with "determin[ing] and mark[ing]" the boundary line "by means of posts in the territory itself"[125]. Those tasks were necessary because Article 2 of the Treaty described the course of the land boundary in general terms which required specific implementation as well as physical marking on the ground. Any disagreement between the Chilean and Peruvian members of the 1929-1930 Mixed Commission was to be finally settled by the casting vote of a third member, to be appointed by the President of the United States of America[126]. In the event, no recourse to a third-member casting

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124 Treaty of Lima, **Annex 45 to the Memorial**, Art. 2.

125 *Ibid*., Art. 3.

126 *Ibid*.

vote was required: the land boundary was fully "determine[d] and mark[ed]" by the 1929-1930 Mixed Commission in bilateral formation.

2.11. The 1929-1930 Mixed Commission had to determine, among other issues relating to the determination and demarcation of the boundary, the precise course of the first segment of the boundary, which under the Treaty of Lima starts from a "point on the coast to be named 'Concordia', ten kilometres to the north of the bridge over the river Lluta"[127]. The matter was referred to the two Governments and was decided by agreement between them in April 1930. The Parties' agreement was recorded in identically-worded formal instructions sent by each Government to its delegate[128]. The instructions set forth directions as to the course of the first segment of the boundary, stated that a boundary marker (*hito*) would be the "Starting Point, on the coast [*en la costa*], of the borderline", and gave guidance as to the placement of that *hito* on the coast[129].

2.12. The 1929-1930 Mixed Commission, in bilateral formation, duly completed the functions that were given to it pursuant to Article 3 of the Treaty of Lima. It determined and marked the entire course of the land boundary. Specifically, in its Final Act of 21 July 1930 (the ***1930 Final Act***) the Mixed Commission recorded the coordinates and specifications of the 80 boundary markers (*hitos*) that were eventually placed on the ground. The 1930 Final Act

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127 Treaty of Lima, **Annex 45 to the Memorial**, Art. 2.

128 Two identical sets of instructions, approved by the Foreign Ministries of Chile and Peru, were separately sent to the Chilean Delegate and the Peruvian Delegate by their respective Governments on 28 April and 24 April 1930 respectively, **Annex 87 to the Memorial**.

129 *Ibid*. The instructions required the relevant boundary marker to be placed "as close to the sea as allows preventing it from being destroyed by ocean waters". It was to be called "Concordia Boundary Marker [*Hito Concordia*]" but, as we will see at para 2.15, it was actually named simply *Hito No. 1*, and the name *Hito Concordia* was given to a more prominently-located *hito* which was inscribed with dedications to the concord (*concordia*) between the two nations.

also records that the 1929-1930 Mixed Commission concluded its work "in accordance with the instructions received by both delegates"[130]. The 1930 Final Act thus completed the process required under Article 3 of the Treaty of Lima. (The 1930 Final Act also received the Parties' approbation in a joint Act concluded in accordance with Article 4 of the Treaty of Lima, as noted at paragraph 2.15.)

2.13. The land boundary as definitively demarcated is described in the 1930 Final Act as follows:

> "The demarcated boundary line starts from the Pacific Ocean at a point on the seashore [*un punto en la orilla del mar*] ten kilometres northwest from the first bridge over the River Lluta of the Arica-La Paz railway, and ends in the Andean mountain range at Boundary Marker V of the former dividing line between Chile and Bolivia."[131]

2.14. The 1929-1930 Mixed Commission also confirmed that boundary markers were "positioned or established" "[i]n order to definitely fix the said frontier line between Chile and Peru on the land"[132]. The description of the boundary markers is given in a list in the 1930 Final Act; Hito No. 1 is stated to be placed on the "seashore [*orilla del mar*]", with the astronomical coordinates 18° 21' 03" S and 70° 22' 56" W[133].

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130 1930 Final Act, **Annex 54 to the Memorial**, first paragraph.

131 *Ibid*., second paragraph.

132 *Ibid*., third paragraph.

133 *Ibid*.; see the description of the first *hito*. The astronomical latitude of Hito No. 1, 18° 21' 03" S, as determined by the 1929-1930 Mixed Commission, is equal to 18° 21' 00" S when referred to WGS84 Datum, 18° 20' 47" S when referred to the Provisional South American Datum 1956 (***PSAD56***), and 18° 20' 58" S when referred to the South American Datum 1969 (***SAD69***). (Longitude is not directly relevant for present purposes.)

2.15. Article 4 of the Treaty of Lima provided that the position and distinguishing characteristics of the boundary markers were to be set out in a "deed of transfer [*Acta de Entrega*]" signed by Plenipotentiaries of the Contracting Parties[134]. In fulfilment of this obligation, the Ambassador of Chile to Peru and the Minister of Foreign Affairs of Peru signed and sealed an *Acta* on 5 August 1930 (the ***Act of Plenipotentiaries***)[135]. In this agreement Chile and Peru recorded the "definitive location and characteristics" [*ubicación y características definitivas*] of each boundary marker (by reproducing the list of 80 *hitos* in the 1930 Final Act)[136] and acknowledged that those boundary markers demarcate the land boundary between them, "beginning in order from the Pacific Ocean"[137]. The Parties also agreed to give the name "Concordia" to the ninth *hito* from the coast, rather than to the first *hito*, as was earlier intended[138]. This was for reasons of symbolism. The ninth *hito* is a larger, more conspicuous boundary marker than Hito No. 1, and is inscribed with the word "Concordia". This "Hito

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134 Treaty of Lima, **Annex 45 to the Memorial**, Art. 4, second sentence.

135 **Annex 55 to the Memorial**.

136 The location and characteristics of the first and last boundary markers, as well as the ninth one from the coast, are described as follows:

Number	Class	Latitude and Longitude	Place of location
1	Concrete	18-21-03 70-22-56	Seashore [*Orilla del mar*]
⋮	⋮	⋮	⋮
9	Concordia	18-18-50.5 70-19-56.6	Pampa de Escritos 84m to the west of the Arica-Tacna railway
⋮	⋮	⋮	⋮
80	Iron	17-29-57.0 69-28-28.8	Final common point of the frontiers between Peru, Chile and Bolivia. Hito No. 5 of the old dividing line between [Chile and Bolivia]

137 Act of Plenipotentiaries, **Annex 55 to the Memorial**, introductory paragraph.

138 See footnote 129 above.

Concordia", symbolizing an era of concord between the two States, was placed at a prominent place next to the railway line connecting Peru with the port of Arica[139].

2.16. With the Treaty of Lima, the 1930 Final Act and the Act of Plenipotentiaries, all outstanding land-boundary matters were definitively closed. The land boundary has been fully determined and demarcated, and Hito No. 1 is the seaward terminus of the land boundary as determined by agreement of the Parties.

2.17. Consistent with the foregoing, Peru has in fact treated Hito No. 1 as the point under Article 2 of the Treaty of Lima, i.e. the starting point of the land boundary. For example, both the 1982 and 1988 editions of Peru's official *Sailing Directions* (*Derrotero de la Costa*) contain a section entitled "Hito Concordia (18° 20.8' S, 70° 22.5' W)"[140] and describe this point as the southern frontier of Peru[141]. The *Atlas of Peru* issued in 1989 by Peru's Ministry of Defence[142] also marks the boundary marker closest to the sea as "Hito Concordia". Moreover, Peru does not claim sovereignty over territory to the south of 18° 21' 03" S[143]. As recently as 2001, Peru enacted a statute setting out

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139 Therefore, Peru's notation "Point Concordia" to refer to a point on the coast in Figures 6.4 and 6.5 to the Memorial (p. 217 and p. 219 respectively) is without foundation.

140 See footnote 129 above: the two identical sets of instructions, approved by the Foreign Ministries of Chile and Peru, **Annex 87 to the Memorial**, intended to use the term "Hito Concordia" to refer to the "Starting Point, on the coast [*en la costa*], of the borderline". This term has been subsequently used by Peru when referring to Hito No. 1.

141 Directorate of Hydrography and Navigation of the Navy of Peru, *Derrotero de la Costa del Perú*, *Vol. II,* 1982, **Annex 172**, p. B-103; 2nd edition of the same work, *Vol. II*, 1988, **Annex 175**, p. 103.

142 Annexed to the Memorial as Figure 5.6 (Vol. IV, p. 43).

143 See, e.g., Geographic Advisor's Office of the National Institute of Planning in the Office of the President, *Atlas Histórico Geográfico y de Paisajes Peruanos*, 1963-

the boundaries of its southernmost province of Tacna and its districts. Hito No. 1 was identified as the southernmost tip of the perimeter of this province, being located by the "Pacific Ocean"[144]. Publicists share the same view: in 2001, two Peruvian professors of public international law published a treatise in which they acknowledged that the land boundary between Chile and Peru "ends at the seashore of the Pacific Ocean on boundary marker Concordia (18° 21' 03" S), which is the southernmost point of Peru"[145].

2.18. This is the context in which Peru stated, in 1996, that "[t]he binding legal regime is the one enshrined by the 1929 Treaty [of Lima] and its Supplementary Protocol" and that "[t]he legal nature of what is pending of execution [under the Treaty of Lima] does not involve boundary questions"[146]. When the pending matters were resolved and the Act of Execution was concluded in 1999 (as already described at paragraphs 1.41 and 1.55 above), the Foreign Minister of Peru stated that this agreement ended the "last consequences of the conflict between Peru and Chile"[147].

1970, **Annex 169**, p. 22 ("In the south, the southernmost point of Peru is found in the department of Tacna, on the frontier with Chile, to the south of the point called 'Pascana del Hueso', on the shore of the Pacific Ocean and it has the following coordinates: 18° 21' 03" Latitude South, 70° 22' 56" Longitude West."); Ministry of Energy and Mines of Peru, *Anuario Estadístico de Hidrocarburos – Hydrocarbons Statistical Yearbook 2000*, 2000, **Annex 190**, p. 13.

144 Law No. 27415 of 25 January 2001 on Territorial Demarcation of the Province of Tacna, **Annex 191**, Art. 3.

145 F. Novak and L. García-Corrochano, *Derecho Internacional Público*, *Tome II, Vol. I*, 2001, **Annex 296**, p. 185.

146 Aide-mémoire enclosed with Note No. 6-4/02 of 3 January 1996 from the Ministry of Foreign Affairs of Peru to the Chilean Embassy in Peru, **Annex 87**, para. 2.

147 Statement by the Minister of Foreign Affairs of Peru on 13 November 1999, **Annex 182**.

2.19. It is therefore clear that no issue relating to the land boundary has arisen since 1930; and that no issue can indeed reasonably arise given the comprehensive land-boundary determination and demarcation that was then effected.

2.20. In 2005, Peru passed a baselines law. The southernmost basepoint in Peru's new baseline system is Point 266, a point some 250 metres to the south-west of Hito No. 1, having coordinates 18° 21' 08" S and 70° 22' 39" W when referred to the WGS84 Datum[148]. To the extent that Point 266 unilaterally seeks to depart from the Parties' long-standing agreement that Hito No. 1 is the first demarcated point on the land boundary, Point 266 is simply incapable of producing any effect vis-à-vis Chile (i.e., it is not opposable to Chile). Chile has lodged protests with Peru to that effect[149]. To the extent that Point 266 seeks to put into question the existence and course of an agreed maritime boundary following the parallel of latitude corresponding to Hito No. 1, it is not opposable to Chile on that additional basis as well, for reasons set out in paragraphs 3.46-3.47 below.

Section 3. Concordant Unilateral Proclamations of 200M Zones (1947)

A. Background to the 1947 Proclamations

2.21. The Treaty of Lima was solely concerned with the land boundary between the Parties. It did not delimit their territorial seas or any other maritime zones. In 1947 Chile and Peru issued official proclamations, each State claiming

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148 See Law No. 28621 of 3 November 2005: Maritime Dominion Baselines Law, **Annex 23 to the Memorial**. In this Law this point is called Point 266 or Point Concordia.

149 See, e.g., Note No. 17359/05 of 3 November 2005 from the Minister of Foreign Affairs of Chile to the Peruvian Ambassador to Chile, **Annex 107**, fourth and fifth paragraphs.

a maritime zone of 200 nautical miles from its coast. The Parties claimed "national sovereignty", in Chile's case, and "national sovereignty and jurisdiction", in Peru's case, over the continental shelf and the waters adjacent to their respective coastlines, as well as control over all natural resources contained therein. The proclamations were made less than six weeks apart, with Chile taking the lead. They were formulated in substantially similar terms.

2.22. As will be explained in this Subsection, the two proclamations were issued largely in response to industrial-scale fishing and whaling by foreign fleets. The Parties considered such exploitation of the natural resources off their coasts to be unfair: the coastal States received no benefit, and neither State's own industries were at the time sufficiently developed to permit fishing and whaling on a similar scale.

2.23. Following the end of the Second World War, large-scale distant-seas fishing resumed. Large-scale fishing by foreign fleets was regarded in both Chile and Peru as a threat to the national interest, barring the development of national fishing and fisheries industries. Foreign fleets were engaged in industrial-scale fishing of tuna and Peruvian anchoveta (anchovy) and whale-hunting. In summary:

— In August 1945, the United States Government decided to rebuild the nation's fishing fleet. Part of this programme was to bring the tuna-clipper fleet up to pre-war levels. The newly built tuna clippers were to be able to operate on the high seas and remain at sea for as long as 90 days. The capacity of their holds was said to be "from 125 to 225 tons,

or more, and they were to carry sophisticated refrigeration equipment for freezing the catch"[150].

— The demand for anchovy had two main causes. First, the decline of sardine stocks off the California coast meant that an alternative source was necessary for the production of fishmeal and fish-oil. Second, the foreign fleets engaged in tuna fishing in the south-east Pacific used anchovy as bait.

— Foreign whaling fleets returned to the south-east Pacific after 1945. There was already concern at the time about potential over-hunting of whales, as is apparent from the establishment of the International Whaling Commission by the 1946 International Convention for the Regulation of Whaling.

2.24. The increase of fishing and whaling by foreign fleets in the south-east Pacific Ocean was a matter of grave concern to Chile and Peru, as it jeopardized their emerging fishing industries. President González Videla, who issued the 1947 Chilean Declaration, noted in 1975 that Chile was concerned because waters off its coast were "plagued with foreign fleets which threatened the extinction of some species."[151] Similarly, Dr. García Sayán, the Foreign Minister of Peru who signed the 1947 Peruvian Supreme Decree together with the then President Bustamante y Rivero, subsequently stated that his country had needed

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150 Press Release (for advance release) of 7 August 1945 issued by the United States Department of the Interior, Office of the Coordinator of Fisheries, **Annex 206**, p. 1.

151 G. González Videla, *Memorias*, *Vol. 2*, 1975, **Annex 268**, p. 836.

to find a way to exclude foreign fishing vessels from the waters off the Peruvian coast[152].

2.25. As part of the justification for Chile's Declaration on 23 June 1947, its recitals referred to the 1945 proclamations made by the United States of America with respect to coastal fisheries and the continental shelf[153], to Mexico's proclamation on the continental shelf later in 1945[154] and to the proclamation by Argentina in 1946 concerning the "epicontinental sea and the continental shelf"[155]. The United Nations Secretariat observed in 1950 that those earlier proclamations, in particular the United States proclamations by President Truman, claimed lesser rights than the assertions of sovereignty made by Chile and Peru in their 1947 proclamations[156]. The assertion of sovereignty by Chile and Peru went well beyond the management of fisheries.

2.26. When Peru came to issue its Supreme Decree on 1 August 1947, less than six weeks after Chile's Declaration, Peru similarly referred to those earlier

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152 See E. García Sayán, *Notas sobre la Soberanía Marítima del Perú – Defensa de las 200 millas de mar peruano ante las recientes transgresiones*, 1955, **Annex 266**, p. 3.

153 Proclamation No. 2667 of 28 September 1945, *Policy of the United States with respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf*, **Annex 88 to the Memorial**; Proclamation No. 2668 of 28 September 1945, *Policy of the United States with respect to Coastal Fisheries in Certain Areas of the High Seas*, **Annex 88 to the Memorial**.

154 Declaration of the President of Mexico on the Continental Shelf of 29 October 1945, **Annex 89 to the Memorial**.

155 Decree No. 14,708 of 9 October 1946, Declaration of the President of Argentina Proclaiming Sovereignty over the Epicontinental Sea and the Continental Shelf, **Annex 90 to the Memorial**.

156 See United Nations, *Memorandum on the Regime of the High Seas submitted by the Secretariat to the ILC* (2nd session of the ILC (1950)), document A/CN.4/32, **Annex 227**, p. 87, paras 144-145. Also see R. Young, "Recent Developments with Respect to the Continental Shelf", *American Journal of International Law*, *Vol. 42*, 1948, **Annex 316**, pp. 850, 853-854.

proclamations in the recitals. Peru also recorded in its Supreme Decree that it had taken into account the 1947 Chilean Declaration[157].

B. THE TERMS OF THE 1947 PROCLAMATIONS

2.27. Chile's 200M claim was set out in an Official Declaration by President González Videla on 23 June 1947[158]. The operative part of Chile's Official Declaration reads in full as follows:

> "1. The Government of Chile confirms and proclaims its national sovereignty over all the continental shelf adjacent to the continental and island coasts of its national territory, whatever may be their depth below the sea, and claims by consequence all the natural riches which exist on the said shelf, both in and under it, known or to be discovered.
>
> 2. The Government of Chile confirms and proclaims its national sovereignty over the seas adjacent to its coasts whatever may be their depths, and within those limits necessary in order to reserve, protect, preserve and exploit the natural resources of whatever nature found on, within and below the said seas, placing within the control of the government especially all fisheries and whaling activities with the object of preventing the exploitation of natural riches of this kind to the detriment of the inhabitants of Chile and to prevent the spoiling or destruction of the said riches to the detriment of the country and the American continent.
>
> 3. The demarcation of the protection zones for whaling and deep sea fishery in the continental and island seas under the control of the Government of Chile will be made in virtue of this declaration of sovereignty at any moment

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157 1947 Peruvian Supreme Decree, **Annex 6 to the Memorial**, fifth recital.

158 1947 Chilean Declaration, **Annex 27 to the Memorial**.

> which the Government may consider convenient, such demarcation to be ratified, amplified, or modified in any way to conform with the knowledge, discoveries, studies and interests of Chile as required in the future. *Protection and control is hereby declared immediately over all the seas contained within the perimeter formed by the coast and the mathematical parallel projected into the sea at a distance of 200 nautical miles from the coasts of Chilean territory*. This demarcation will be calculated to include the Chilean islands, indicating a maritime zone contiguous to the coasts of the said islands, projected parallel to these islands at a distance of 200 nautical miles around their coasts.
>
> 4. The present declaration of sovereignty does not disregard the similar legitimate rights of other States on a basis of reciprocity, nor does it affect the rights of free navigation on the high seas."
>
> (Emphasis added.)

2.28. Chile's declaration of a maritime zone of 200 nautical miles was quickly followed by Peru's similar claim. This was formulated in a Supreme Decree, No. 781 of 1947[159], which was jointly signed by President Bustamante y Rivero and Foreign Minister García Sayán. Its operative clauses read as follows:

> "1. To declare that national sovereignty and jurisdiction are extended to the submerged continental or insular shelf adjacent to the continental or insular shores of national territory, whatever the depth and extension of this shelf may be.
>
> 2. National sovereignty and jurisdiction are exercised as well over the sea adjoining the shores of national territory whatever its depth and in the extension necessary to

[159] 1947 Peruvian Supreme Decree, **Annex 6 to the Memorial**.

reserve, protect, maintain and utilize natural resources and wealth of any kind which may be found in or below those waters.

3. As a result of previous declarations the State reserves the right to establish the limits of the zones of control and protection of national resources in continental or insular seas which are controlled by the Peruvian Government and to modify such limits in accordance with supervening circumstances which may originate as a result of further discoveries, studies or national interests which may become apparent in the future and at the same time *declares that it will exercise the same control and protection on the seas adjacent to the Peruvian coast over the area covered between the coast and an imaginary parallel line to it at a distance of two hundred (200) nautical miles measured following the line of the geographical parallels*. As regards islands pertaining to the Nation, this demarcation will be traced to include the sea area adjacent to the shores of these islands to a distance of two hundred (200) nautical miles, measured from all points on the contour of these islands.

4. The present declaration does not affect the right to free navigation of ships of all nations according to international law."

(Emphasis added.)

2.29. The Chilean and Peruvian proclamations are substantially similar in form, content and effect. Both Chile and Peru proclaimed national sovereignty over, first, the continental shelf adjacent to their coasts, irrespective of depth, and, second, over the sea adjacent to their respective coasts. They proclaimed sovereignty over the water-column to the extent necessary to preserve and exploit all natural resources in or beneath the waters adjacent to their coasts.

Furthermore, both Chile and Peru claimed that they were entitled to extend the outer limit of their respective maritime zones in the light of, *inter alia*, scientific studies[160].

2.30. Each State's 200M zone was immediately established by its respective proclamation, without the need for any further formality or enacting legislation. The Chilean Declaration states that "[p]rotection and control is hereby declared immediately over all the seas contained within the perimeter formed by the coast and the mathematical parallel projected into the sea at a distance of 200 nautical miles from the coasts of Chilean territory"[161]. The Peruvian Supreme Decree provides that Peru "will exercise. . .control and protection on the seas adjacent to the Peruvian coast over the area covered between the coast and an imaginary parallel line to it at a distance of two hundred (200) nautical miles"[162].

2.31. Both texts addressed the issue of the perimeter of the maritime zone in which sovereignty and jurisdiction were claimed. The 1947 Chilean Declaration provided that Chile's maritime zone was–

> "within the perimeter formed by the coast and the mathematical parallel projected into the sea at a distance of 200 nautical miles from the coasts of Chilean territory."[163]

A "mathematical parallel" is a technical concept which in effect leads to a form of *tracé parallèle* of the coastline (cf. paragraph 2.33, below).

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160 1947 Chilean Declaration, **Annex 27 to the Memorial**, Art. 3; 1947 Peruvian Supreme Decree, **Annex 6 to the Memorial**, Art. 3.

161 1947 Chilean Declaration, **Annex 27 to the Memorial**, Art. 3.

162 1947 Peruvian Supreme Decree, **Annex 6 to the Memorial**, Art. 3.

163 1947 Chilean Declaration, **Annex 27 to the Memorial**, Art. 3.

2.32. The Peruvian Supreme Decree of 1947 states in its recitals that "it is the obligation of the State to determine in an irrefutable manner the maritime dominion of the Nation, within which should be exerted the protection, conservation and vigilance of the aforesaid resources"[164]. Peru's decree did so by establishing the perimeter of Peru's maritime claim. Peru declared that it exercised control and protection–

> "on the seas adjacent to the Peruvian coast over the area covered between the coast and an imaginary parallel line to it at a distance of two hundred (200) nautical miles *measured following the line of the geographical parallels*."[165] (Emphasis added.)

2.33. The "imaginary parallel line" forming the seaward limit of Peru's maritime claim was to be formed by taking each point of the Peruvian coastline and moving it due west, along the corresponding parallel of latitude, for 200 nautical miles to a point in the Pacific Ocean. The aggregate of those points in the Pacific Ocean formed that "imaginary parallel line". To use the terms employed by the Court, Peru's outward limit was a form of *tracé parallèle*, a method "which consists of drawing the outer limit of the belt of territorial waters by following the coast in all its sinuosities"[166]. Peru confirms that this is how it measured the claim which it formulated in 1947:

> "The intention [of the Peruvian Supreme Decree] was to depict a situation in which at each point on the coast a line 200-mile[s] long would be drawn seaward along the geographical line of latitude, so that there would be a 'mirror' coastline parallel to the real coastline – the real

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164 1947 Peruvian Supreme Decree, **Annex 6 to the Memorial**, final recital.

165 *Ibid*., Art. 3.

166 *Fisheries Case* (*United Kingdom v. Norway*), *Judgment, I.C.J. Reports 1951*, p. 128.

> coastline would in effect be transposed 200 miles offshore and form the outer edge of the 200-mile zone."[167]

2.34. The method employed by Peru to measure the outward limit of its maritime zone also determined the northern and southern lateral limits of its zone. The northernmost point of Peru's coastline was the point where its land boundary with Ecuador reached the sea. That point had already been established by agreement[168]. The line of geographic parallel passing through that point formed the northern limit of Peru's maritime zone. The southernmost point of Peru's coastline was the point where its land boundary with Chile reached the sea. That point had also been established by agreement between Chile and Peru[169]. The line of geographic parallel passing through that point formed the southern limit of Peru's maritime zone. **Figure 3** illustrates this schematically.

2.35. **Figure 3** is consistent with the way in which Peruvian Foreign Minister García Sayán understood the perimeter of Peru's claim. His contemporaneous depiction of Peru's maritime zone (**Figure 4**) shows the zone bounded in the north and south by the two parallels of latitude passing through the seaward termini of Peru's land boundaries with Chile and Ecuador[170].

2.36. This understanding was shared by Dr. Vergaray Lara, President of the National Association of Geographers of Peru between 1962 and 1964. In 1962 he published a study entitled *El Mar del Perú es una Región Geográfica*, which was stated to have been presented at institutions and seminars on geography and law

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167 Memorial, para. 4.58.

168 See Protocol of Peace, Friendship and Boundaries, signed at Rio de Janeiro on 29 January 1942, **Annex 3**, Art. VIII.

169 See Chapter II, Section 2, above.

170 See E. García Sayán, *Notas sobre la Soberanía Marítima del Perú - Defensa de las 200 millas de mar peruano ante las recientes transgresiones*, 1955, **Annex 266**.

between 1949 and 1962[171]. Chapter V of this study contained a diagram called *Superficie de Mar Peruano* (**Figure 5**)[172], showing the Peruvian maritime zone bounded by two parallels of latitude (3° 23' 33" S and 18° 21' 03" S).

2.37. Dr. Vergaray Lara's book contains a section on the general characteristics of the Peruvian sea, where it is said that the southern limit of Peru's sea (the parallel of latitude 18° 21' 03" S) is derived from the Peruvian Supreme Decree of 1947[173]. The 18° 21' 03" S parallel was stated to be that of the land-boundary *hito* at *orilla del Mar*[174], i.e., Hito No. 1.

2.38. As noted above[175], both the Chilean and Peruvian proclamations allowed for seaward extension beyond 200M. Any such further seaward extension of Peru's maritime zone was also to be measured using parallels of latitude. President Bustamante y Rivero explained in a 1972 book that:

> "The text in Article 3 [of Peru's 1947 Supreme Decree] mentions the prerogative reserved to the State to establish the 'necessary extension' at different times or on the basis

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171 See E. Vergaray Lara, "El Mar del Perú es una Región Geográfica", in Asociación Nacional de Geógrafos Peruanos, *Anales, Vol. III*, 1962, **Annex 314**. The introduction to this study states that it was submitted to a geography workshop organized by the Geographic Society of Lima in 1949, the Institute of Geography of the *Universidad Nacional Mayor de San Marcos*, the Seminar on the Law of the Sea organized by the Law Faculty of the same University, and to the First National Congress of Geography in 1962.

172 *Ibid*., p. 32.

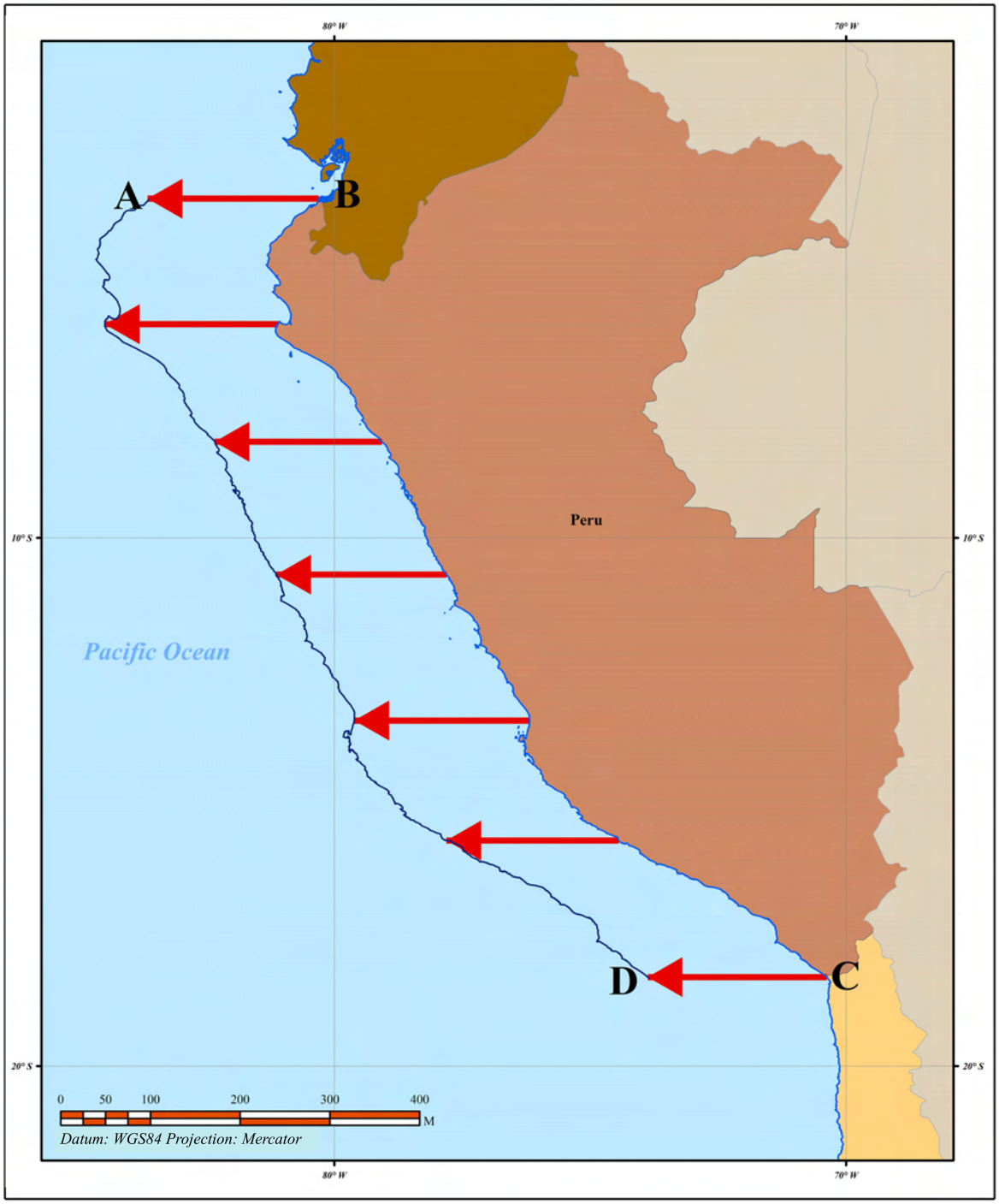
173 *Ibid*., pp. 29-30.

174 *Ibid*., p. 29 ("[Peru's marine region is] located between the following coordinates: L. S. 3° 23' 33" at the level of the Point of Boca de Capones. L. S. 18° 21' 03" at the level of the Pascana del Hueso boundary marker, seashore [*Orilla del Mar*]. . ."). "Pascana del Hueso" is a term used in Peruvian official documents to refer to Hito No. 1; see, e.g., footnote 143 above and National Institute of Statistics and Information of Peru, *Environmental Statistics 2000* (*Estadísticas del Medio Ambiente 2000*), **Annex 186**.

175 See para. 2.29.

Figure 3

Schematic illustration of the perimeter of Peru's maritime zone in accordance with the 1947 Supreme Decree

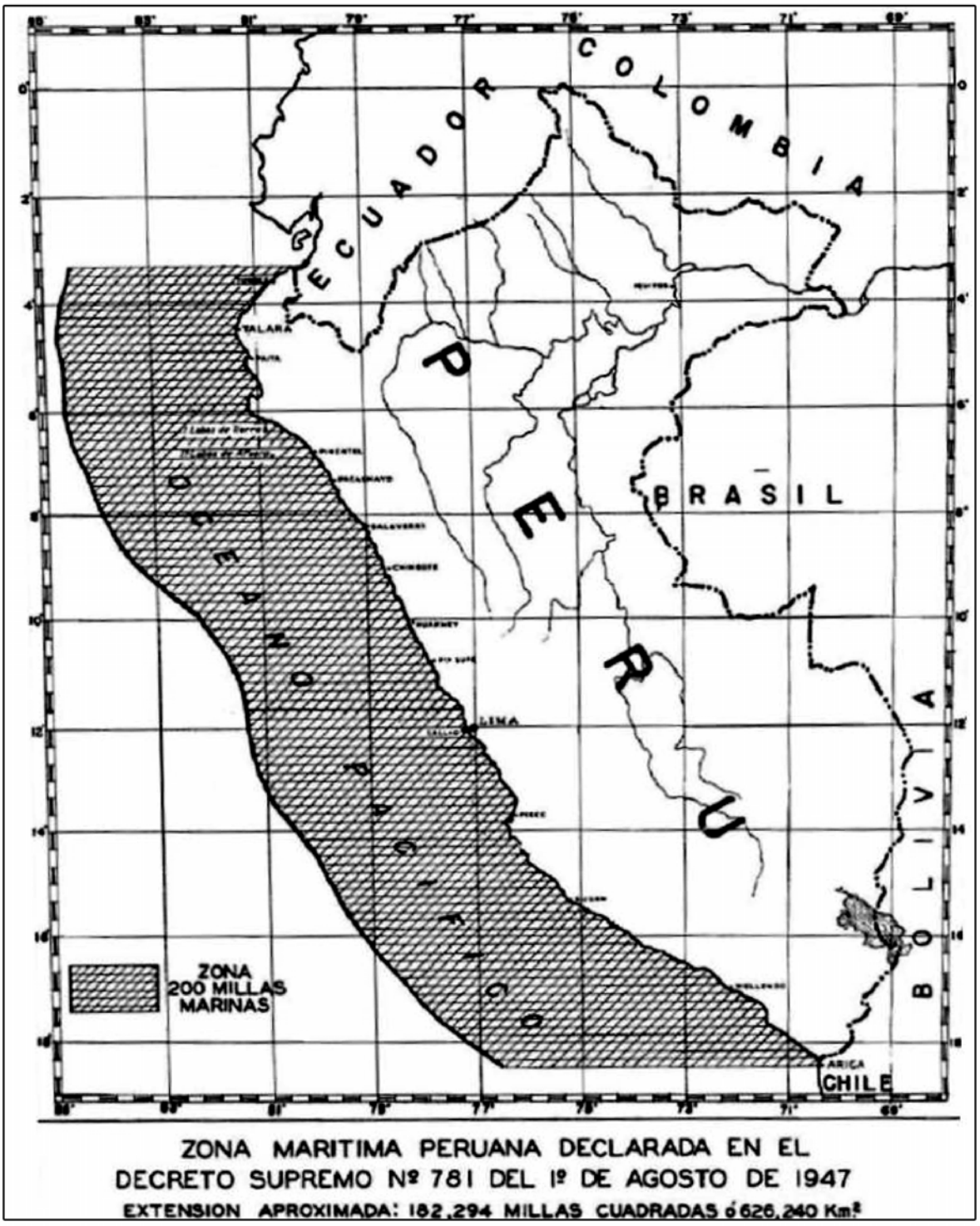


- The red arrows represent the seaward extension of Peru's maritime zone, measured following parallels of latitude. Each arrow is 200M long.
- Line A-D represents the seaward limit constituted by a *tracé parallèle.*
- Line B-C is the entire extent of Peru's coastline. Point B is the northernmost point of Peru's coastline, and Point C is the southernmost point of Peru's coastline.
- Joining points A, B, C and D provides the perimeter of Peru's maritime zone in the 1947 Supreme Decree.

Prepared by the Ministry of Foreign Affairs of Chile

Figure 4

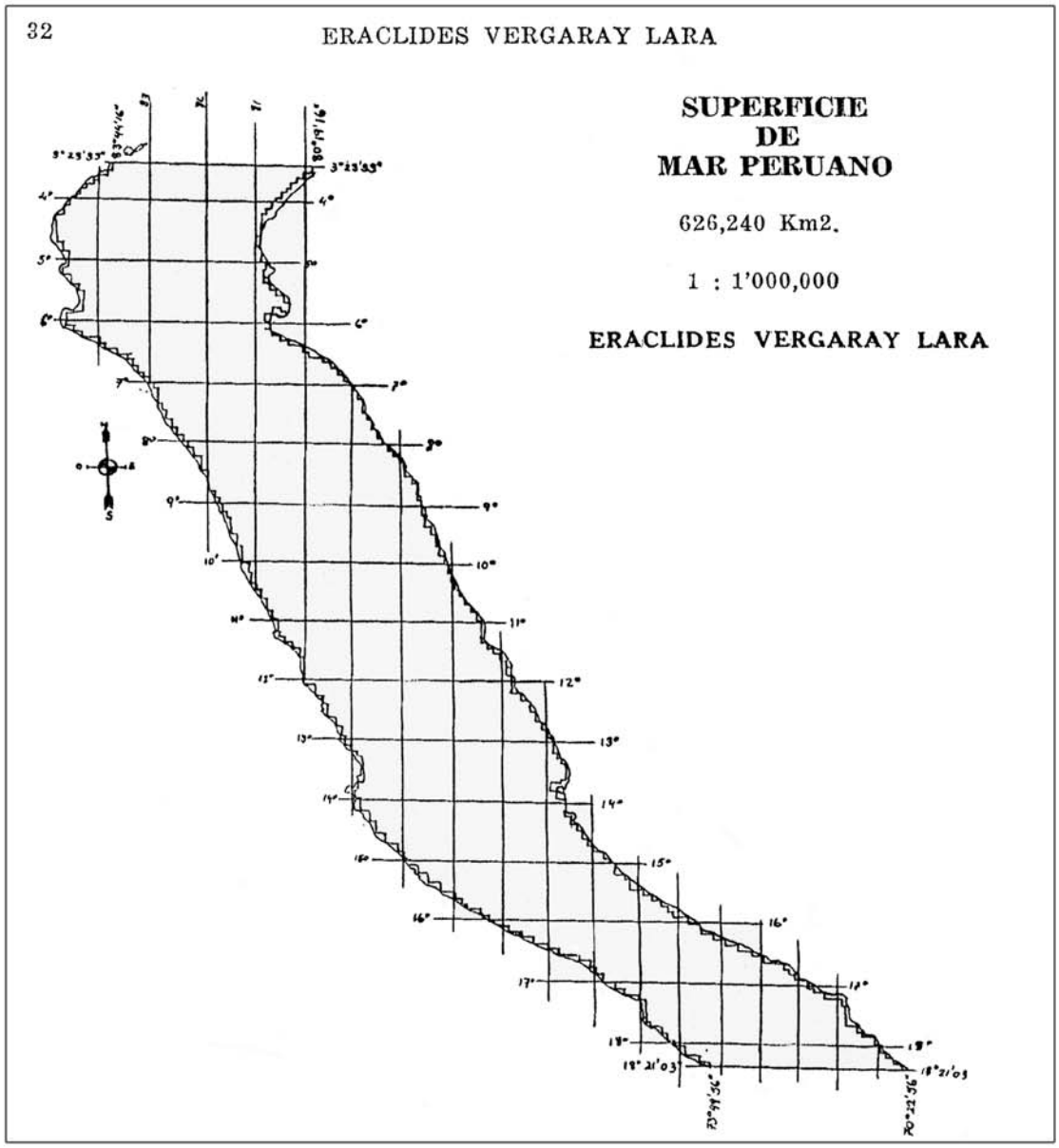
Sketch-map of Peru's maritime zone by Minister García Sayán (1955)



Source: E. García Sayán, *Notas sobre la Soberanía Marítima del Perú — Defensa de las 200 millas de mar peruano ante las recientes transgresiones*, 1955

Figure 5

Sketch-map of Peru's maritime zone by Dr. Vergaray Lara (1962)



Source: E. Vergaray Lara, "El Mar del Perú es una Región Geográfica", Asociación Nacional de Geógrafos Peruanos, *Anales, Vol. III*, 1962

> of future supervening circumstances; and therefore it demarcates and fixes [that necessary extension] within a zone which, starting from the coast, ends at an imaginary line parallel to it and traced over the sea at a distance of 200 nautical miles following the line of the geographic parallels."[176]

2.39. In short, Peru's maritime zone was conceived in 1947 as a corridor bounded by two parallels of latitude, extending seaward due west for a minimum distance of 200 nautical miles.

2.40. As recently as 2002, a Peruvian official document stated that the maritime zone of Peru was based on the Supreme Decree of 1947[177], without any suggestion that the lateral limits under that Supreme Decree were uncertain or no longer applicable.

2.41. Chile and Peru exchanged formal notifications of their 1947 proclamations. Chile's Ambassador notified Peru's Foreign Minister, Dr. García Sayán, of Chile's 1947 Declaration in July 1947[178]. Peru acknowledged this note without protest[179]. In due course Peru's Ambassador notified Chile's Foreign

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176 J. L. Bustamante y Rivero, *Derecho del Mar – La Doctrina Peruana de las 200 Millas*, 1972, **Annex 255**, p. 24.

177 See Ministry of Agriculture of Peru, *Peru: Estadística Agraria* [*Agricultural Statistics*] *2000*, 2002, **Annex 194**, p. 8. In this publication the Ministry of Agriculture was specifying the "territory", including maritime territory, to which its statistics related. In particular the size of the maritime territory corresponding to each internal Peruvian administrative district was specified, and the fact that the Supreme Decree of 1947 established the total size of Peru's maritime area was noted.

178 See Note No. 621/64 of 24 July 1947 from the Chilean Ambassador to Peru to the Minister of Foreign Affairs of Peru, **Annex 52**.

179 See Note No. (D)-6-4/46 of 17 November 1947 from the Minister of Foreign Affairs of Peru to the Chilean Ambassador to Peru, **Annex 54**.

Minister of Peru's 1947 Supreme Decree[180]. Chile acknowledged this notification, again without protest[181]. In this way the Parties accepted the validity, *inter se*, of each other's claim of sovereignty to a seaward distance of 200 nautical miles, including with respect to the perimeter of each claim.

2.42. The lateral limits established by Peru's 1947 Supreme Decree caused no controversy with Chile. Accordingly, the unilateral claims formulated by each of the Parties in 1947 were concordant. As described in Section 4, below, these claims were confirmed in 1952 by way of a multilateral international agreement, the Santiago Declaration. The northern and southern lateral limits of Peru's maritime zone had already been in place for five years when, in 1952, Chile, Peru and Ecuador agreed that the same lines were international maritime boundaries between them.

2.43. Before coming to the Santiago Declaration, it is useful by way of further background to outline instances of utilization of geographic parallels (as well as meridians) to bound maritime zones in the region. That practice provides relevant context for both the 1947 proclamations and the 1952 Santiago Declaration which followed the proclamations.

C. Prior Instances of Use of Parallels of Latitude in the Practice of American States

2.44. Prior to the Santiago Declaration of 1952, Ecuador had not unilaterally claimed a 200M zone of the kind claimed by Chile and Peru since 1947. Until 1952, Ecuador then claimed a territorial sea of 12M, as well as jurisdiction over

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180 See Note No. 5-4-M/45 of 8 October 1947 from the Peruvian Ambassador to Chile to the Minister of Foreign Affairs of Chile, **Annex 53**.

181 See Note No. 015799 of 3 December 1947 from the Vice-Minister of Foreign Affairs of Chile (signing for the Foreign Minister) to the Peruvian Ambassador to Chile, **Annex 55**.

the continental shelf and its superjacent waters, including in respect of the fisheries contained in those waters, to the limit where the continental shelf reached a depth of 200 metres[182]. From 1939 Ecuador also claimed a maritime zone of security that extended seaward to approximately 250M[183]. This zone of security implemented the Declaration of Panama of 1939, which established a neutral maritime zone around North and South America, with the exception of Canada. Chile, Ecuador and Peru were all signatories to the Declaration of Panama.

2.45. The Declaration of Panama used a parallel of latitude beginning at the seaward terminus of the Canada-United States of America land boundary on the east coast of North America as the starting line of the zone of neutrality. The zone then proceeded south in the Atlantic, using two meridians of longitude and two other lines joining specified coordinates, to a point south-east of Cape Horn. At that point it followed a parallel of latitude westwards until a point south-west of Cape Horn, whence it continued north to the Pacific, to surround the American continents in a clockwise direction, using a series of specified points connected by lines. The neutrality zone ended at the parallel of latitude of "the Pacific terminus of the United States-Canada boundary"[184].

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182 See Legislative Decree of the Congress of the Republic of Ecuador Relating to Territorial Waters of 6 November 1950, executed by the President on 21 February 1951, **Annex 207**, Arts 1 and 2 (jurisdiction over the continental shelf and its superjacent waters) and Art. 3 (territorial sea).

183 See Presidential Decree No. 53 Establishing the Limits of the Maritime Zone of Security of 7 October 1939, **Annex 205**.

184 Declaration of Panama, contained in the Final Act of the Consultative Meeting of Foreign Ministers of the American Republics, signed at Panama City on 3 October 1939, Part XIV, **Annex 2**, Art. 1.

2.46. The neutrality zone is depicted in **Figure 6**. The point to note is that the zone begins and ends with parallels of latitude determined by the seaward termini of the land boundary between the United States of America and Canada.

2.47. Ecuador used the same method of lateral delimitation in implementing the Declaration of Panama. Article 1 of Ecuador's Presidential Decree No. 53 of 1939 stated:

> "The following is considered as a maritime zone of security adjacent to Ecuadorean territory: the zone included between two imaginary lines drawn from the north and south extremities of the Ecuadorean coast to the degrees of longitude west of Greenwich which correspond respectively to Article 1 of the Declaration of Panama. . ."[185]

2.48. These "imaginary lines" (a terminology later adopted in the Peruvian Supreme Decree of 1947[186]) were the parallels of latitude joining the seaward termini of Ecuador's land boundaries to the seaward limit of the zone of neutrality established by the Declaration of Panama. An Ecuadorean diplomat, Dr. Lara Brozzesi, has observed that this utilization of parallels of latitude passing through the seaward termini of the land boundaries was an antecedent to the lateral delimitation effected in the Santiago Declaration of 1952[187].

2.49. There was a much earlier occasion on which Ecuador had utilized the parallel of latitude passing through the seaward terminus of a land boundary as a maritime limit. In 1836 an Ecuadorean Presidential Decree adopted measures for

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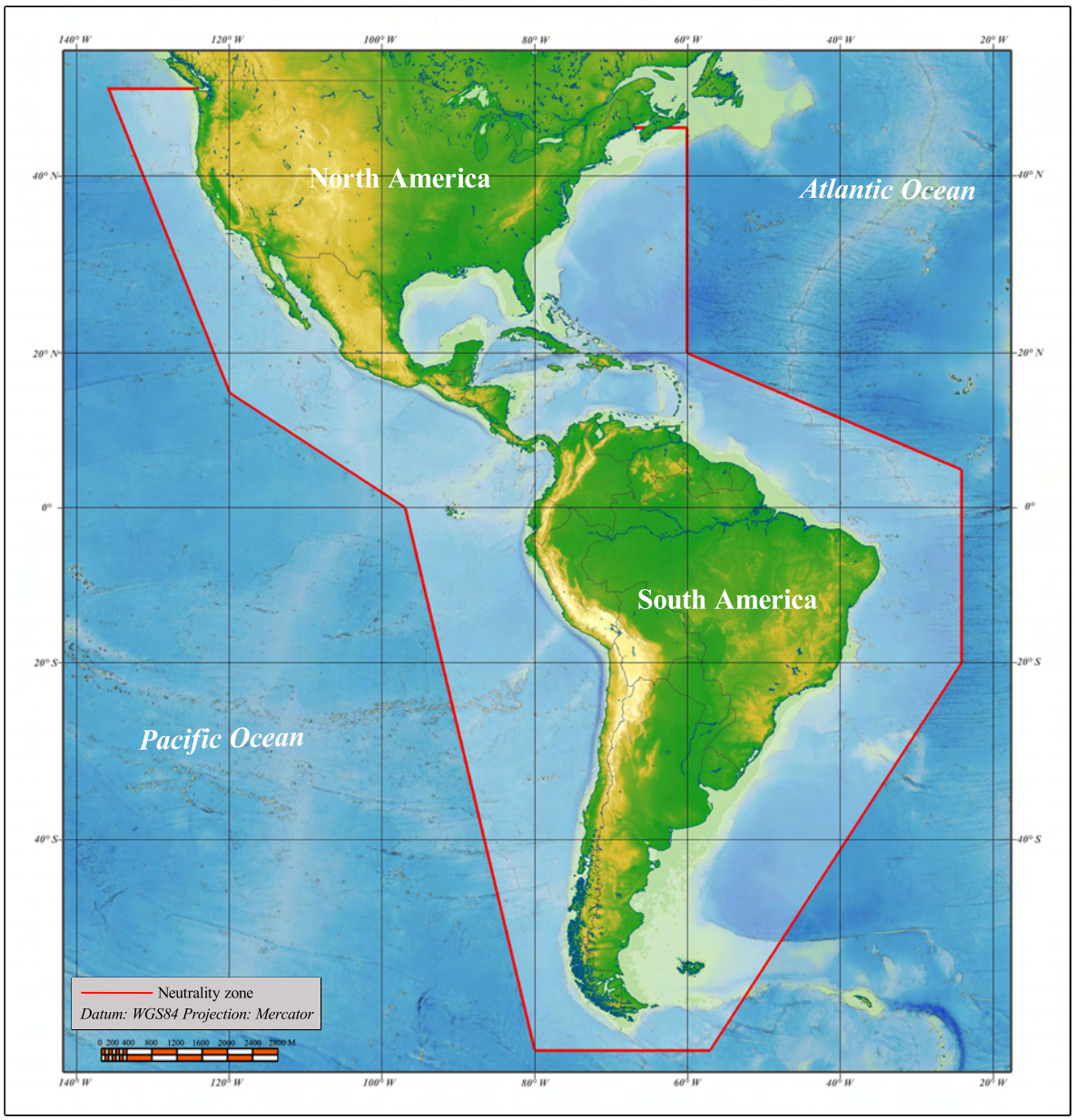
185 Presidential Decree No. 53 of 7 October 1939 establishing the Limits of the Maritime Zone of Security, **Annex 205**, Art. 1.

186 See 1947 Peruvian Supreme Decree, **Annex 6 to the Memorial**, Art. 3.

187 See C. Lara Brozzesi, *La Delimitación Marítima entre el Ecuador y el Perú: Nuevas Aclaraciones*, 2005, **Annex 287**, pp. 52-54. Cf. Memorial, para. 4.66.

Figure 6

Neutrality zone under the Declaration of Panama, 3 October 1939



Prepared by the Ministry of Foreign Affairs of Chile

preventing smuggling by sea. It provided that vessels sailing from Peru, in the south, to Colombia, in the north, "shall pass three miles to the west of Cabo San Francisco and must maintain that trajectory until they have reached the neighbouring State parallel"[188], namely the parallel passing through the seaward terminus of the Ecuador-Colombia land boundary.

Section 4. The Santiago Declaration (1952)

A. INTRODUCTION

2.50. This Section begins by explaining the motivation for the Santiago Declaration and describing a number of formal matters concerning that Declaration and the conference at which it was agreed and adopted (the ***1952 Conference***). The Section then turns to the terms and effect of the Santiago Declaration regarding three issues:

(a) the nature of the maritime zone to which each State was entitled under the Santiago Declaration;

(b) the lateral delimitation effected between each of those zones; and

(c) the seaward extension of those zones.

B. MOTIVATION FOR THE SANTIAGO DECLARATION

2.51. In practice, foreign industrial-scale fishing vessels, including whalers, continued to operate within 200 nautical miles of the coasts of Chile and Peru even after the 1947 proclamations. The proclamations were formally protested by (notably) the United Kingdom and the United States of America, which

[188] Decree of 15 April 1836, **Annex 204**, Art. 10.

refused to recognize any claim to sovereignty by Chile or Peru beyond three nautical miles from their coasts[189].

2.52. In 1952, Chile and Peru decided to act in concert in defence of their 200M claims, and invited Ecuador to join them. To use Peru's description, in the Santiago Declaration the three States "intended to assert regional solidarity in respect of the new maritime zones in the face of threats from third States. This solidarity was necessary because of the hostility of certain States to the 1947 claims."[190]

2.53. It was the Government of Chile that convened the 1952 Conference. On the subject-matter of the proposed 1952 Conference, Chile's formal invitation to Ecuador to participate in this conference stated that the "determination of the Territorial Sea is set as one of the objectives of the meeting."[191] In this invitation, the first item on the agenda was as follows:

> "1. – Territorial Sea. The legalization of the declarations of the Presidents of Chile and Peru with respect to sovereignty over 200 miles of the continental waters".[192]

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189 See Note No. 11 (152/8/48) of 6 February 1948 from the British Ambassador to Peru to the Minister of Foreign Affairs of Peru, **Annex 61 to the Memorial**, p. 2; Note No. 1030 of 2 July 1948 from the chargé d'affaires of the United States in Peru to the Minister of Foreign Affairs of Peru, **Annex 62 to the Memorial**, p. 2; Protest by the United Kingdom Government of 6 February 1948 to the Ministry of Foreign Affairs of Chile, **Annex 56**; Note of 2 July 1948 from the United States Ambassador to Chile to the Minister of Foreign Affairs of Chile, **Annex 57**. Protests are also recounted in Peru's Memorial, para. 4.67.

190 See Memorial, para. 4.67.

191 Note No. 468/51 of 7 July 1952 from the Chilean Ambassador to Ecuador to the Minister of Foreign Affairs of Ecuador, **Annex 59**, para. 3.

192 *Ibid*., para. 4. The original Spanish text states:

2.54. Peru now suggests that the 1952 Conference focused on whaling along the coast of the three participating States, and was therefore directed towards the collective policing of one shared zone[193]. This suggestion is not borne out by the contemporaneous materials. When Chile, Peru and Ecuador agreed to gather in Santiago in 1952, their intention was to act on a regional level in furtherance of the "legalization [*legalización*]" of the 200M claims of 1947 to "national sovereignty", in Chile's case, and "national sovereignty and jurisdiction", in Peru's case[194]. These claims concerned separate national zones of each Party, which had been challenged by other States as being contrary to international law and were not being respected by foreign whaling and fishing fleets. To defend these claims by elevating them to the level of a multilateral agreement, representatives of Chile and Peru, joined by representatives of Ecuador, met in Santiago, commencing on 11 August 1952.

C. THE 1952 SANTIAGO CONFERENCE

2.55. At the 1952 Santiago Conference, Chile, Ecuador and Peru concluded the Santiago Declaration ("Declaration on the Maritime Zone") along with three other agreements, namely:

> "1°. – Mar Territorial. Legalización de las declaraciones de los Presidentes de Chile y Perú, en cuanto a la soberanía sobre 200 millas de aguas continentales".

193 Memorial, paras 4.63-4.64.

194 See J. L. Bustamante y Rivero, *Derecho del Mar, La Doctrina Peruana de las 200 millas*, 1972, **Annex 255**, pp. 27-28.

(a) the Agreement Relating to the Organization of the Permanent Commission of the Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific[195];

(b) the Joint Declaration concerning Fishing Problems in the South Pacific[196]; and

(c) the Regulations for Maritime Hunting Operations in the Waters of the South Pacific[197].

The four agreements were all signed at Santiago on 18 August 1952. As recorded in the United Nations *Treaty Series*, all four of them entered into force upon signature.

2.56. The existence of the other three specific agreements, listed above, meant that the Santiago Declaration was not encumbered with the details of the overall conservation scheme for marine resources, which was the object of these three other agreements. The Santiago Declaration was the foundational instrument dealing with the issues of principle, namely general claims of sovereignty and jurisdiction and the geographic perimeters within which those claims were made. Stated otherwise, the general claim of sovereignty and jurisdiction by each State in terms of the Santiago Declaration was the predicate

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195 Agreement Relating to the Organization of the Permanent Commission of the Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific, Santiago, signed and entered into force on 18 August 1952, 1006 *UNTS* 331, **Annex 48 to the Memorial**.

196 Joint Declaration concerning Fishing Problems in the South Pacific, Santiago, signed and entered into force on 18 August 1952, 1006 *UNTS* 317.

197 Regulations for Maritime Hunting Operations in the Waters of the South Pacific, Santiago, signed and entered into force on 18 August 1952, 1006 *UNTS* 305, **Annex 49 to the Memorial**.

upon which the three States entered into further agreements concerning the regulation of natural resources in each of their respective maritime zones.

2.57. To administer the four agreements reached in Santiago in August 1952, Chile, Ecuador and Peru created the Permanent Commission of the South Pacific (the ***CPPS***). This was to be a regional international organization with executive functions, established "to achieve the goals set forth" in the Santiago Declaration[198]. It was mandated to perform co-ordination and research functions and to establish Technical Offices in each of the three Member States. The Technical Offices were tasked with gathering information. In the Cali Declaration of 1981 the Member States declared that the CPPS remained "the appropriate regional organization for the defence of their maritime interests"[199].

D. ENTRY INTO FORCE OF THE SANTIAGO DECLARATION

2.58. The United Nations *Treaty Series* records that, as a matter of international law, the Santiago Declaration entered into force upon signature on 18 August 1952[200]. As a matter of Chilean law it was "approved" by the Chilean Congress and then "accept[ed] and ratif[ied]" by the President of Chile through Supreme Decree No. 432 of 23 September 1954[201]. Ecuador's Congress

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198 Agreement Relating to the Organization of the Permanent Commission of the Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific, Santiago, signed and entered into force on 18 August 1952, 1006 *UNTS* 331, **Annex 48 to the Memorial**, Art. 1.

199 Cali Declaration of 24 January 1981, attached to the note verbale of 9 March 1981 from the Heads of Delegation of Chile, Colombia, Ecuador and Peru to the President of the Third United Nations Conference on the Law of the Sea, translated by the United Nations, document A/CONF.62/108, **Annex 49**, p. 94, ninth paragraph.

200 Santiago Declaration, **Annex 47 to the Memorial**, footnote 1 added by the United Nations (Volume II of the Memorial, p. 261).

201 Supreme Decree No. 432 of 23 September 1954, **Annex 30 to the Memorial** and Note No. 2890 of 25 March 1955 from the Minister of Foreign Affairs of Chile to the Director of the Official Gazette of Chile, **Annex 115**.

"approved" it on 6 November 1954[202], and on 7 February 1955 the President of Ecuador "decree[d]" that it was "ratified" in Decree No. 275[203]. The President of Peru, with the approval of the Peruvian Council of Ministers, resolved "to approve" the Santiago Declaration in a Supreme Resolution of 11 April 1953, as an executive agreement[204]. Two years later, the Peruvian Congress "resolved to approve" the Santiago Declaration (together with the Lima Agreement of 1954) by Legislative Resolution No. 12305 of 6 May 1955 and the Peruvian President "enacted" that resolution of Congress on 10 May 1955[205].

2.59. The Peruvian Congress was under no misapprehension about the boundary-delimitation aspect of the Santiago Declaration. In the Congressional debate in May 1955, Congressman Dr. Peña Prado had this to say about the conferences which resulted in the Santiago Declaration and the Lima Agreement:

> "The purposes of these conferences. . .are the declaration of the maritime zone, the Agreements signed for establishing the control and surveillance of our seas, *for establishing the maritime boundaries between the signatory countries*, for determining the sanctions, the permits and the meeting of the Permanent Commission that must take place every year."[206] (Emphasis added.)

2.60. In its Memorial Peru states that when "reference was made to the [Santiago] Declaration in the Congresses of Peru and Chile in the 1950s there

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202 Recorded in Decree No. 275 of 7 February 1955, **Annex 208**.

203 *Ibid*.

204 Supreme Resolution of 11 April 1953, **Annex 161**.

205 Legislative Resolution No. 12305 of 6 May 1955, enacted by the Peruvian President on 10 May 1955, **Annex 10 to the Memorial**.

206 J. M. Peña Prado, Address to the Congress of Peru, reproduced in *La Crónica*, Lima, 7 May 1955, **Annex 246**.

was no mention of it being a boundary agreement"[207]. That statement does not take into account Dr. Peña Prado's statement in the Peruvian Congress that the purposes of the 1952 and 1954 Conferences included "establishing the maritime boundaries between the signatory countries".

2.61. The approval processes recounted above operated on the internal-law plane only. No act of ratification was necessary as a matter of international law. Chile, Ecuador and Peru jointly provided the Santiago Declaration to the United Nations for registration in 1973[208]. Registration occurred on 12 May 1976[209]. As noted, following that joint registration, the United Nations *Treaty Series* records that the Santiago Declaration entered into force upon signature[210].

E. THE SANTIAGO DECLARATION HAS ALWAYS BEEN A TREATY

2.62. Peru asserts in its Memorial that the Santiago Declaration was conceived "not as a treaty but as a proclamation of the international maritime policy of the three States"[211]. The Santiago Declaration had, Peru says, only a "'declarative' character"[212] and was "initially conceived as a soft law instrument"[213]. Peru acknowledges that the Santiago Declaration is now to be

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207 Memorial, para. 4.81.

208 See Letter of 3 December 1973 from the Permanent Representatives of Peru and Chile and the Ecuadorean chargé d'affaires to the United Nations to the Secretary-General of the United Nations, **Annex 83**.

209 See the cover page of the *UNTS* publication of the Santiago Declaration, **Annex 47 to the Memorial**.

210 *Ibid*., p. 261, footnote 1.

211 Memorial, para. 4.70.

212 *Ibid*.

213 *Ibid*., para. 4.81.

regarded as a treaty, but says that it only "acquired the status of a treaty", "[o]n ratification by Congress"[214].

2.63. It is a novel proposition that an international instrument not agreed as a treaty was elevated to treaty status by subsequent unilateral acts under municipal law. Peru accepts that the Santiago Declaration has been a treaty since the mid-1950s, so in a sense Peru's reliance on this novel proposition is immaterial. Nonetheless, Peru makes this suggestion to help its main argument that the Santiago Declaration was not an instrument in which maritime delimitation could have been effected, so the following must be said. The Santiago Declaration has been a treaty from its inception. The States parties memorialized an international agreement setting forth rights and obligations governed by international law. The three States did so when their delegates signed the Santiago Declaration on 18 August 1952, not because of any subsequent unilateral act of a constituent organ of any of these States. That is in fact what the United Nations *Treaty Series* records, following registration by the three States parties jointly.

2.64. Chile understands Peru's assertion that the Santiago Declaration was a proclamation of policy having only a "soft law" character[215] to be an assertion that the Santiago Declaration was not intended to be legally binding. This assertion is contradicted by the way in which Peru's delegate, former Foreign Minister Dr. Enrique García Sayán, represented the legal nature of the Santiago Declaration at the First United Nations Conference on the Law of the Sea in 1958. He said: "The instruments of *positive law* which stated Peru's position

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214 Memorial, para. 4.70.

215 *Ibid*., para. 4.81.

were the decree of 1 August 1947 and the pact with Chile and Ecuador, referred to as the Santiago Declaration, signed in 1952" (emphasis added)[216].

2.65. The fact that the Santiago Declaration is called a "declaration" does not diminish its status as a treaty. The instrument declared on the international stage, on a multilateral basis, claims that both Chile and Peru had already made by internal-law instruments. Ecuador joined with them. That is the sense in which the 1952 text was a declaration, and it is immaterial to the legally binding character of the instrument. As the Permanent Court said: "From the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, *declarations*, agreements, protocols, or exchanges of notes" (emphasis added)[217].

2.66. Examples of treaty instruments titled "declaration" abound. In the *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria* the Court found that the Maroua Declaration of 1975[218] constituted a treaty establishing a maritime boundary[219]. There are other examples[220]. The broader legal point here is that designation does not determine whether an

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216 United Nations, Summary Record of the 9th Meeting of the Second Committee of the United Nations Conference on the Law of the Sea, 13 March 1958, 3.15 p.m., document A/CONF.13/40, **Annex 101 to the Memorial**, p. 17, para. 33.

217 *Customs Regime between Germany and Austria, Advisory Opinion, 1931, P.C.I.J., Series A/B*, *No. 41*, p. 47.

218 Maroua Declaration, signed and entered into force on 1 June 1975, 1237 *UNTS* 319.

219 See *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria; Equatorial Guinea intervening*), *Merits, Judgment, I.C.J. Reports 2002*, para. 263.

220 See, e.g., Declaration by France and Monaco Concerning the Delimitation of the Territorial Waters of the Principality of Monaco, Paris, signed and entered into force on 20 April 1967, 1516 *UNTS* 131; the Tashkent Declaration between India and Pakistan, Tashkent, signed and entered into force on 10 January 1966, 560 *UNTS* 39; the Declaration on the Construction of Main International Traffic Arteries, Geneva, signed and entered into force on 16 September 1950, 92 *UNTS* 91.

instrument is a treaty. That point was made clearly in the *South West Africa Cases*:

> "Terminology is not a determinant factor as to the character of an international agreement or undertaking. In the practice of States and of international organizations and in the jurisprudence of international courts, there exists a great variety of usage; there are many different types of acts to which the character of treaty stipulations has been attached."[221]

2.67. Article 2(1)(a) of the Vienna Convention provides that for its purposes a treaty is–

> "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and *whatever its particular designation*." (Emphasis added.)

2.68. The question whether an instrument sets forth binding obligations is ultimately one of substance, not form or (much less) intitulation. Customary international law prescribes no necessary form for treaties[222]. What is decisive is whether the relevant States intended the instrument to be an agreement governed by international law. Whether those States had the requisite intention is to be

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221 *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 331.

222 See *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Preliminary Objections, Judgment, I.C.J. Reports 1961*, p. 31. In that case the Court held that:

> "Where . . . as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it."

gathered from the instrument's "actual terms and. . .the particular circumstances in which it was drawn up."[223] The terms of the Santiago Declaration will be discussed in further detail below. The only point to be stressed here is that, as noted at paragraph 2.58 above, the Santiago Declaration entered into force upon signature. This alone indicates that it had legal force, and had it upon signature.

2.69. On the authority cited above, Peru's related assertion that the Santiago Declaration "does not have the format of a boundary treaty"[224] is also misplaced. A treaty effecting a boundary delimitation can take whatever form the parties choose to give it[225], so long as the parties manifest an intention for their agreement to be governed by international law and, where Article 2(1) of the Vienna Convention is applicable, that the agreement be reduced to writing. As will be explained in further detail below, in the Santiago Declaration the parties designated the boundary line as the "parallel at the point at which the land frontier of the States concerned reaches the sea"[226]. To borrow the Court's words in the *Case concerning the Temple of Preah Vihear*, this was "an obvious and convenient way of describing a frontier line objectively, though in general terms."[227]

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223 *Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, I.C.J. Reports 1978*, p. 39, para. 96; also see *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, pp. 120-122, paras 23-30.

224 Memorial, para. 4.81.

225 See *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 25, para. 51.

226 Santiago Declaration, **Annex 47 to the Memorial**, Art. IV.

227 *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 35.

F. THE MARITIME ZONES DELIMITED BY THE SANTIAGO DECLARATION

2.70. In Article II of the Santiago Declaration, Chile, Ecuador and Peru declared–

> "exclusive sovereignty and jurisdiction over the sea along the coasts of their respective countries to a minimum distance of 200 nautical miles from these coasts."[228]

2.71. Article III made it explicit that this exclusive sovereignty and jurisdiction extended to "the seabed and the subsoil thereof"[229]. The States parties claimed sovereignty and jurisdiction because they wished to control natural resources, in particular fisheries and whales. Nevertheless the States parties did not merely claim functional jurisdiction over some or all natural resources. They explicitly claimed "exclusive sovereignty and jurisdiction" over the sea, seabed and subsoil. That claim encompassed exclusive control over all natural resources, living and non-living, contained therein. At the time, the Secretariat of the United Nations regarded the 1947 claims of Chile and Peru as establishing zones "s'apparent[a]nt en réalité à des espaces de mer territoriale."[230] Similarly, a number of authors have taken the view that the Santiago Declaration set forth, or at least implied, claims to 200M territorial seas[231].

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228 Santiago Declaration, **Annex 47 to the Memorial**, Art. II.

229 *Ibid*., Art. III.

230 United Nations, *Memorandum on the Regime of the High Seas by the Secretariat to the ILC* (2nd session of the ILC (1950)), document A/CN.4/32, **Annex 227**, p. 87, para. 144.

231 See, e.g., E. Jiménez de Aréchaga, "Report on the Colombia-Ecuador Maritime Boundary" in J. I. Charney and L. M. Alexander (eds), *International Maritime Boundaries*, *Vol. I*, 1993, **Annex 281**, p. 810; D. P. O'Connell, *The International Law of the Sea, Vol. 1*, 1982, **Annex 298**, p. 553; R. Dupuy and D. Vignes (eds),

2.72. It is well known that the Santiago Declaration served as the foundation for subsequent developments in international law. This point was stressed in a joint letter by the CPPS Member States (by that time, Colombia had joined the original three States) to the President of the Third United Nations Conference on the Law of the Sea (the ***Third Conference on the Law of the Sea***) in 1982. The four States observed that–

> "the universal recognition of the rights of sovereignty and jurisdiction of the coastal State within the 200-mile limit provided for in the draft Convention is a fundamental achievement of the countries members of the Permanent Commission of the South Pacific, in accordance with the basic objectives stated in the Santiago Declaration of 1952."[232]

2.73. The CPPS Member States have made the same point on a number of other occasions[233], as has the CPPS itself[234]. The early South American maritime

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A Handbook on the New Law of the Sea, *Vol. 1*, 1991, **Annex 258**, p. 276; B. Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea,* 1989, **Annex 285**, p. 210; W. C. Extavour, *The Exclusive Economic Zone*, 1979, **Annex 260**, pp. 79-80.

232 Letter of 28 April 1982 from the representatives of Chile, Colombia, Ecuador and Peru to the President of the Conference, translated by the United Nations, document A/CONF.62/L.143, **Annex 108 to the Memorial**, first paragraph.

233 See, e.g., Letter No. 804/124 of 20 August 1979 from the Heads of Delegation of Chile, Colombia, Ecuador and Peru to the President of the Conference, 22 August 1979, translated by the United Nations, document A/CONF.62/85, **Annex 46**; Statement by the Delegation of Peru, 4 April 1980, translated by the United Nations, document A/CONF.62/WS/6, **Annex 48**, paras 3-4; Note verbale of 9 March 1981 from the Heads of Delegation of Chile, Colombia, Ecuador and Peru to the President of the Conference, transmitting the Cali Declaration of 24 January 1981, translated by the United Nations, document A/CONF.62/108, **Annex 49**.

234 See Statement by the CPPS to the Third United Nations Conference on the Law of the Sea, translated by the United Nations, document A/CONF.62/WS/36, **Annex 51**.

claims, most notably the Santiago Declaration, constituted a prime foundation for what ultimately became known as the EEZ[235].

2.74. Notwithstanding the recognition now afforded to the Santiago Declaration as an early step in the development of the contemporary law of the sea, conformity with general international law was an open question at the time. Doubt was expressed on that score, both in respect of the Santiago Declaration and the unilateral proclamations of 1947 that preceded it, by a number of States[236], the ILC[237] and scholars[238]. The Santiago Declaration was the first

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235 See R. Jennings and A. Watts (eds), *Oppenheim's International Law*, 9th edn, 1992, **Annex 276**, p. 613; R. Dupuy and D. Vignes (eds), *A Handbook on the New Law of the Sea*, *Vol. 1*, 1991, **Annex 258**, p. 275; S. N. Nandan, "The Exclusive Economic Zone: A Historical Perspective", in *Essays in memory of Jean Carroz: The Law and the Sea*, 1987, **Annex 294**, p. 175; A. Arias-Schreiber, "La Nature Juridique de la Zone Économique Exclusive" in *Propos sur le nouveau droit de la mer*, 1985, **Annex 251**, pp. 53-54; F. Orrego Vicuña, "The Economic Zone in a Latin American Perspective: An Introduction", in F. Orrego Vicuña (ed.), *The Exclusive Economic Zone – A Latin American Perspective*, 1984, **Annex 300**, pp. 1-2; F. V. Garcia-Amador, "The Origins of the Concept of an Exclusive Economic Zone: Latin American Practice and Legislation", in F. Orrego Vicuña (ed.), *The Exclusive Economic Zone – A Latin American Perspective*, 1984, **Annex 267**, pp. 7 and 23; R. Galindo Pohl, "The Exclusive Economic Zone in the Light of Negotiations of the Third United Nations Conference on the Law of the Sea", in F. Orrego Vicuña (ed.), *The Exclusive Economic Zone – A Latin American Perspective*, 1984, **Annex 265**, pp. 32-33; D. P. O'Connell, *The International Law of the Sea*, *Vol. 1*, 1982, **Annex 298**, p. 553; W. C. Extavour, *The Exclusive Economic Zone*, 1979, **Annex 260**, pp. 73 and 79.

236 See, e.g., Note of 7 April 1951 from the Government of France to the Government of the United Kingdom, reproduced in Ch. Vallée, *Le Plateau Continental dans le Droit Positif Actuel*, 1971, **Annex 58**, p. 62; Note No. 276 of 4 March 1955 from the United States Ambassador to Peru to the Minister of Foreign Affairs of Peru, enclosing and aide-mémoire, **Annex 67**; Internal note of the United Kingdom Foreign Office of 17 January 1958 authored by the Legal Advisor, Sir Gerald Fitzmaurice, **Annex 209**; Note No. 57/1954 of 4 October 1954 from the Legation of Sweden in Peru to the Minister of Foreign Affairs of Peru, **Annex 64**; Note No. 197 of 4 October 1954 from the Danish chargé d'affaires in Peru to the Minister of Foreign Affairs of Peru, **Annex 65**; Memorandum No. 3883 of 28 October 1954 from the Legation of the Netherlands in Peru to the Ministry of Foreign Affairs of Peru, **Annex 66**.

multilateral instrument in which States claimed sovereignty and jurisdiction to a distance of 200 nautical miles. Peru's present claim to a "maritime dominion" (see paragraphs 2.166-2.176 below) is historically continuous with the claim that it made under the Santiago Declaration. As will also be seen below (paragraph 2.177), in 1986 Chile adopted legislation implementing maritime zones consistent with UNCLOS, to which it later became party.

2.75. The crucial point here is that the sovereignty and jurisdiction claimed by the Parties in 1947 and 1952 was fully delimited as between them in 1952. That delimitation was binding and valid as between the Parties, both then and now (whatever view third States might have taken in 1952 about the opposability to them of the 200M claims to sovereignty and jurisdiction). That delimitation fully covers the maritime zones now asserted by the Parties. Indeed, as noted (paragraph 2.40 above), Peru's 200M "maritime dominion" claim is directly founded on the 1947 Supreme Decree and the Santiago Declaration.

G. LATERAL DELIMITATION

2.76. When the Parties met in Santiago in 1952, both Chile and Peru had already, in 1947, unilaterally decreed sovereignty over the water column, the seabed, its subsoil, and all of the associated natural resources to a seaward extent of 200 nautical miles. The two boundaries potentially at issue at the 1952 Conference were the Ecuador-Peru boundary and the Peru-Chile boundary; that

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237 See United Nations, *Report of the Special Rapporteur to the ILC* (2nd session of the ILC (1950)), document A/CN.4/17, **Annex 226**, pp. 49-50, paras 109 *et seq*.

238 See, e.g., L. Oppenheim, *International Law: A Treatise, Vol. 1: Peace* (H. Lauterpacht (ed.)), 1955, **Annex 299**, p. 632; J. P. A. François, *Handboek van het Volkenrecht*, 1949, **Annex 263**, p. 929; M. W. Mouton, *The Continental Shelf,* 1952, **Annex 293**, p. 83.

is, Peru's northern and southern maritime boundaries. In 1947 Peru had claimed a maritime zone that was bounded in the north and south by the parallels of latitude passing through the seaward termini of its land boundaries. Accordingly, in the Santiago Declaration, the issue of the lateral, *inter se* delimitation of maritime zones was not contentious. Article IV of the Santiago Declaration provides simply that the line which bounds "the general maritime zone belonging to another of those countries" is the "parallel at the point at which the land frontier of the States concerned reaches the sea."

2.77. In full, Article IV of the Santiago Declaration reads as follows:

> "In the case of island territories, the zone of 200 nautical miles shall apply to the entire coast of the island or group of islands. If an island or group of islands belonging to one of the countries making the declaration is situated less than 200 nautical miles from the general maritime zone belonging to another of those countries, the maritime zone of the island or group of islands shall be limited by the parallel at the point at which the land frontier of the States concerned reaches the sea."[239]

2.78. The minutes of the 1952 Conference (the ***1952 Minutes***) indicate the background to this Article. In the Legal Affairs Commission which was charged with drawing up the Santiago Declaration, Ecuador's delegate–

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[239] Santiago Declaration, **Annex 47 to the Memorial**, Art. IV. The original Spanish text reads as follows:

> "En el caso de territorio insular, la zona de 200 millas marinas se aplicará en todo el contorno de la isla o grupo de islas. Si una isla o grupo de islas pertenecientes a uno de los países declarantes estuviere a menos de 200 millas marinas de la zona marítima general que corresponde a otro de ellos, la zona marítima de esta isla o grupo de islas quedará limitada por el paralelo del punto en que llega al mar la frontera terrestre de los estados respectivos."

> "observed that it would be advisable to clarify [the provision which became Article IV of the Santiago Declaration] in order to prevent any misinterpretation of the interference zone in the case of islands, and suggested that the declaration be drawn on the basis that *the boundary line of the jurisdictional zone of each country be the respective parallel from the point at which the borders of the countries touches or reaches the sea*."[240]
>
> (Emphasis added.)

Immediately following this extract the 1952 Minutes record that:

> "All the delegates agreed to this proposal."[241]

2.79. Following this agreement, the Chilean and Peruvian delegates were asked to revise the parts of the Santiago Declaration to which changes had been agreed. The Peruvian and Chilean delegates presented this revised text at the next session of the Legal Affairs Commission (the following day) and, with some further minor modifications, the final text of Article IV of the Santiago Declaration was adopted. Article IV of the Santiago Declaration was thus agreed upon a mutual understanding that the maritime entitlements of the States parties were laterally delimited by the parallel of latitude passing through the point where the relevant land boundary reaches the sea.

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[240] Minutes of the First Session of the Legal Affairs Commission of the 1952 Conference, 11 August 1952 at 4.00 p.m., **Annex 56 to the Memorial**, p. 2. The original Spanish text reads as follows:

> "observó a continuación que convendría dar más claridad al artículo 3°, a fin de evitar cualquier error de interpretación de la zona de interferencia en el caso de islas y sugirió que la declaración se redactara sobre la base de que la línea limítrofe de la zona jurisdiccional de cada país fuera el paralelo respectivo desde el punto en que la frontera de los países toca o llega al mar."

[241] *Ibid*., p. 2. The original Spanish text reads as follows: "Todos los delegados estuvieron conformes con esta proposición."

1. Article IV delimits both the general and insular zones of the States parties

2.80. As discussed at paragraph 1.6 above, in the Santiago Declaration, Chile, Ecuador and Peru conceived of their continental coasts and their insular coasts as having separate maritime projections. The continental coast of each State party generates a "general maritime zone"[242]. Each "island or group of islands" generates its own radial projection of 200 nautical miles[243]. Proceeding on the basis of that distinction, the States parties were concerned to preserve the primacy of the general maritime zone generated by each of their continental coastlines over any maritime zone generated by an island or group of islands belonging to an adjacent State party. Article IV of the Santiago Declaration provides that if an island is within 200 nautical miles of the parallel of latitude constituting the boundary between the general zones of the relevant adjacent States, then the maritime zone generated by that island is also delimited by that same parallel. In the result, where an insular zone overlaps with a general maritime zone, the general zone generates its full effect and the insular zone is limited by the applicable boundary parallel before reaching the full 200M radial projection otherwise afforded to islands[244].

2.81. The conclusion which follows is that the treatment of insular zones in Article IV of the Santiago Declaration may only be understood as a specific application of a general rule that the maritime boundary must in every case be the parallel of latitude of the point at which the land boundary of the States concerned reaches the sea. That parallel of latitude constitutes the boundary of all possible maritime zones, whether general or insular, between the States parties.

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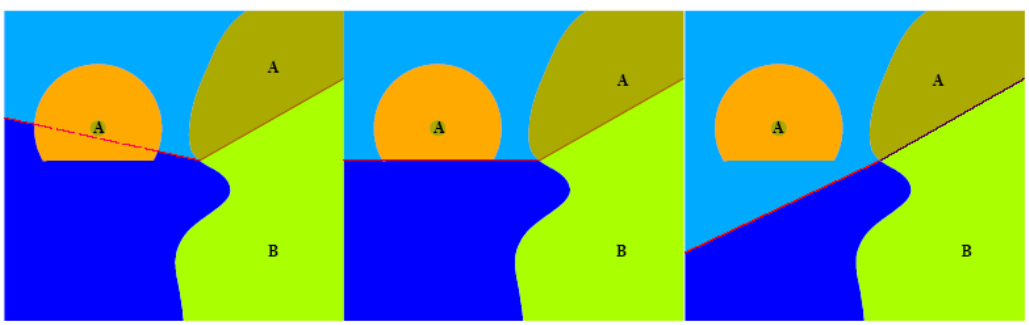
242 Santiago Declaration, **Annex 47 to the Memorial**, Art. IV.

243 *Ibid*.

244 *Ibid*.

2.82. Stated differently, the use of parallels of latitude to limit the zone of an "island or group of islands" presupposes, and may be explained only on the basis, that the general maritime zones are also delimited by the same parallels of latitude. This is the situation illustrated in the middle box of the figure below. As shown in that diagram, if the general maritime zones of adjacent States A and B are delimited in any way other than by a parallel of latitude starting from the seaward terminus of the land boundary (as illustrated in the boxes on the right and left), there is no reason to delimit the insular maritime zone of State A (the area in orange) by using that parallel of latitude.



2.83. Pursuant to Article IV of the Santiago Declaration, the maritime zone generated by an island or group of islands is limited by a parallel of latitude if those islands are "situated less than 200 nautical miles from the general maritime zone belonging to another of those countries".[245] In order to be able to ascertain whether an island is situated less than 200 nautical miles from that "general" (i.e. continental) maritime zone, the perimeter of the general maritime zone must be defined. If that perimeter were not defined, it would not be possible to determine if an island was situated more or less than 200 nautical miles from that general maritime zone. Article IV proceeds on the basis that the general maritime zone of each State was also delimited by a line following a parallel of latitude.

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[245] Santiago Declaration, **Annex 47 to the Memorial**, Art. IV.

2.84. A present-day reader might wonder why the application of the parallels of latitude to the general maritime zones was not made more explicit in Article IV of the Santiago Declaration. The answer is that Peru had unilaterally declared in 1947 that its maritime zone was limited by those parallels of latitude. Chile, which had also claimed a 200M zone, had acknowledged and accepted Peru's 1947 Supreme Decree. In 1952 there was no controversy between Chile and Peru concerning their maritime boundary. Ecuador was not part of the reciprocal process concerning maritime zones between Chile and Peru in 1947. Nevertheless, so far as Chile is aware, Ecuador had not protested Peru's 1947 proclamation and the use of parallels as maritime limits.

2.85. When Ecuador joined with Chile and Peru in 1952 to make a multilateral agreement on extended maritime zones, Ecuador's participation brought with it a new issue: how the maritime zones granted to Ecuador's islands should be delimited, especially if the maritime zones were to be extended farther than 200 nautical miles and thus affect the Galápagos Islands. The agreed approach was that if an insular zone of one State overlapped with the general zone of another State, the boundary between the general maritime zones of the States concerned would also delimit the relevant insular zone. The general maritime boundary cut short the insular zone. This was a specific application to insular zones of the general maritime boundaries accepted by the three States.

2.86. The Galápagos Islands, belonging to Ecuador, were surrounded by rich fishing grounds. Chile acknowledged that fact as a significant new factor in the note it sent to Ecuador on the subjects to be covered at the Santiago Conference of 1952, as follows:

> "The participation of Ecuador in this conference is of great importance given the significant quantity of sperm whales

> existing in its maritime zone, particularly in the zone of the Galápagos islands, and [because] the provisional agenda states that the determination of the Territorial Sea is set as one of the objectives of the meeting."[246]

2.87. The 200M insular maritime zone generated by the Galápagos Islands would not overlap with the 200M general maritime zone of Peru. However, as will be discussed in the next Subsection, 200 nautical miles was a minimum claim under the Santiago Declaration. Possible further seaward extension was envisaged, as is clear on the face of Article II ("a minimum distance of 200 nautical miles")[247]. A relatively minor extension of the Peruvian maritime zone would have created a potential overlap with the zone generated by the Galápagos Islands. This issue was resolved by Article IV of the Santiago Declaration, which established the priority of general maritime zones over insular maritime zones.

2.88. Peru's Memorial argues that Article IV is to be understood as dealing only with the delimitation of zones generated by, respectively, islands and continental territories[248]. It is difficult to see why the States parties would have chosen to deal only with the issue of a few islands in the Gulf of Guayaquil and with the prospective issue of the Galápagos Islands, but left open the delimitation of the maritime zones generated by their continental territories. The negotiating record does not indicate that there was any maritime-boundary delimitation issue

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246 Note No. 468/51 of 7 July 1952 from the Chilean Ambassador to Ecuador to the Minister of Foreign Affairs of Ecuador, **Annex 59**, para. 3. The original Spanish text reads as follows:

> "La concurrencia de Ecuador a esta conferencia tiene gran importancia, ya que en su zona marítima existe una gran cantidad de cachalotes, especialmente en la región de las Islas Galápagos y entre los puntos del temario provisional se señala como uno de los objetivos de la reunión la fijación del Mar Territorial."

247 Also see paras 2.102-2.106 below.

248 See, e.g., Memorial, paras 4.77 and 4.80; also see the discussion at paras 2.89 *et seq.* below.

that the States parties intended to leave open for any reason. On the contrary, the negotiating record quoted at paragraph 2.78 above plainly indicates the States parties' unanimity that the maritime boundary was in every case the parallel of latitude of the point at which the land boundary between the States concerned reaches the sea.

2.89. Peru has recently confirmed that there is no outstanding maritime boundary delimitation issue between Peru and Ecuador[249]. However, the interpretation of Article IV of the Santiago Declaration now proposed by Peru in its Memorial[250] explains only part of Peru's complete maritime boundary with Ecuador. On the approach Peru advances in its Memorial, Article IV of the Santiago Declaration serves to delimit only the maritime zone generated by Ecuador's islands in the Gulf of Guayaquil and the part of Peru's general maritime zone abutted by the zone created by those islands. This is a legal difficulty with Peru's present interpretation of Article IV, but there is the additional difficulty of its being unable to account for a segment of the Peru-Ecuador maritime-boundary line.

2.90. Ecuador's general maritime zone extends further seaward than the insular maritime zone generated by Ecuador's islands in the Gulf of Guayaquil. Part of that seaward portion of Ecuador's general maritime zone is within 200

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249 See Official Communiqué RE/13-05 of 25 November 2005 by the Ministry of Foreign Affairs of Peru, **Annex 199**. There is a curt statement in passing in an earlier internal Peruvian document suggesting that in the event that Peru became party to UNCLOS, a boundary negotiation with Ecuador would follow: "Apreciaciones a Convención de las Naciones Unidas sobre el Derecho del Mar", appearing as Annex (1) to Letter No. 4626 SGMD-D of 21 November 2000 from the Minister of Defence of Peru to the Minister of Foreign Affairs of Peru, **Annex 189**, para. (n).

250 The Memorial, para. 4.77, states that the delimitation effected by Article IV "applied only to those islands and groups of islands that are situated less than 200 nautical miles from the general (*sc*., the continental) maritime zone of another State Party and only in the segment in which the maritime zone of such islands would overlap with the general maritime zone of the neighbouring State."

nautical miles of Peru's basepoints. This is so whether Ecuador's general maritime zone is measured from basepoints on its continental coast or from Ecuador's straight baseline. The interpretation of Article IV proposed by Peru in its Memorial does not account for the delimitation of Ecuador's general maritime zone and the part of Peru's general maritime zone that is not within 200 nautical miles of an Ecuadorean island. This point is illustrated in **Figure 7**.

2.91. Interpreted consistently with the understanding jointly held by its three States parties until Peru conceived a new interpretation for the purposes of its present claim, Article IV of the Santiago Declaration delimits all maritime zones — both insular and general — as between all of its States parties, by using in every case "the parallel at the point at which the land frontier of the States concerned reaches the sea"[251]. This interpretation explains the complete maritime boundary delimitation between Ecuador and Peru and the complete maritime boundary delimitation between Chile and Peru.

2.92. As explained below, the parties to the Santiago Declaration confirmed their common understanding that Article IV laterally delimits their respective maritime entitlements using parallels of latitude on a number of subsequent occasions. This occurred when Chile, Ecuador and Peru negotiated the Complementary Convention to the Santiago Declaration and the Lima Agreement in 1954 (see paragraphs 2.189-2.201 below). It also occurred in 1955 when the three States negotiated a protocol for the accession of other American States to the Santiago Declaration. At that time Chile and Peru confirmed their understanding that Article IV is a delimitation agreement and agreed that this Article would not apply to States acceding in future, because the use of parallels of latitude as maritime boundaries was not necessarily suitable for the coastal configuration of other States (see paragraphs 3.121-3.126 below). The necessary

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[251] Santiago Declaration, **Annex 47 to the Memorial**, Art. IV.

conclusion is that in 1955 the Parties confirmed that geographic parallels were appropriate boundary lines for them.

2.93. Notwithstanding these subsequent acknowledgements that Article IV of the Santiago Declaration delimited the maritime boundary between Chile and Peru, Peru's Memorial makes a number of new arguments which seek to cast doubt on the applicability of Article IV of the Santiago Declaration between Chile and Peru. Those arguments fail on the face of the Santiago Declaration. Article IV refers to "the general maritime zone belonging to another of those countries". Two significant points arise from this language.

2.94. The first point arises from the use of the words "another of those countries". These words indicate that Article IV applied to all three States parties. The full meaning of the abbreviation "those countries" is given earlier in the same sentence of Article IV. "Those countries" are "the countries making the declaration", i.e. all three States parties. If the delimitation provision applied only to Ecuador and Peru, as Peru now suggests[252], the appropriate language when referring to the general maritime zone belonging to another State would have been the singular: *the other country*.

2.95. The second point is that it was agreed that each State was to have its own maritime zone, "belonging" to that State. The Santiago Declaration did not, as Peru suggests in its Memorial[253], create one unified maritime zone extending the length of the coasts of all three States parties — a zone shared among them and without any internal delimitation. Even on Peru's own reading that

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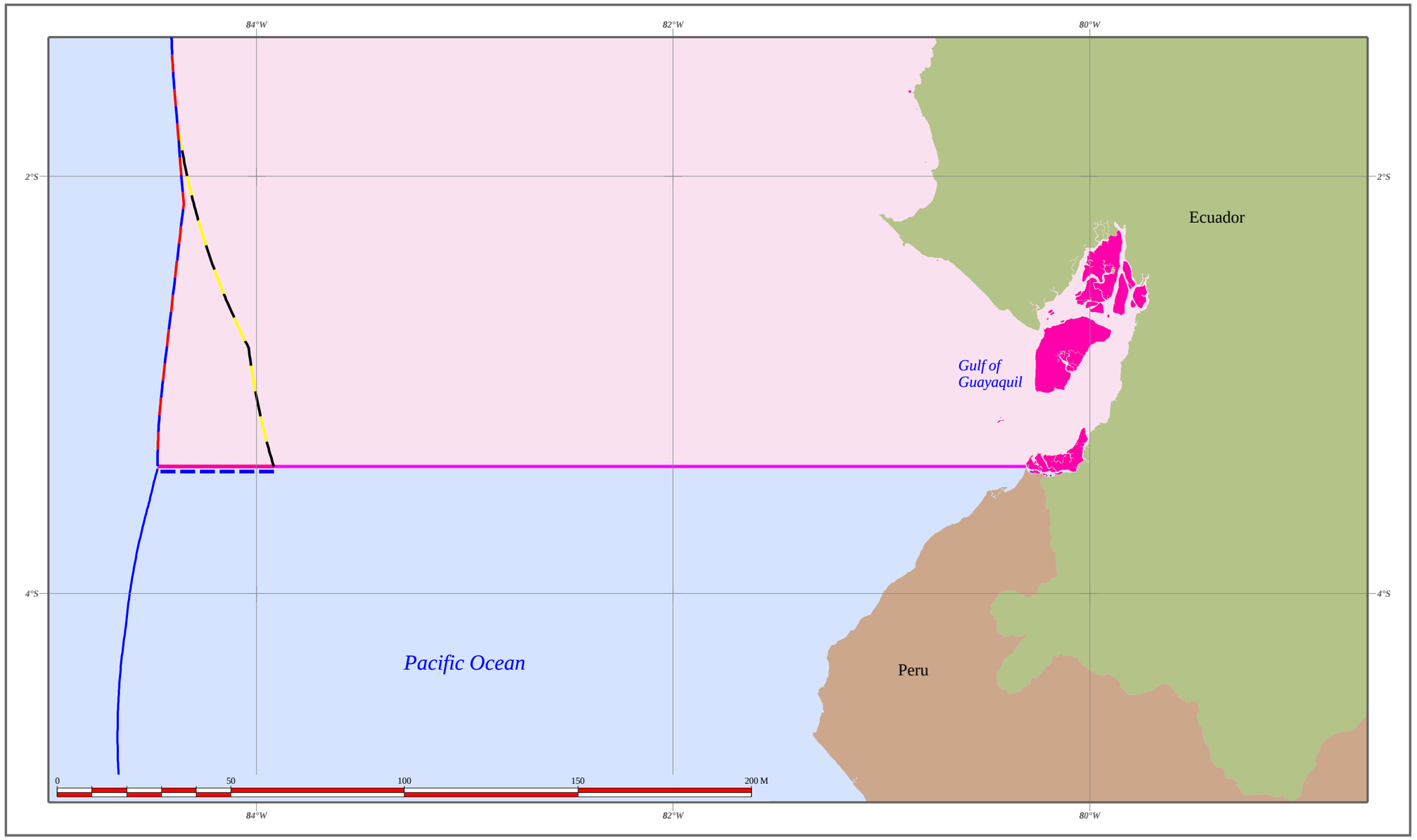
252 See, e.g., Memorial, para. 4.77.

253 *Ibid*., paras 4.72-4.73.

Figure 7

Ecuador-Peru maritime boundary and Peru's interpretation of Article IV of the Santiago Declaration



Ecuador's island territories

Ecuador's waters

Ecuador - Peru maritime boundary

Part of Ecuador - Peru boundary not explained by Peru's interpretation of Article IV of the Santiago Declaration

Ecuador's 200M limit generated by insular territories alone

Ecuador's 200M limit measured from its baselines set out in Supreme Decree No. 959-A of 28 June 1971

200M arcs from Peru's baselines

Prepared for the Ministry of Foreign Affairs, Chile, by UKHO Law of the Sea Consultancy

Article IV delimits only insular zones as against general maritime zones[254], there could not have been such a unified zone.

2. Article IV of the Santiago Declaration delimits each State party's own separate maritime zone

2.96. It is plain that in the Santiago Declaration each State party claimed its own 200M maritime zone and that, where the States co-operated on issues of common interest, they did so in the exercise of the sovereignty that each one of them claimed over its own maritime zone. A few observations are called for in that regard.

2.97. In the first place, the Santiago Declaration itself refers in the plural to the States parties' protection of the resources of "the maritime zones adjacent to their coasts"[255]. These States claimed that "they each possess exclusive sovereignty and jurisdiction"[256]. As discussed above, the delimitation provision in Article IV refers to the general maritime zone "belonging to another of those countries".

2.98. Further, in the Second Session of the Legal Affairs Commission, the delegates also discussed Article VI of the Santiago Declaration. This Article states:

> "For the application of the principles contained in this Declaration, the Governments of Chile, Ecuador and Peru hereby announce their intention to sign agreements or conventions which shall establish general norms to

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254 See, e.g., Memorial, paras 4.77 and 4.80.

255 Santiago Declaration, **Annex 47 to the Memorial**, fourth (unnumbered) introductory paragraph to the operative provisions.

256 *Ibid*., Art. II.

> regulate and protect hunting and fishing within the maritime zone belonging to them, and to regulate and coordinate the exploitation and development of all other kinds of products or natural resources existing in these waters and which are of common interest."[257]

2.99. The discussion concerned whether the draft wording that originally ended this Article, which referred to natural resources "in, below, or above said waters", should be replaced with a reference to natural resources "existing in these waters and which are of common interest"[258]. This replacement was agreed. The rationale for this change appears in the extract from the 1952 Minutes quoted below. It is clear from the extract that, notwithstanding the desirability of co-operation on certain matters of common interest, each State had its own maritime zone, the resources of which it was ultimately entitled to exploit as it alone saw fit:

> "Mr. Fernández, Delegate of Ecuador, stated that the Declaration's final words 'to regulate and coordinate the exploitation and development of all other kinds of products or natural resources existing in, below, or above said waters' did not appear to express clearly the purpose of the declaration and could lead one to believe, for instance, that if Chile discovered a submarine coal mine or oilfield or any other submarine resource, it should coordinate with the other countries its course of action for exploitation

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257 The original Spanish text reads as follows:

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

258 Minutes of the Second Session of the Legal Affairs Commission of the 1952 Conference, 12 August 1952 at 4.00 p.m., **Annex 34**, p. 2.

purposes. Mr. Claro pointed out that the Article could only refer to exploitations that were of common interest, an argument reinforced by the words at the beginning of the Article referring to the countries' intention to sign agreements or conventions, which in no case could be deemed an obligation. Hence, any submarine resource any of the countries wished to explore within the zone of its jurisdiction that were of its sole and exclusive interest could be freely exploited without the need for an agreement with the other agreeing countries. [Mr. Claro] added that he did not object to an amendment of the wording that would dispel the possibility of misinterpretations. After an exchange of ideas between all the attendees, it was agreed to replace the words 'in, below, or above said waters' for 'existing in these waters and which are of common interest'."[259]

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[259] Minutes of the Second Session of the Legal Affairs Commission of the 1952 Conference, 12 August 1952 at 4.00 p.m., **Annex 34**, p. 2. The original Spanish text reads as follows:

> "El señor Fernández, Delegado del Ecuador, expresó que las palabras finales de la declaración al decir 'regular y coordinar la explotación y aprovechamiento de cualquier otro género de productos o riquezas naturales existentes dentro, bajo o sobre dichas aguas', no le parecían que expresaran con claridad el propósito de la declaración y eran inductivas a hacer creer que, por ejemplo, si Chile descubriera una mina de carbón submarina o un yacimiento petrolífero o cualquier otra riqueza submarina, debiera coordinar con los demás países su acción para los efectos de su explotación. El señor Claro observó que el artículo solo podía referirse a aquellas explotaciones que fueran de interés común, lo que se reforzaba todavía con las palabras iniciales del artículo que contienen la idea del propósito de suscribir acuerdos o convenciones, a lo cual no podía darse en ningún caso el alcance de una obligación y que, consiguientemente, cualquier riqueza submarina que cualquiera de los países quisiera explotar dentro de la zona de su jurisdicción y que fuera de su único y exclusivo interés, podría ser explotada libremente sin que para ello tuviera que concertar acuerdo alguno con los otros países pactantes. Agregó que por su parte no objetaba un cambio de redacción que alejara la posibilidad de una interpretación errada. Después de un cambio de ideas en que participaron todos los presentes, se acordó sustituir las palabras 'dentro, bajo o sobre dichas aguas' por las siguientes: 'en dichas aguas y que sean de interés común'."

2.100. Consistent with this, at the First United Nations Conference on the Law of the Sea, Dr. García Sayán of Peru said that: "Even though a condominium was not established and *each country has its own maritime zone in front of its coastline*, the Santiago agreement is in line with the historic evolution towards the creation of integration among States" (emphasis added)[260]. Dr. García Sayán made the same point again in 1967, as Secretary-General of the CPPS, when he said: "a condominium was not established and each country has its own maritime zone in front of its coastline"[261].

2.101. Enforcement of agreed regulations was left to each individual State within its own maritime zone. This is clear from Article 5 of the Agreement on the CPPS, which was also concluded at the Santiago Conference. It reads as follows:

> "The signatory Governments shall ensure compliance with the agreements of the Conference and the decisions of the Permanent Commission by applying a legal system of penalties for violations committed within their jurisdiction. For this purpose, if their respective legislations do not provide for such penalties, the Governments concerned shall request the appropriate public authorities to establish them."[262]

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260 Intervention by Dr. García Sayán of Peru in the general debate in the Second Committee of the First United Nations Conference on the Law of the Sea, 13 March 1958, in *Revista Peruana de Derecho Internacional, Vol. XVIII*, January-June 1958, No. 53, **Annex 42**, p. 51.

261 Statement made by Dr. García Sayán on 31 January 1967, in CPPS Secretary-General, *Convenios y Otros Documentos (1952-1966)*, **Annex 239**, para. 6.

262 Agreement on the Organization of the Permanent Commission of the Conference on Exploitation and Conservation of the Maritime Resources of the South Pacific, Santiago, signed and entered into force on 18 August 1952, 1006 *UNTS* 331, **Annex 48 to the Memorial**, Art. 5.

In implementing Article 5, each State in fact policed its own maritime zone. In 1972, the CPPS collected data on enforcement measures which had been taken by each State over time[263]. Peru's enforcement of its own maritime zone, evidenced by these data, is described at paragraph 2.143 below. The data, and the way in which they were compiled, clearly demonstrate that Chile, Ecuador and Peru were each arresting foreign vessels in their own maritime zone.

H. SEAWARD EXTENSION OF THE ZONES CLAIMED IN THE SANTIAGO DECLARATION

2.102. Under Article II of the Santiago Declaration, each State's claim to exclusive jurisdiction and sovereignty was to extend seaward to "a minimum distance of 200 nautical miles". This mirrored the seaward extent of the claims in the 1947 proclamations of both Chile[264] and Peru[265]. Chile had reserved the right to extend its maritime claim further seaward than 200 nautical miles on the basis of "knowledge, discoveries, studies and interests of Chile as required in the future"[266]. Similarly, in its 1947 Supreme Decree Peru reserved the right to extend its maritime zone further seaward than 200 nautical miles "in accordance with supervening circumstances which may originate as a result of further discoveries, studies or national interests which may become apparent in the future"[267].

2.103. That aspect of the 1947 proclamations was specifically noted by the Special Rapporteur of the ILC on the Law of the Sea in 1950, Professor J.P.A.

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263 See CPPS Secretary-General, *Infracciones en la Zona Marítima del Pacífico Sur*, January 1972, **Annex 240**.

264 See 1947 Chilean Declaration, **Annex 27 to the Memorial**, Art. 3.

265 See 1947 Peruvian Supreme Decree, **Annex 6 to the Memorial**, Art. 3.

266 1947 Chilean Declaration, **Annex 27 to the Memorial**, Art. 3.

267 1947 Peruvian Supreme Decree, **Annex 6 to the Memorial**, Art. 3.

François. He observed that Chile and Peru "revendiquent une zone de 200 milles marins à partir des côtes, et cette distance est susceptible d'être modifiée à tout moment, suivant les besoins de la nation. Dans cette zone la souveraineté nationale est proclamée"[268]. The United Nations Secretariat made the same observation, noting that Chile and Peru "établissent une zone de protection de 200 milles marins en dimension horizontale à partir du rivage, zone dont les limites peuvent être d'ailleurs changées à tout moment"[269].

2.104. The precise seaward limit of the fisheries-rich Humboldt Current[270] off the west coast of South America was not known in 1947 or 1952, and the States parties were preserving the possibility of extending their claims to its seaward limit if that limit was found to be more than 200 nautical miles from shore. The States parties were conscious that the waters around the Galápagos Islands, which were more than 200 nautical miles from the coast of the continent, held productive fisheries[271].

2.105. Against this background each State agreed in the Santiago Declaration to a "minimum" claim of 200 nautical miles. No State party could unilaterally *reduce* the seaward extension of its claim. The States parties agreed that each of

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268 United Nations, *Report of the Special Rapporteur to the ILC* (2nd session of the ILC (1950)), document A/CN.4/17, **Annex 226**, pp. 49-50, para. 109.

269 United Nations, *Memorandum on the Regime of the High Seas submitted by the Secretariat to the ILC* (2nd session of the ILC (1950)), document A/CN.4/32, **Annex 227**, p. 86, para. 143. The same point is made at p. 92, para. 192.

270 The Humboldt Current is comprised of cold Antarctic water which flows from south-east to north-west from the southern tip of Chile to the waters off northern Peru. From there, the current turns west, away from the Peruvian coast. This current causes upwelling of deep ocean waters, bringing to the surface nutrients deposited in the Pacific Ocean by the Andean rivers.

271 See Note No. 04938 of 27 June 1952 from the Minister of Foreign Affairs of Chile to the Chilean Ambassador to Ecuador, **Annex 111**, p. 2; Note No. 468/51 of 7 July 1952 from the Chilean Ambassador to Ecuador to the Minister of Foreign Affairs of Ecuador, **Annex 59**, para. 3.

them could unilaterally *extend* its claim seaward beyond 200 nautical miles, without any need to amend the Santiago Declaration or even to consult with the other States parties. The 1952 Minutes confirm this:

> "[T]he delegate of Chile, Mr. Benjamín Claro, said. . .any of the three signatory countries may, as a sovereign State, extend its maritime zone beyond the 200 miles at the time and for the length it deems necessary or appropriate without the need to obtain permission or consent from the other signatory countries. Nonetheless, on account of the common interest shared by the three signatory countries, Chile considers that none of them may reduce the extension of the 200-nautical-mile maritime zone without the prior agreement of the other countries attending the Conference. In other words, a restriction is imposed on each country's sovereignty in respect of reducing the zone of jurisdiction contained in the declaration, but such sovereignty may be freely exercised to extend the referred jurisdictional zone as each country deems appropriate. The Chair, His Excellency Ambassador Dr. Alberto Ulloa [of Peru], expressed his agreement with the statements made by Mr. Claro on behalf of the Chilean Delegation. Mr. Fernández also expressed that, in his capacity as the Ecuadorean delegate, he accepted the Declaration with the scope explained by the delegate of Chile."[272]

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[272] Minutes of the Second Session of the Legal Affairs Commission of the 1952 Conference, 12 August 1952 at 4.00 p.m., **Annex 34**, p. 3. The original Spanish text reads as follows:

> "[E]l delegado de Chile, señor Benjamín Claro, expresó . . . cualquiera de los tres países que firmarán la declaración, soberanamente, pueden en cualquier tiempo que lo estime conveniente o necesario ampliar su zona jurisdiccional más allá de las doscientas millas en la extensión que juzgue adecuada sin necesidad de solicitar la venia o el acuerdo de los otros países signatarios. Sin embargo, estando envuelto un interés común de los tres países, Chile considera que ninguno de los países signatarios podría disminuir la extensión jurisdiccional de las doscientas millas sin el acuerdo de los otros países concurrentes a la Conferencia, o sea, la

2.106. The use of parallels of latitude as maritime boundaries allowed each of the States parties to extend its maritime zone further seaward than 200 nautical miles, without creating any overlap with the adjacent State, even if that latter State was subsequently to extend its own maritime zone.

2.107. Peru now seeks to use the fact that the Santiago Declaration provides for a minimum 200M seaward extension, rather than an invariable seaward limit, to argue that the Declaration was "provisional"[273]. A "provisional" instrument is one intended to have limited duration, or which is subject to later confirmation or change[274]. The term "provisional" is inapposite here. The parties to the Santiago Declaration agreed that each of them could unilaterally extend its maritime zone beyond 200 nautical miles. Only in this limited sense was the breadth of the maritime zone that each State party could potentially claim variable. That did not mean that the entitlement of each State party to a maritime zone, or the Santiago

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> soberanía queda limitada para disminuir la zona de jurisdicción que contiene la declaración, pero puede ser ampliamente ejercitada como cada país lo estime del caso para ampliar la respectiva zona jurisdiccional. El señor Presidente Exemo. Embajador Dr. Alberto Ulloa [Peru], expresó que estaba conforme con lo expresado por el señor Claro a nombre de la Delegación chilena. El Sr. Fernández expresó que como delegado del Ecuador aceptaba la declaración con el alcance explicado por el delegado de Chile."

273 Memorial, para. 4.71.

274 See, e.g., Memorandum of Understanding between the Government of the Republic of Indonesia and the Government of Australia Concerning the Implementation of a Provisional Fisheries Surveillance and Enforcement Arrangement, signed at Jakarta on 29 October 1981 (entered into force on 1 February 1982), in J. I. Charney and L. M. Alexander (eds), *International Maritime Boundaries*, *Vol. II*, 1993, **Annex 11**, pp. 1238-1243; Agreement on Provisional Arrangements for the Delimitation of the Maritime Boundary between the Republic of Tunisia and the People's Democratic Republic of Algeria, signed at Algiers on 11 February 2002, 2238 *UNTS* 208, **Annex 27**, Arts 1 and 4; Interim Accord between Greece and the Former Yugoslav Republic of Macedonia, signed at New York on 13 September 1995, 1891 *UNTS* 3 (entered into force on 13 October 1995), **Annex 22**, Art. 23(2).

Declaration in which such entitlement is to be found, were provisional in any way. The entitlement to a potential maritime zone greater than 200M was treated as a firm, perfected right on the international-law plane, which could be acted upon unilaterally by any of the States parties. None of the other States parties could oppose action upon that entitlement; nor was the entitlement contingent upon further approval by the other States parties.

Section 5. The *Alta Mar* Area Now Claimed by Peru

2.108. In its Memorial, Peru requests the Court to declare that its "maritime dominion" also includes a 28,356 km^2 area of the high seas that lies: (a) south of the parallel of latitude that passes through the point at which the land boundary reaches the sea; (b) seaward of the outer limit of Chile's continental shelf and EEZ; and (c) within 200 nautical miles of the nearest point of Peru's coast measured using an envelope of arcs of circles. Peru calls this the "outer triangle"[275]. It is depicted in **Figure 2** (and in Figure 7.1 (page 245) of Peru's Memorial).

2.109. Peru formulates its claim to this *alta mar* area separately from its claim to an area of 38,324 km^2 that lies within Chile's maritime zones. Yet under the operative delimitation instrument, which is the Santiago Declaration, no such differentiation can be made. The Santiago Declaration established a single lateral limit for all maritime zones, both actual and prospective, of the States parties, whether or not the adjacent State claims an abutting maritime zone at all, or a zone with different jurisdictional content.

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[275] Memorial, Chap. VII.

A. PERU'S INCONSISTENT SUBMISSIONS

2.110. Peru's first submission requests the Court to declare that the delimitation between the respective maritime zones of the Parties is a line "equidistant from the baselines of both Parties, up to a point situated at a distance of 200 nautical miles from those baselines"[276]. In its second submission Peru asks the Court to declare that: "*Beyond the point where the common maritime border ends*, Peru is entitled to exercise exclusive sovereign rights over a maritime area lying out to a distance of 200 nautical miles from its baselines." (emphasis added)[277] This second submission is Peru's claim to the *alta mar* area as a separate demand. Peru asks the Court to grant its first submission "and"[278] its second one.

2.111. As already noted[279], Peru's two submissions are logically inconsistent with each other. If the boundary were an equidistance line (which it is not), there could not be any "outer triangle". The respective maritime zones of the Parties would be coterminous at the end of the equidistance line, and that line would give to Peru the *alta mar* area[280]. By definition, no separate maritime zone would arise for Peru "[b]eyond the point where the common maritime border ends"[281]. Yet that is what Peru asks the Court to award in its second submission. Peru's presentation of its claim to the *alta mar* area can logically be predicated only on the existence of an agreed delimitation using a parallel of latitude[282].

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276 Memorial, p. 275.

277 *Ibid*.

278 *Ibid*.

279 See paras 1.12-1.16 above.

280 See para. 2.108 above; and cf. Figure 7.1 of the Memorial (p. 245).

281 Memorial, p. 275.

282 *Ibid*., p. 245, Figure 7.1; and p. 265, Figure 7.5.

2.112. Peru says that its *alta mar* claim is made "independently of"[283] the remainder of its claim. Logically, however, Peru's claim to the *alta mar* area must be regarded as an alternative to Peru's primary claim to an equidistance-line boundary. The *alta mar* claim assumes that the Court will declare the maritime boundary to be the parallel of latitude, though only up to 200M from Chile's basepoints. As will be seen presently, even this modified position on the existence of an agreed boundary would be wrong.

B. THE AGREED DELIMITATION APPLIES REGARDLESS OF DISTANCE FROM THE COAST

2.113. The parties to the Santiago Declaration asserted "a minimum distance of 200 nautical miles"[284]. As discussed at paragraphs 2.102-2.107 above, any of the States parties could "as a sovereign State, extend its maritime zone beyond the 200 miles at the time and for the length it deems necessary or appropriate without the need to obtain permission or consent from the other signatory countries."[285]

2.114. Using parallels of latitude as maritime boundaries meant that if a State party unilaterally extended its zone seaward, the parallel of latitude would continue to operate as a lateral limit, regardless of whether the adjacent State claimed any abutting maritime zone of "sovereignty" or any type of "jurisdiction" on the other side of the parallel of latitude. In this way, if one State extended its claim further than 200 nautical miles, no issue of overlap could arise with the adjacent State. The adjacent State could at any time also extend its own

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283 Memorial, para. 7.3.

284 Santiago Declaration, **Annex 47 to the Memorial**, Art. II.

285 Minutes of the Second Session of the Legal Affairs Commission of the 1952 Conference, 12 August 1952 at 4.00 p.m., **Annex 34**, p. 3.

zone, in which case the extended zone would continue to be laterally limited by the same parallel of latitude.

2.115. As a result, in the Santiago Declaration Peru precluded itself from exercising any sovereign rights or jurisdiction south of the parallel of latitude passing through the point where the land boundary of the Parties reaches the sea, regardless of distance from the nearest point on the coast.

2.116. Consistently with the Santiago Declaration, Peru has never purported to exercise any jurisdiction in the *alta mar* area. In Chapter VII of its Memorial, which is devoted solely to the *alta mar* area, Peru cites two examples in which it claims to have "firmly maintained its position"[286]. These examples relate to arrests of vessels. Neither of the arrests cited actually occurred in the *alta mar* area. They occurred off the coast of the northern part of Peru, and are therefore irrelevant to Peru's new claim to the *alta mar* area south of the parallel of latitude passing through the point where Peru's land boundary with Chile reaches the sea.

C. The Agreed Delimitation Applies Regardless of the Method used to Measure the Outer Limit of a State's Maritime Zone

2.117. As noted above at paragraphs 2.31-2.34, in 1947 both Chile and Peru measured the seaward limits of their maritime zones using a line parallel to the coastline at a distance of 200 nautical miles from the coast. Chile declared that the area subject to its claim was that "within the perimeter formed by the coast and the mathematical parallel projected into the sea at a distance of 200 nautical miles from the coasts of Chilean territory"[287]. Peru claimed the "area covered

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286 Memorial, para. 7.33.

287 1947 Chilean Declaration, **Annex 27 to the Memorial**, Art. 3.

between the coast and an imaginary parallel line to it at a distance of two hundred (200) nautical miles"[288]. Article 3 of the 1947 Peruvian Supreme Decree was explicit that the seaward distance of 200 nautical miles was to be "measured following the line of the geographical parallels". Using that method of measurement, the outer limit of Peru's maritime zone was a form of *tracé parallèle* following the sinuosities of the coastline. Every point of the outer limit was exactly 200 nautical miles from the point on the coast due east of it, following the line of the parallel of latitude corresponding to that point on the coast.

2.118. As agreed in the Santiago Declaration, the lateral delimitation between the Parties used the geographical parallel of latitude passing through the point where their land boundary reaches the sea. The method adopted by Peru and Chile to measure the seaward limit, combined with the use of a parallel of latitude as the lateral boundary, meant that the extreme south-westerly point of the Peruvian 200M maritime zone was exactly the same point as the extreme north-westerly point of the Chilean 200M zone. This is point X in **Figure 8**, which illustrates the seaward extent of the maritime zones claimed by the Parties when they delimited their maritime boundary in 1952. There was no overlap, there was no cut-off and there was no "outer triangle".

2.119. Since Peru began using the envelope-of-arcs-of-circles method to measure the seaward limit of its maritime zone, the south-western extremity of Peru's zone does not abut the Chilean continental shelf or EEZ on the other side of the parallel of latitude. In its Memorial Peru states that its 1955 Supreme Resolution adopted an "arcs of circles" methodology to measure the outer limit of its maritime claim[289]. The basis for this suggestion is that the 1955 Supreme

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[288] 1947 Peruvian Supreme Decree, **Annex 6 to the Memorial**, Art. 3.

[289] See Memorial, para. 4.112.

Resolution referred to "a line parallel to the Peruvian coast and at a constant distance of 200 nautical miles from it"[290]. If Peru is right, then that only weakens its case, because it confirms the self-evident conclusion that the lateral boundary stands regardless of the methodology that each State party adopts in measuring the outward reach of its maritime zone. The lateral boundary is an agreed limit set forth in an international treaty, which cannot be defeated or qualified by one State's choice, at any given time, concerning its preferred methodology for seaward projection. At the time of the 1955 Supreme Resolution, there was no suggestion by Peru that the Santiago Declaration lateral boundary would not bound Peru's maritime zone; in fact, there was every indication that it did.

2.120. Nevertheless, the terms of the 1955 Supreme Resolution do not indicate an envelope-of-arcs-of-circles methodology. An outward limit comprised of an envelope of arcs of circles would not produce "a line parallel to the coast". This is apparent from the comparison of the two different methods depicted in **Figure 9** (and Figure 4.1 of the Memorial). Peru's 1955 Supreme Resolution is discussed in detail in Section 3.A of Chapter III. The relevant point here is that the Resolution is in fact silent on how the "constant distance of 200 nautical miles" from the coast was to be measured. The Resolution states in its recitals that it implements the 1947 Supreme Decree and the Santiago Declaration. The 1947 Supreme Decree is explicit that the 200 nautical miles seaward projection is to be "measured following the line of the geographical parallels".[291] That methodology certainly gave a seaward limit that was "parallel to the coast", as envisaged in the 1955 Supreme Resolution. The natural meaning of the 1955 Supreme Resolution is that, like the 1947 Supreme Decree, it used the *tracé parallèle* method.

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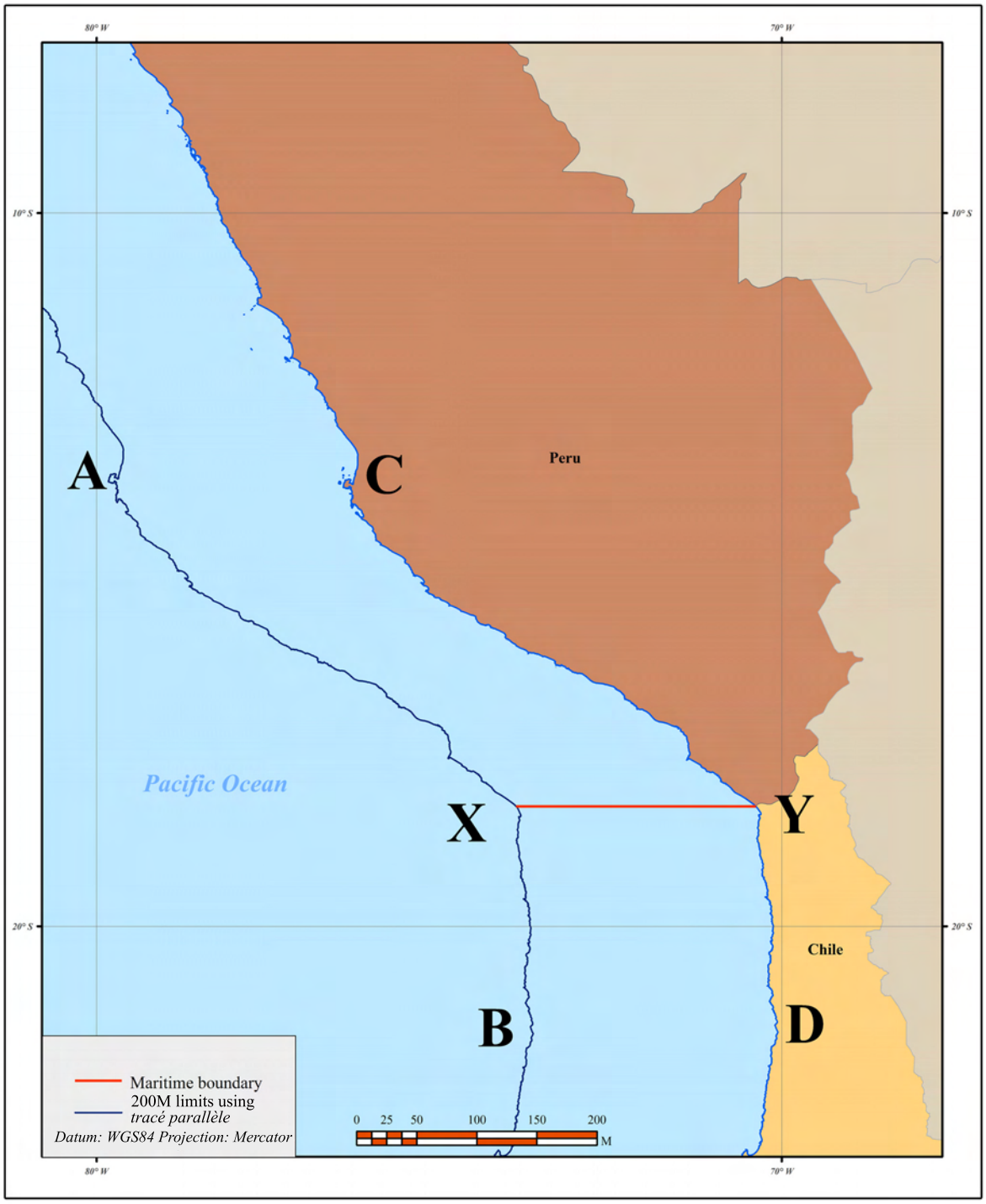
290 1955 Supreme Resolution, **Annex 9 to the Memorial**, first operative paragraph.

291 1947 Peruvian Supreme Decree, **Annex 6 to the Memorial**, Art. 3.

Figure 8

Seaward extent of maritime zones of Chile and Peru at the time of the Santiago Declaration

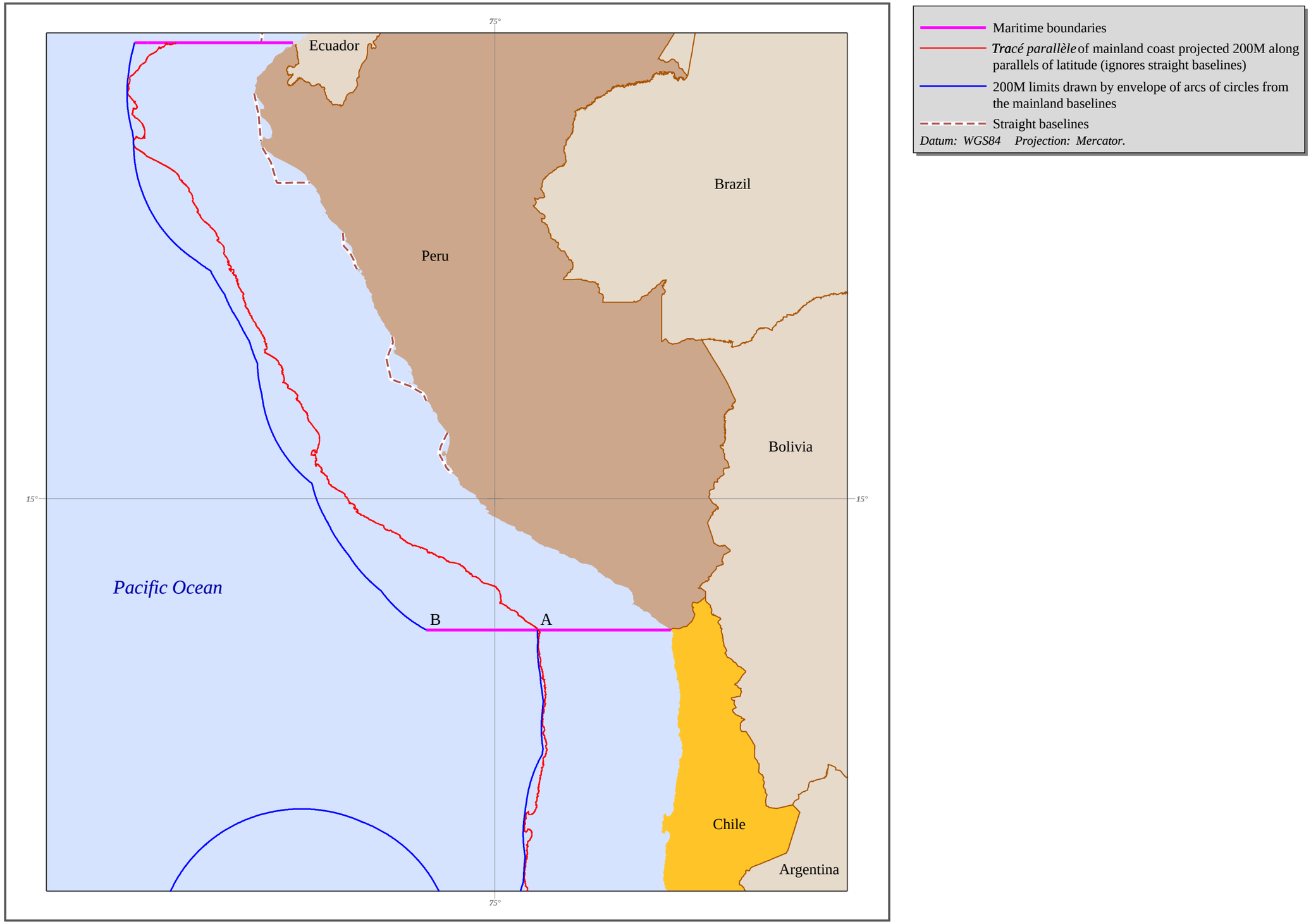


- Line X-Y is 200M in length and follows a parallel of latitude.
- Point X is the north-western extreme of Chile's maritime zones.
- Point X is also the south-western extreme of Peru's maritime zone as claimed in 1947 and 1952.
- Line A-B is the *tracé parallèle* of coastline C-D.

Prepared by the Ministry of Foreign Affairs of Chile

Figure 9

Comparison of the outer limits of maritime zones of Chile and Peru using *tracé parallèle* and an envelope of arcs of circles



Prepared for the Ministry of Foreign Affairs, Chile, by UKHO Law of the Sea Consultancy

2.121. Peru now also asserts that its Petroleum Law of 1952 used the envelope-of-arcs-of-circles method to measure the outward limit of Peru's continental shelf. The Petroleum Law does not say so. It refers to "an imaginary line drawn seaward at a constant distance of 200 miles from the low-water line along the continental coast"[292]. It does not say that it is to be a constant distance in every direction. The 1947 Supreme Decree and the 1955 Supreme Resolution, which respectively preceded and followed the 1952 Petroleum Law, both used a *tracé parallèle* method in which a line parallel to the coast was created by measuring a constant distance of 200 nautical miles along the parallels of latitude. In a publicly available letter from Peru's Ministry of Defence to Peru's Ministry of Foreign Affairs in November 2000, the Ministry of Defence acknowledged that both the Petroleum Law of 1952 and the Supreme Resolution of 1955 "measur[ed] the 200 miles following the parallels of the points of the coast"[293].

2.122. Whatever view may be taken as to the method that Peru was using in the 1950s, or today, ultimately the method affects the seaward extent of Peru's "maritime dominion" but it does not and cannot affect the lateral boundary with Chile. Peru's 1955 Supreme Resolution states that "[i]n accordance with clause IV of the Declaration of Santiago, the said line [the seaward limit of the maritime zone] *may not* extend beyond that of the corresponding parallel at the point where the frontier of Peru reaches the sea"[294] (emphasis added). Peru

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[292] Law No. 11780 of 12 March 1952: Petroleum Law, **Annex 8 to the Memorial**, Art. 14.

[293] "Apreciaciones a Convención de las Naciones Unidas sobre el Derecho del Mar", appearing as Annex (1) to Letter No. 4626 SGMD-D of 21 November 2000 from the Minister of Defence of Peru to the Minister of Foreign Affairs of Peru, **Annex 189**, para. (m). The Minister of Defence considered that this method of measurement was an "error", which could be corrected by ratifying UNCLOS and by the enactment of new domestic legislation.

[294] 1955 Supreme Resolution, **Annex 9 to the Memorial**, second operative paragraph.

understood that the parallel of latitude agreed in Article IV of the Santiago Declaration, and incorporated by Peru in the 1955 Supreme Resolution, represented a limit to the south of which Peru could make no claim.

2.123. To conclude on this point, the Santiago Declaration was not prescriptive about the method to be used to measure the seaward limit of each State's maritime zone. Indeed, the seaward limit could be extended farther than 200M, provided always that the boundary parallel was respected. Peru says that its maritime claim is now made on an envelope-of-arcs-of-circles basis. Chile does not object to that claim in so far as it concerns areas only to the north of the parallel of latitude passing through Hito No. 1. The change in the way in which Peru measures the outer limit of its maritime zone means that northward of the Hito No. 1 parallel of latitude Peru enjoys a larger maritime space than it did in 1952 when it used the *tracé parallèle* method. This can be seen from **Figure 9**. Point A on that diagram is the point at which the outer limits of the maritime zones of the two States met when both used the *tracé parallèle* method. Those outer limits are represented by the red line. Point B represents the point at which Peru's outer limit, measured using an envelope of arcs of circles, meets the parallel of latitude passing through Hito No. 1. The envelopes of arcs of circles now adopted by the two States are depicted by the blue line. But however far Peru extends its "maritime dominion" seaward, by whatever method, its claim is limited in the south by the agreed parallel of latitude.

D. THE *ALTA MAR* AREA IS NOT A UNIQUE SITUATION

2.124. There are other cases where one State's entitlement or claim is cut short by a delimitation line even though another State does not have the same type of maritime zone, or any zone at all, on the other side of that line. Such situations can arise in delimitations which are not made fully in accordance with a line of equidistance.

2.125. Lines of this kind have been both determined by international tribunals[295] and agreed by States. Notably, such a line was agreed between Argentina and Chile in 1984. Two segments of that delimitation line follow meridians of longitude, and the segment between them follows a parallel of latitude. In that delimitation, Chile conceded an area almost as large as the *alta mar* area now claimed by Peru, to which Chile would otherwise have been entitled by application of a 200M distance criterion[296]. The sketch-map at **Figure 10** illustrates the position.

E. THE PRESENCIAL SEA IS IRRELEVANT TO THIS CASE

2.126. Peru asserts in Chapter VII of its Memorial that Chile's presencial sea somehow interferes with Peru's alleged sovereign rights in the *alta mar* area. Never before has Peru expressed any concern about the presencial sea. The presencial sea is of no significance for the lateral boundary between the Parties. Peru's present claim to an area of high seas south of the parallel of latitude of Hito No. 1 is excluded by the agreement of the Parties in the Santiago Declaration. It is not excluded by the presencial sea. Nevertheless, for the sake of completeness a brief account of the presencial sea is provided here.

2.127. The presencial sea was described in a 1991 amendment to Chile's General Law on Fisheries and Aquaculture as–

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295 See, e.g., *The Grisbådarna Case* (*Norway v. Sweden*), Award, 23 October 1909, United Nations Reports of International Arbitral Awards (***RIAA***), Vol. XI, p. 147; and *Grisbådarna: primary boundary lines proposed by Sweden and Norway to the Tribunal and the boundary established by the Tribunal*, Figure submitted by the United States in *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Canada/United States of America*), *I.C.J. Pleadings, Vol. VIII*, Map No. 30 (with annotations added by Chile), **Annex 217**.

296 See Treaty of Peace and Friendship between Chile and Argentina, signed at Vatican City on 29 November 1984, 1399 *UNTS* 89 (entered into force on 2 May 1985), **Annex 15**, Art. 7.

> "that portion of the *high seas*, existing for the international community, between the limit of our continental exclusive economic zone and the meridian which, crossing through the western border of the continental shelf of Easter Island, extends from the parallel of boundary marker No. 1 of the international border line separating Chile and Peru, to the South Pole"[297]. (Emphasis added.)

Chile has never received any protest from Peru concerning this legislation.

2.128. As the 1991 Law makes clear, the presencial sea is an area of high seas. The *alta mar* area is also part of the high seas. Chile and Peru, and all other members of the international community, have equal access to this area.

2.129. The concept of the presencial sea is further explained in Chile's *Defence White Book* of 2002. The presencial sea–

> "expresses the wish [of Chile] to have a presence in this area of high seas for the purpose of projecting maritime interests with respect to the rest of the international community, monitoring the environment and preserving marine resources, with *unrestricted observance of International Law*"[298]. (Emphasis added.)

2.130. UNCLOS expressly provides for coastal States to take measures in areas of the high seas adjacent to their EEZ concerning the conservation and management of straddling fish stocks[299], highly migratory species[300] and marine

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297 Law No. 19,080 of 28 August 1991, Amendment to Law No. 18,892 General Law on Fisheries and Aquaculture (the ***1991 Law***), **Annex 38 to the Memorial**, Art. 1.

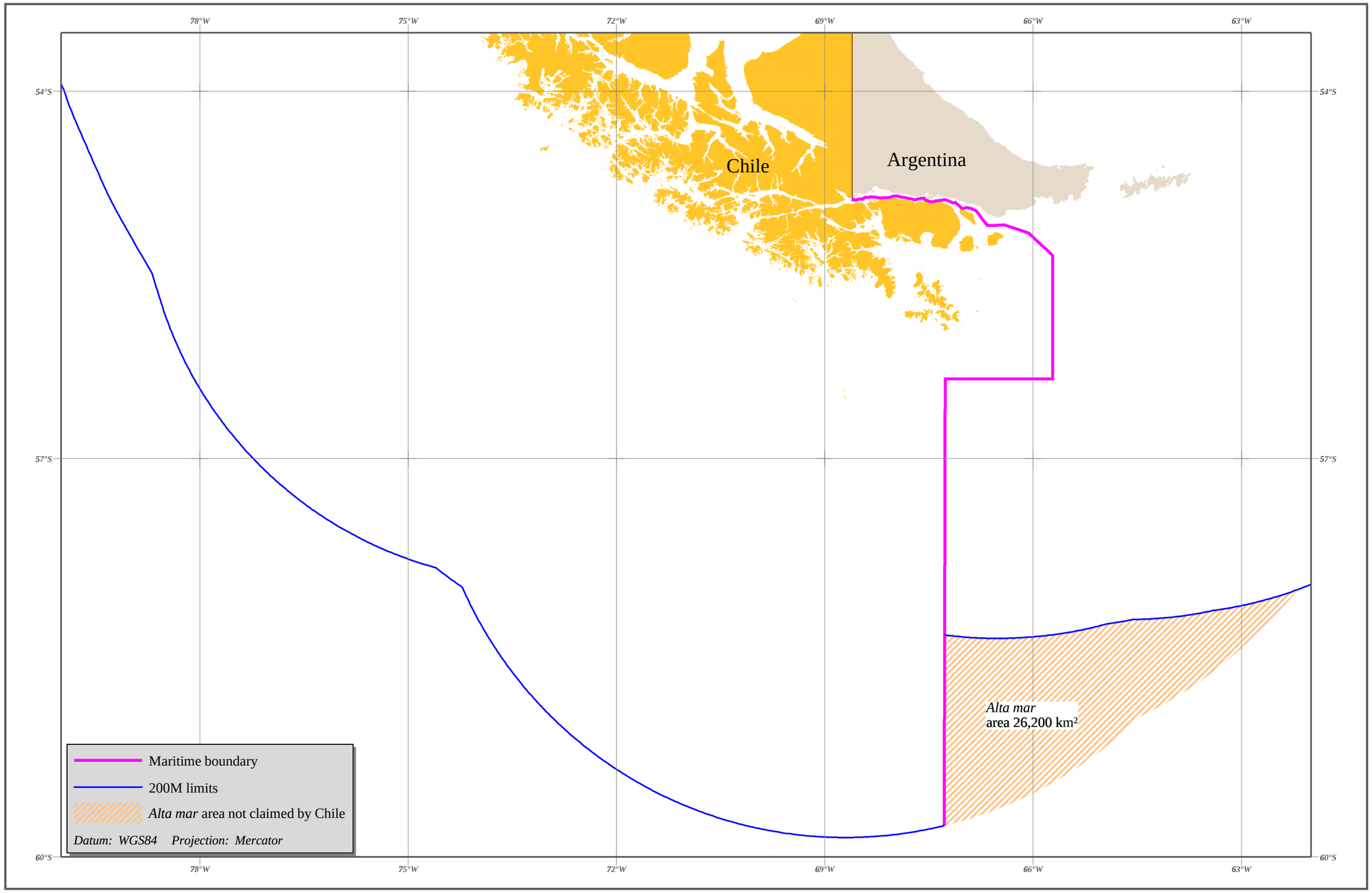
298 Ministry of National Defence of Chile, *Libro de la Defensa Nacional de Chile*, 2002, **Annex 153**, p. 32.

299 See UNCLOS, Art. 63(2).

300 *Ibid*., Art. 64.

Figure 10

Alta mar area arising from the agreed maritime boundary between Chile and Argentina



The boundary is depicted according to the Treaty of Peace and Friendship between Chile and Argentina, signed at Vatican City on 29 November 1984, 1399 UNTS 89 (entered into force 2 May 1985).

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mammals[301] in the circumstances set forth in the relevant articles. The right of all States for their nationals to engage in fishing on the high seas is, as Article 116 of UNCLOS provides, "subject to. . .the rights and duties as well as the interests of coastal States provided for, *inter alia*, in article 63, paragraph 2 and articles 64 to 67".

2.131. Peru, too, takes such measures. Article 7 of Peru's General Law on Fisheries of 1992 states that the regulations there were adopted–

> "to [ensure] the conservation and rational exploitation of the hydrobiological resources in jurisdictional waters, can be applied beyond 200 nautical miles, to those multizonal resources that migrate to adjacent waters or that proceed from these towards the coast due to their feeding association with other marine resources or due to their correspondence to mating or breeding habitats."[302]

2.132. The Agreement on the Protection of the Marine Environment and the Coastal Area of the South-East Pacific, which was concluded under the aegis of the CPPS and which came into force in 1986 for Chile and 1988 for Peru, provides in Article 1 that:

> "The sphere of application of this Agreement shall be the maritime area and the coastal area of the South-East Pacific within the maritime zone of sovereignty and jurisdiction of the High Contracting Parties up to the 200-mile limit and, beyond that zone, *the high seas up to a*

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301 See UNCLOS, Art. 65.

302 Law No. 25977 of 7 December 1992, **Annex 18 to the Memorial**, Art. 7. The term "jurisdictional waters" is frequently used in Chilean and Peruvian legislation, as well as in the correspondence between the naval and maritime authorities of the two States. Although not defined, it obviously means the maritime area in which each State exercises sovereignty and/or jurisdiction.

distance within which pollution of the high seas may affect that area."[303] (Emphasis added.)

Article 3 of that Agreement imposes an obligation on the High Contracting Parties "either individually or through bilateral or multilateral cooperation" to "endeavour" to "adopt appropriate measures. . .in order to prevent, reduce and control pollution of the marine environment and coastal area of the South-East Pacific and to ensure appropriate environmental management of natural resources."[304]

2.133. Finally, UNCLOS imposes certain duties that require Chile to maintain a presence on parts of the Pacific Ocean beyond its maritime zones. These include the duty to "co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State"[305], and to "promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements co-operate with neighbouring States for this purpose"[306].

2.134. To conclude on this point, the presencial sea is irrelevant to this case. What prevents Peru's claim to the *alta mar* area is the lateral delimitation agreed

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303 Agreement on the Protection of the Marine Environment and the Coastal Area of the South-East Pacific, signed at Lima on 12 November 1981, 1648 *UNTS* 3 (entered into force on 19 May 1986), **Annex 12**, Art. 1. Activities beyond their 200M limits are also envisaged by Chile and Peru in the Protocol on the Programme for Regional Study of the Phenomenon "El Niño" in the South-East Pacific, signed at Callao on 6 November 1992, **Annex 20**, Art. II.

304 Agreement on the Protection of the Marine Environment and the Coastal Area of the South-East Pacific, signed at Lima on 12 November 1981, 1648 *UNTS* 3 (entered into force on 19 May 1986), **Annex 12**, Art. 3 (1).

305 UNCLOS, Art. 100.

306 *Ibid*., Art. 98(2).

in the Santiago Declaration. The effect of that delimitation is that, regardless of any distance criterion, Peru's "maritime dominion" is precluded from wrapping around Chile's EEZ and subsuming the international waters and airspace beyond the outer limit of Chile's EEZ.

Section 6. Benefits of the Santiago Declaration to Peru

2.135. Peru cannot rely on the Santiago Declaration for its maritime zone whilst seeking to disavow the delimitation agreed in that treaty. For that reason it is appropriate to outline the considerable benefits that the Santiago Declaration has brought to Peru, along with Chile and Ecuador.

2.136. The parties to the Santiago Declaration gained considerable economic and political benefits from their agreement. Peru's claim to exclusive sovereignty and jurisdiction over the ocean to a minimum distance of 200 nautical miles off its coast facilitated its development of one of the world's largest fisheries industries.

2.137. The size of Peru's catch peaked in 1970, and was then the world's largest, at 12,467,900 metric tonnes. That was more than five million tonnes (or approximately 72%) greater than the nearest rival, Japan, and more than ten million tonnes (or approximately 700%) greater than the total catch of the United States of America[307].

2.138. From 1960 to 1970, the magnitude of Peru's catch varied between 12.9% and 23.7% of the world's total catch. By contrast, in 1952 Peru's catch had been just 106,600 tonnes, which was a fraction of one percent of the world's

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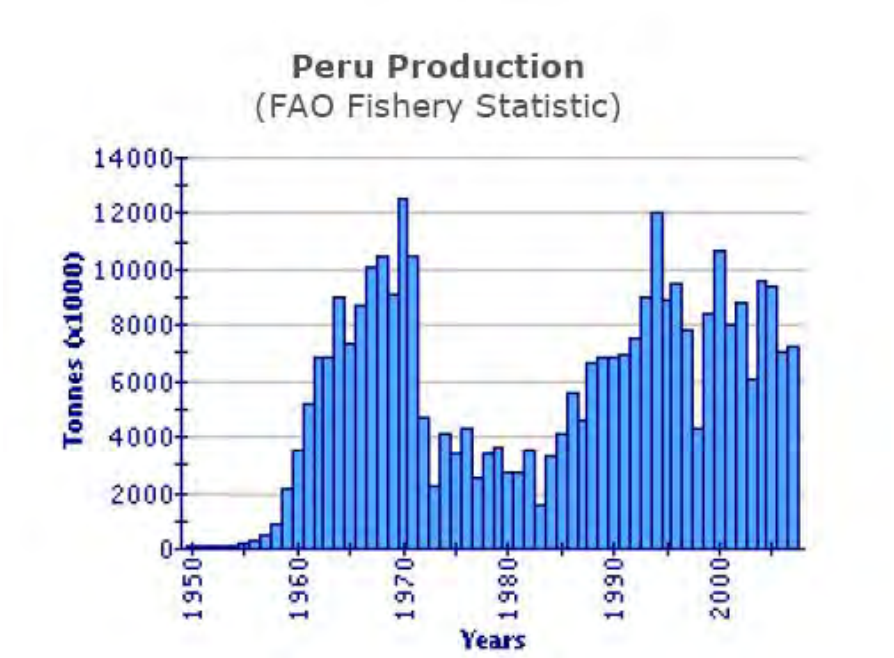
[307] See Food and Agriculture Organization (***FAO***), Statistical Database, *World Catch in 1970 by Country*, <http://www.fao.org/fishery/statistics/global-aquaculture-production/query/en> accessed on 28 August 2009, **Annex 320**.

total catch[308]. The variation in Peru's production over time is depicted in the following chart[309].



2.139. The size of Peru's catch remains significant to this day. It is currently the second largest in the world, as the following chart shows[310].

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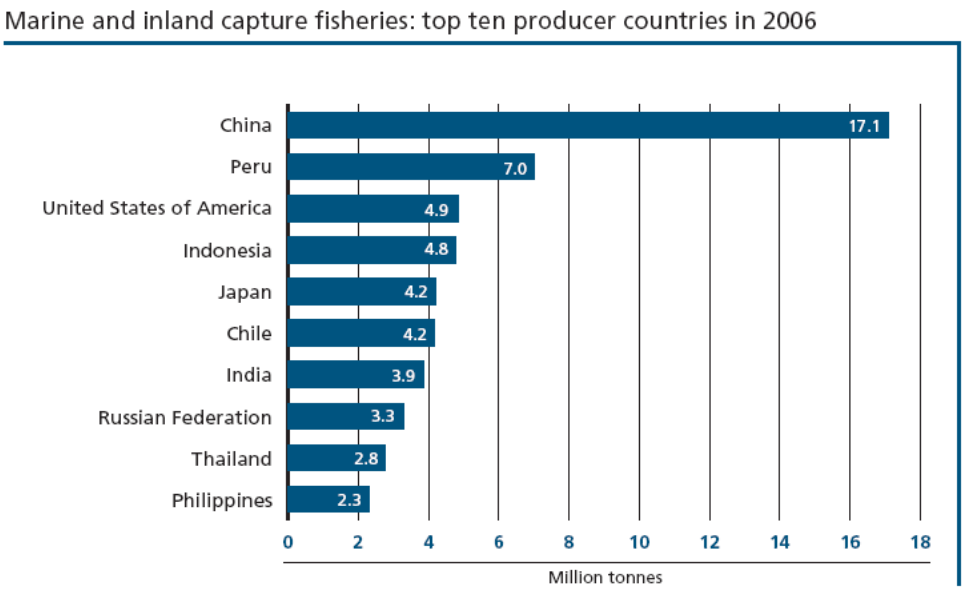
308 See FAO, Statistical Database, *World Catch by Year and by Country*, <http://www.fao.org/fishery/statistics/global-aquaculture-production/query/en> accessed on 10 November 2009, **Annex 320**.

309 FAO, Statistical Database, *Peru – Production by Year*, <http://www.fao.org/fishery/countrysector/FI-CP_PE/3/en> accessed on 4 February 2010.

310 FAO, *The State of World Fisheries and Aquaculture 2008*, <ftp://ftp.fao.org/docrep/fao/011/i0250e/i0250e.pdf> accessed on 4 February 2010, p. 11.



2.140. Chile's catch also became significant over the same period, although it has always been smaller than Peru's. In 1952 Chile's catch was just 95,300 tonnes[311]. By 1970 it amounted to 1,101,200 tonnes, or approximately 8% of Peru's catch of the same year. Chile currently has the sixth-largest catch in the world, as shown in the chart at paragraph 2.139 above.

2.141. The benefits for Peru from the Santiago Declaration were not limited to fisheries. In the Santiago Declaration the States claimed "exclusive sovereignty and jurisdiction over the seabed and the subsoil thereof"[312]. Peru has exercised this sovereignty and jurisdiction in respect of the continental shelf, notably for exploration and extraction of hydrocarbons in the northern part of its maritime dominion. For example, in 1973 Peru produced 25.7 million barrels of

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311 FAO, Statistical Database, *Chile Production by Year*, <http://www.fao.org/fishery/statistics/global-aquaculture-production/query/en> accessed on 28 October 2009, **Annex 320**.

312 Santiago Declaration, **Annex 47 to the Memorial**, Art. III.

oil, 48.4% of which came from its continental shelf[313]. In 2008 Peru's production was 28 million barrels, 17.1% of it from the continental shelf[314].

2.142. Peru has acknowledged the importance of the Santiago Declaration maritime-zone entitlement to Peru's economy in general and its fishing industry in particular. In 1970 the Peruvian Foreign Minister, Major-General Edgardo Mercado Jarrín, gave a speech to the diplomatic corps accredited to Peru titled "Maritime Sovereignty: Basis for the Peruvian Position" in which he explained that:

> "Since 1964, Peru has become the first fishing nation in the world due to the volume of its catch. In 1968, of the 64 million tons of production worldwide, of which 14 were produced by Latin-American countries, Peru caught 10.4 million (16.7%), of which 2.4 million were exported for a value of 232 million dollars, or 30% of the total foreign currency brought in from national exportation.
>
> Although currently this production comes almost entirely from the harvesting of anchovy, which is reserved for Peruvian fishermen, this reservation has been possible thanks to the exercise of national jurisdiction. If Peru had not extended its sovereignty beyond 3 or 12 miles, foreign boats would have been able to exploit that resource as they wish, destroying the local fishing industry. The damage to the economy and national income would be disastrous and would impact on the well-being of the population, whose

313 See E. Ferrero Costa, "Fundamento de la Soberanía Marítima del Perú Hasta las 200 Millas", Pontificia Universidad Católica del Perú, *Derecho*, No. 32, 1974, **Annex 261**, p. 47.

314 See Perupetro, *Estadística Petrolera 2008*, <http://www.perupetro.com.pe/downloads/Estadistica%202008.pdf>, **Annex 318**.

> low standard of living is the country's most pressing problem."[315]

2.143. The exclusion of unauthorized foreign fleets was to facilitate the development of the fishing industries of Chile, Ecuador and Peru. Peru policed the exclusionary aspect of its claim. For example, between 1961 and 1969, Peru was reported to have seized 74 vessels flying the flag of the United States of America[316]. The CPPS compiled non-exhaustive statistics on national enforcement actions in the respective maritime zones of Chile, Ecuador and Peru over the period 1952-1971[317]. For that period, the CPPS reported 53 infractions of the Peruvian maritime zone by foreign vessels[318], of which 34 resulted in the imposition of a fine by the Peruvian Government[319]. The fines generated more than US$3 million in revenue for Peru[320] and, more importantly for present purposes, were an exercise of Peruvian sovereignty enforcing Peru's control over its "maritime dominion" and facilitating the development of the Peruvian fishing industry to its present strength.

2.144. An early and well-known example of Peruvian enforcement of its "maritime dominion" vis-à-vis foreign vessels was the incident involving five vessels in the Onassis whaling fleet. Most of the ships were flying the Panamanian flag and were arrested more than 100M off the Peruvian coast in

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315 E. Mercado Jarrín, "Maritime Sovereignty: Basis for the Peruvian Position", speech delivered on 11 May 1970 in Lima at a conference organized by the Peruvian Ministry of Foreign Affairs for the Diplomatic Corps accredited to Peru, **Annex 168**.

316 See T. Wolff, *Peruvian-United States Relations over Maritime Fishing*, Law of the Sea Institute University of Rhode Island, *Occasional Paper No. 4*, 1970, **Annex 315**, p. 8 (endnote 18, citing *The Los Angeles Times*, 15 February 1969).

317 See CPPS Secretary-General, *Infracciones en la Zona Marítima del Pacífico Sur*, January 1972, **Annex 240**.

318 *Ibid*., p. 49.

319 *Ibid*.

320 *Ibid*., p. 55.

1954. The Peruvian Government knew in advance that the ships intended to engage in whaling and fishing off the Peruvian coast[321]. A note of 13 August 1954 to Panama's Minister of Foreign Affairs gave notice that Peru's sovereignty and jurisdiction required vessels of all nations to abstain from hunting or fishing within its maritime zone without authorization[322]. Peru explained that its maritime claim was to be found in its 1947 Supreme Decree, the Santiago Declaration and the Petroleum Law of 1952[323].

2.145. When the Onassis ships nonetheless proceeded to engage in whaling and fishing without authorization, they were arrested by the Peruvian Navy, with assistance from the Peruvian Air Force. At the time of the arrests Peru issued an official communiqué stating that the Onassis vessels had "invaded Peruvian territorial waters"[324]. The next day proceedings were commenced against the masters of the vessels before the Harbour Master of Paita. In a well-publicized decision of 26 November 1954 the Harbour Master fined the vessels and their owners for "invading Peruvian jurisdictional waters without a permit"[325]. The Harbour Master expressly relied on the 1947 Peruvian Supreme Decree and the Santiago Declaration of 1952 as bases for his decision[326]. A few months later, the Peruvian Government addressed notes to Chile and Ecuador, formally bringing to the attention of the other States parties to the Santiago Declaration the

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321 See Note No. 5-20-M/18 of 13 August 1954 from the Peruvian Embassy in Panama to the Minister of Foreign Affairs of Panama, reproduced in the *Memoria* of the Minister of Foreign Affairs of Peru (28 July 1954 – 28 July 1955), **Annex 61**.

322 Note No. 5-20-M/18 of 13 August 1954 from the Peruvian Embassy in Panama to the Minister of Foreign Affairs of Panama, reproduced in the *Memoria* of the Minister of Foreign Affairs of Peru (28 July 1954 – 28 July 1955), **Annex 61**.

323 *Ibid*.

324 Official Communiqué of 16 November 1954 by the Directorate-General of Information of Peru, **Annex 162**.

325 Decision of the Harbour Master of Paita of 26 November 1954 in the matter of the offences in the Maritime Zone of Peru, **Annex 163**.

326 *Ibid*.

decision in the *Onassis* matter together with two other decisions enforcing Peru's maritime zone[327].

2.146. Dr. García Sayán of Peru referred to the enforcement of Peru's maritime claim in the *Onassis* case in his explanation of that claim at the First United Nations Conference on the Law of the Sea in 1958. He said:

> "Modern fishing enterprises had become so vast and efficient and had so great a capacity for destruction that the concepts of the past were no longer applicable. That was why in 1954 the Peruvian authorities had detained the larger part of a foreign-owned whaling fleet consisting of a factory ship and fifteen other vessels capable of capturing 15,000 whales per season. Such fleets from other continents had no right to prejudice the coastal states, which were by nature entitled to those resources."[328]

2.147. On the political plane, the Santiago Declaration was the basis of regional solidarity and mutual political support in advocating international acceptance of the maritime claims first made by Chile and Peru in 1947, which had met with protest from several States.

2.148. Throughout the lengthy international negotiations that ultimately led to the acceptance of the EEZ and a distance-based criterion for the continental shelf in UNCLOS, the Santiago Declaration was relied upon by the CPPS States as a multilateral precedent supporting the legitimacy of extended maritime zones. To take one of many examples, Chile, Colombia (which had by then become a

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327 Note No. 5-4-M/29 of 20 April 1955 from the Peruvian Embassy in Chile to the Ministry of Foreign Affairs of Chile, **Annex 69**.

328 United Nations, Summary Record of the 9th meeting of the Second Committee of the United Nations Conference on the Law of the Sea, 13 March 1958, 3.15 p.m., document A/CONF.13/40, **Annex 101 to the Memorial**, p. 18, para. 38.

member of the CPPS), Ecuador and Peru sent a note verbale to the President of the Third Conference on the Law of the Sea transmitting the Cali Declaration of 1981. The Cali Declaration stated that–

> "the purposes and principles stated in the Santiago Declaration of 18 August 1952 were the forerunners of the policy of decolonizing the seas and reformulating the law of the sea, with a view to the establishment of an equitable and just legal system that will take particular account of the interests of the developing countries"[329].

2.149. Although Peru now seeks to unsettle its maritime boundary with Chile, the existence of that agreed boundary has in itself been a benefit to Peru. The Court's remark in the *Case concerning the Temple of Preah Vihear* is also apposite in the present case: Peru has enjoyed "the benefit of a stable frontier"[330]. Peru has enforced that frontier against foreign vessels and aircraft and has controlled its cartographic depiction, as described in Chapter III below. Peru cannot now resile from one aspect of the Santiago Declaration, namely its maritime boundary with Chile, after having obtained those benefits from the Declaration as a whole.

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329 Note verbale of 9 March 1981 from the representatives of Chile, Colombia, Ecuador and Peru to the President of the Conference, transmitting the Cali Declaration of 24 January 1981, translated by the United Nations, document A/CONF.62/108, **Annex 49**, p. 93. Also see the Letter of 20 August 1979 from the heads of delegation of Chile, Colombia, Ecuador and Peru to the President of the Third United Nations Conference on the Law of the Sea, translated and reproduced by the United Nations, document A/CONF.62/85, **Annex 46**.

330 *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 32.

Section 7. Contemporaneous International Law: The Work of the ILC and the *North Sea Continental Shelf* Cases

2.150. As noted, delimitation of maritime zones of 200 nautical miles or more was a novel issue in 1952. Delimitation was itself a nascent discipline, its importance increasing as more extensive maritime zones were becoming gradually current in international practice. Viewed in light of the stage of development of the law at the time, it is unremarkable that in the Santiago Declaration the States parties chose to use a parallel of latitude as their maritime boundary. Equidistance had no special status as a methodology of delimitation. In the *North Sea Continental Shelf* cases in 1969 the Court observed that a "striking feature" of the "early and middle stages" of the consideration by the ILC of delimitation of the continental shelf by adjacent States, which lasted from 1949 to 1956, was that–

> "not only was the notion of equidistance never considered from the standpoint of its having *a priori* a character of inherent necessity: it was never given any special prominence at all, and certainly no priority. . . It was not in fact until after the matter had been referred to a committee of hydrographical experts, which reported in 1953, that the equidistance principle began to take precedence over other possibilities"[331].

2.151. Discussion of maritime delimitation in the ILC proceeded on the basis that delimitation was to be effected by agreement and that existing agreements were to be preserved[332]. These paramount rules remain good law today, as

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331 *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 34, para. 50.

332 See, e.g., United Nations, *Report of the ILC to the United Nations General Assembly* (2nd session of the ILC (1950)), document A/CN.4/34, **Annex 228**, para. 199; United Nations, *Report of the ILC to the United Nations General Assembly* (3rd session of the ILC (1951)), document A/CN.4/48 and Corr. 1&2, "Draft Articles on the Continental Shelf and Related Subjects", Draft Art. 7, **Annex 230**, p. 143; United

explained at paragraphs 4.70-4.80 below. The discussion in the ILC concerned the applicable rules in the absence of any agreement, and that discussion may be helpful to bear in mind in appreciating the general context in which the Parties were operating in the late-1940s to the mid-1950s.

2.152. In its first report to the United Nations General Assembly on its work on the law of the sea, in 1950, the ILC stated that "where two or more neighbouring states were interested in the submarine area of the continental shelf outside their territorial waters, boundaries should be delimited"[333]. The ILC did not propose any specific guidelines or rules for such delimitations. In his first report to the ILC on the law of the sea, also in 1950, Special Rapporteur François referred to the uncertainty concerning "la répartition entre deux Etats dans le cas où le plateau continental leur est commun" and added: "toute directive pour la délimitation faisant défaut, les proclamations se bornent à renvoyer cette question à des accords entre les pays intéressés"[334]. This was consistent with the Truman Proclamation on the continental shelf of 1945, which was explicitly mentioned as a precedent in both the Chilean and the Peruvian unilateral proclamations of 1947[335]. The Truman Proclamation postulated that, in the case of adjacent continental shelves, "the boundary shall be determined by the United

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Nations, *Report of the ILC to the United Nations General Assembly* (5th session of the ILC (1953)), document A/CN.4/76, "Chapter III on the Regime of the High Seas", Draft Art. 7, **Annex 235**, p. 213; United Nations, *Report of the ILC to the United Nations General Assembly* (8th session of the ILC (1956)), document A/CN.4/104, "Articles Concerning the Law of the Sea", Draft Art. 72, **Annex 236**, p. 300.

333 United Nations, *Report of the ILC to the United Nations General Assembly* (2nd session of the ILC (1950)), document A/CN.4/34, **Annex 228**, p. 384, para. 199.

334 United Nations, *Report of the Special Rapporteur to the ILC* (2nd session of the ILC (1950)), document A/CN.4/17, **Annex 226**, p. 50, para. 116.

335 See 1947 Peruvian Supreme Decree, **Annex 6 to the Memorial**, fifth recital; 1947 Chilean Declaration, **Annex 27 to the Memorial**, first recital.

States and the State concerned in accordance with equitable principles"[336]. In the second session of the ILC, Judge Hudson expressed the view that "[c]ustom and theory gave no enlightenment on the subject" of delimitation of the continental shelf, and "the question should therefore be set aside. . . The States concerned must come to an agreement."[337] In its sessions in 1950, 1951 and 1952, the ILC discussed a number of possible methods for delimiting the territorial sea and continental shelf in the absence of agreement. It could not, however, agree on any rule, or even any generally applicable guideline. All that could be concluded was that "boundaries should be fixed by agreements among the States concerned. It is not feasible to lay down any general rule which States should follow"[338].

2.153. The Special Rapporteur reviewed the practice of States concerning the territorial sea, including that of Bulgaria, which in October 1951 had issued a decree indicating that "le parallèle géographique du point où la frontière terrestre touche la côte délimite les eaux territoriales bulgares et celles des Etats voisins"[339]. The Special Rapporteur expressed the view that: "[C]ette règle ne saurait toutefois être considérée que comme une solution pour un cas spécial"[340]. He suggested that the ILC could recommend a median-line methodology in principle, subject to adjustment according to any special circumstances[341]. His

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336 Truman Proclamation on the Continental Shelf, United States Presidential Proclamation No. 2667 of 28 September 1945, **Annex 88 to the Memorial**.

337 United Nations, *Summary Record of the 69th meeting of the ILC* (4th session of the ILC (1952)), document A/CN.4/SR.69, **Annex 229**, paras 39 and 42.

338 United Nations, *Report of the ILC to the United Nations General Assembly* (3rd session of the ILC (1951)), document A/CN.4/48 and Corr. 1&2, **Annex 230**, p. 143, commentary to Draft Art. 7.

339 United Nations, *Report of the Special Rapporteur* (4th session of the ILC (1952)), document A/CN.4/53(F), Commentary to Draft Article 13 on the Regime of the Territorial Sea, **Annex 231**, p. 38, para. 3.

340 *Ibid*.

341 *Ibid*., p. 38, para. 4.

proposal was rejected by the ILC. Dr. Zourek (later the First Vice-Chairman of the ILC) stated in that discussion that–

> "the method of delimiting the territorial sea of two adjacent States adopted by the Bulgarian government in its decree of 10 October 1951 had the great virtue of simplicity, and would be effective in preventing disputes.
>
> The special rapporteur seemed to be in favour of the method of the median line, but it was clear from the discussion that it could not be applicable to all cases and was therefore unacceptable"[342].

2.154. Following the lack of consensus about delimitation methods, the ILC convened a committee of technical experts, which met in April 1953. That committee reported that for both the territorial sea and the continental shelf, if a delimitation had not already been agreed in accordance with another method, then the equidistance method should be applied[343]. "In this almost impromptu, and certainly contingent manner was the principle of equidistance for the delimitation of continental shelf boundaries propounded."[344]

2.155. In addition to convening the technical committee, the ILC had requested States to submit observations on maritime delimitation. Observations were received from twelve States in May 1953 (but not from Chile, Ecuador or Peru). Even that limited number of observations revealed the diversity of

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342 United Nations, *Summary Record of the 171st meeting of the ILC* (4th session of the ILC (1952)), document A/CN.4/SR.171, **Annex 232**, p. 183, paras 26-27.

343 See United Nations, "Rapport du Comité d'experts sur certaines questions d'ordre technique concernant la mer territoriale", *Annex to the Second Report of the Special Rapporteur on the Regime of the Territorial Sea* (5th session of the ILC (1953)), document A/CN.4/61/Add.1, **Annex 233**, p. 79, para. VII.

344 *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 35, para. 53.

practice. France described its territorial-sea delimitation with Spain in the Mediterranean Sea as follows:

> "[É]tant donné que la côte franco-espagnole est orientée nord-sud, la limite des eaux territoriales qui a été adoptée en pratique par les agents embarqués des douanes comme par ceux de l'inscription maritime est celle du parallèle passant par la grotte susvisée [grotte de la Cova Foradada qui fixe la démarcation à terre par l'acte de délimitation, du 11 juillet 1868]. Un piquet blanc matérialise à terre le point exact où passe ce parallèle."[345]

2.156. The French submission shows that Chile and Peru were not the only States that found the use of a parallel convenient, nor the only States that used a land-boundary marker on the coast as a reference point for that parallel (as is the case for Hito No. 1; see paragraph 3.44 below).

2.157. When the ILC reported to the General Assembly in 1956 it set forth multiple methods of delimitation that could be used in the absence of agreement. Those methods included:

(a) an extension of the direction of a segment of the land-boundary line;

(b) a line at right angles to the coast at the point of intersection of the land boundary and the coastline;

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[345] United Nations, *Information and Observations Submitted by Governments Regarding the Question of the Delimitation of the Territorial Sea of Two Adjacent States* (5th session of the ILC (1953)), document A/CN.4/71 and Add. 1-2, **Annex 234**, p. 89.

(c) "the geographical parallel passing through the point at which the land frontier meets the coast" — i.e. the same method as the one used in Article IV of the Santiago Declaration;

(d) a line drawn at right angles to the general direction of the coastline; and

(e) "the median line. . .drawn according to the principle of equidistance"[346].

2.158. The ILC set forth all of these methods as possibilities, but influenced by the work of the technical committee, by the time of the ILC report in 1956, the commentary recommended the median line as "the best solution", so long as it was "very flexibly applied"[347]. The 1956 report of the ILC came after the 1952 Santiago Declaration and the confirmation of the existence of an agreed boundary in the Lima Agreement of 1954.

2.159. In the 1958 Geneva Convention on the Continental Shelf the primary rule was expressed as being that boundaries between the continental shelves of adjacent States "shall be determined by agreement between them". Failing agreement, equidistance was adopted as the preferred methodology, subject to any special circumstances justifying a different boundary. In full, Article 6(2) of the 1958 Geneva Convention on the Continental Shelf provided that:

> "Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the

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346 United Nations, *Report of the ILC to the United Nations General Assembly* (8th session of the ILC (1956)), document A/CN.4/104, Commentary to Draft Article 14 on the Delimitation of Territorial Sea of Two Adjacent Seas, **Annex 236**, p. 272.

347 *Ibid*.

> continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured."[348]

2.160. In the *North Sea Continental Shelf* cases the Court held that the 1958 Geneva Convention on the Continental Shelf "did not embody or crystallize any pre-existing or emergent rule of customary law, according to which the delimitation of continental shelf areas between adjacent States must, unless the Parties otherwise agree, be carried out on an equidistance-special circumstances basis."[349] Equidistance, as modified by any special circumstances, was one delimitation methodology, favoured in the 1958 Geneva Convention, but not having any special status in customary international law. Although both Chile and Peru signed the 1958 Convention, it never entered into force for either State, as neither of them ratified it.

2.161. The rule of customary international law was stated in the *North Sea Continental Shelf* cases as follows:

> "[D]elimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without

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348 Convention on the Continental Shelf, signed at Geneva on 29 April 1958, 499 *UNTS* 311 (entered into force on 10 June 1964), Art. 6(2).

349 *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 41, para. 69.

> encroachment on the natural prolongation of the land territory of the other"[350].

2.162. Two points arise for present purposes from the *North Sea Continental Shelf* cases. First, the primary rule has always been that delimitation is to occur by agreement. The work of the ILC, the 1958 Geneva Convention on the Continental Shelf and the Court's 1969 judgment in the *North Sea Continental Shelf* cases are all clear on that point. Secondly, at the time that the Parties concluded the Santiago Declaration, and still when the *North Sea Continental Shelf* cases were decided in 1969, the equidistance methodology was not part of any rule of customary international law.

2.163. The President of the Court that decided the *North Sea Continental Shelf* cases was Judge Bustamante y Rivero, who as Peru's President had issued the 1947 Supreme Decree. He agreed on both of the points above. In his Separate Opinion, he referred to the shape of the North Sea, observing that the "natural convergence of the lateral delimitation lines of adjacent shelves belonging to such seas in fact precludes the possibility of giving to those lines parallel directions and, in consequence, of obtaining shelves of a rectangular shape."[351] Although such a method could not be followed in the North Sea, President Bustamante y Rivero clearly thought that continental shelves of rectangular shape, delimited by parallel lines, were perfectly normal, and even to be preferred. In both its written pleadings[352] and the oral pleadings of Professors

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350 *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 53, para. 101(C)(1).

351 Separate opinion of President Bustamante y Rivero, *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 61, para. 6(b).

352 See *North Sea Continental Shelf (Federal Republic of Germany/Denmark)*, Reply submitted by the Government of the Federal Republic of Germany on 31 May 1968, Annex, "International and inter-state Agreements concerning the Delimitation of Continental Shelves and Territorial Waters", Chile-Peru-Ecuador, *I.C.J. Pleadings*, *Vol. I*, pp. 437-438.

Oda[353] and Jaenicke[354], Germany had relied on the delimitation between Chile and Peru effected by the Santiago Declaration as an example of an agreed delimitation that did not follow an equidistance methodology. In his oral pleadings for Denmark and the Netherlands, Sir Humphrey Waldock accepted that such a delimitation was in place, stating that it was an agreement that applied in particular circumstances[355]. Denmark and the Netherlands had earlier made the same acknowledgement in their written pleadings[356]. In his Separate Opinion President Bustamante y Rivero did not dissent from, or adversely comment on, these references to the Santiago Declaration as a delimitation agreement between Chile and Peru using a parallel of latitude.

Section 8. The Parties' Maritime Zones

2.164. In the Santiago Declaration the States parties agreed that each of them had exclusive sovereignty and jurisdiction over its own maritime zone. Since reaching that general, all-encompassing agreement, Chile and Peru have exercised their sovereignty and jurisdiction to claim maritime zones of greater specificity. The purpose of this Section is to describe those maritime zones.

2.165. The relevance of the Parties' specific maritime claims to the issue of delimitation is as follows. In the Santiago Declaration the States parties claimed

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353 See *North Sea Continental Shelf (Federal Republic of Germany/Denmark)*, Oral Argument of the Government of the Federal Republic of Germany, 1969, *I.C.J. Pleadings*, *Vol. II*, p. 58.

354 *Ibid*., p. 22.

355 See *North Sea Continental Shelf (Federal Republic of Germany/Denmark)*, Joint Oral Argument of the Kingdom of Denmark and the Kingdom of The Netherlands, 1969, *I.C.J. Pleadings*, *Vol. II*, pp. 101, 112-113 and 258.

356 See *North Sea Continental Shelf (Federal Republic of Germany/Denmark)*, Common Rejoinder Submitted by the Governments of the Kingdom of Denmark and the Kingdom of The Netherlands, 30 August 1968, *I.C.J. Pleadings*, *Vol. I*, p. 496, para. 68.

plenitude of "exclusive sovereignty and jurisdiction". Both Chile and Peru have exercised that sovereignty and jurisdiction, by claiming their own specific maritime zones. Since the Santiago Declaration, Chile has implemented UNCLOS. Peru is not party to UNCLOS and maintains a 200M "maritime dominion". Whatever differences may now exist between the respective maritime zones claimed by the Parties, the plenitude of exclusive sovereignty and jurisdiction which the Parties claimed in the Santiago Declaration was and remains effective *inter se*; and all specific zones which can be claimed in exercise of such sovereignty and jurisdiction have been definitively delimited as between the Parties by an all-encompassing delimitation[357].

A. PERU'S MARITIME ZONE

2.166. Peru has a single undifferentiated maritime zone, the "*dominio marítimo*". The official English translation of Peru's Constitution provided by the Congress of Peru translates this as "maritime dominion"[358]. Neither Peru's Constitution nor relevant legislation refers, in terms, to a continental shelf. Peru does not claim an EEZ. Peru is not party to UNCLOS, which allows for a territorial sea of no more than 12 nautical miles in width[359] and provides for freedom of navigation and overflight beyond that limit.

2.167. Peru started using the term "maritime dominion" prior to the Santiago Declaration. The term appears in Peru's Supreme Decree of 1947[360] and in Article 6 of Supreme Decree No. 21 of 1951 on Regulations of Captaincies and

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357 See, e.g., E. Jiménez de Aréchaga, "South American Maritime Boundaries", in J. I. Charney and L. M. Alexander (eds), *International Maritime Boundaries, Vol. I*, 1993, **Annex 279**, p. 287, who considered the Santiago Declaration to be an "all-purpose delimitation".

358 Political Constitution of Peru of 1993, **Annex 179**, Art. 54.

359 UNCLOS, Art. 3.

360 1947 Peruvian Supreme Decree, **Annex 6 to the Memorial**, final recital.

the National Merchant Navy[361]. It appears again in the Peruvian Constitutions of 1979 and 1993. Replicating Articles 97, 98 and 99 of the 1979 Constitution, Article 54 of Peru's 1993 Constitution[362], at present in force, states that: "The territory of the Republic is inalienable and inviolable." Article 54 then states that "it", i.e., the territory of the Republic, includes the "maritime dominion"[363]. Article 54 goes on to confirm that the "maritime dominion" includes the sea, its seabed and its subsoil, to a distance of 200 nautical miles from Peru's baselines. This Article further states that Peru "exercises sovereignty and jurisdiction on the airspace over its territory and its adjacent sea up to the limit of 200 miles".

2.168. On the basis of these Constitutional provisions the United Nations Division for Ocean Affairs and the Law of the Sea has, from 1986 until the present, listed Peru as claiming a territorial sea of 200 nautical miles[364]. No objection from Peru to that characterization is recorded. A number of publicists have also described Peru's "maritime dominion" as a territorial sea, or as amounting to a territorial sea in substance[365].

2.169. Characterization of Peru's "maritime dominion" as a species of territorial sea is consistent with the position taken by Peru at the Third United

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361 Peruvian Supreme Decree No. 21 of 1951, Regulations of Captaincies and the National Merchant Navy, **Annex 7 to the Memorial**.

362 Political Constitution of Peru of 1993, **Annex 179**, Art. 54.

363 Article 2 of Law No. 28611 of 13 October 2005, General Law of the Environment, also states that "the national territory" includes the "maritime dominion", **Annex 198**.

364 See United Nations Division for Ocean Affairs and the Law of the Sea, *Table of Claims to Maritime jurisdiction*, 2008, **Annex 244**. The tables of claims to maritime jurisdiction for 1986 to 2007 can be found in previous editions of the Law of the Sea Bulletin at: <http://www.un.org/Depts/los/doalos_publications/los_bult.htm>.

365 See, e.g., D. P. O'Connell, *The International Law of the Sea, Vol. I*, 1982, **Annex 298**, p. 571; J. Castañeda, "Les positions des États Latino-Américains", *Actualités du droit de la mer*, 1973, **Annex 256**, p. 159; R. Dupuy and D. Vignes (eds), *A Handbook on the New Law of the Sea*, *Vol. I*, 1991, **Annex 258**, p. 302.

Nations Conference on the Law of the Sea, where Peru emphasized that it exercised "*full* sovereignty and jurisdiction over the seas adjacent to its coast up to a distance of 200 miles"[366] (emphasis added). Peru observed that it–

> "had exercised its sovereignty over a 200-mile zone off its coast for almost 30 years. It had punished law-breakers, faced up to threats and coercive measures, and successfully developed its fishing and related industries. It was not therefore prepared now to renounce its rights or its achievements or to accept the conversion of its national waters into an essentially international zone, in which foreign fishing fleets could exploit the resources for the benefit of wealthier and more powerful nations."[367]

2.170. Peru's "maritime dominion" is on any view more than the aggregation of an EEZ and continental shelf. This is clear from the fact that Peru claims sovereignty over the airspace over the entire 200 nautical mile breadth of its "maritime dominion". If the "maritime dominion" were equivalent to an EEZ, it would create no right for Peru to control overflight[368]. In its Civil Aeronautics Law of 1965, Peru asserted "sole sovereignty over the airspace above its territory and jurisdictional waters within a distance of 200 miles"[369]. At the last stage of

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366 United Nations, *48th Meeting of the Second Session of the Second Committee of the Third United Nations Conference on the Law of the Sea*, 2 May 1975, 3.30 p.m., document A/CONF.62/C.2/SR.48, **Annex 45**, para. 23. Also see United Nations, *45th Meeting of the Second Session of the Second Committee of the Third United Nations Conference on the Law of the Sea*, 28 August 1974, 11.00 a.m., document A/CONF.62/C.2/SR.45, **Annex 44**, para. 20; United Nations, *118th Meeting of the Resumed Eighth Session of the Plenary Meetings of the Third United Nations Conference on the Law of the Sea,* 23 August 1979, 4.35 p.m., document A/CONF.62/SR.118, **Annex 47**, p. 5, para. 13.

367 United Nations, *30th Meeting of the Second Session of the Second Committee of the Third United Nations Conference on the Law of the Sea*, 7 August 1974, 11.10 a.m., document A/CONF.62/C.2/SR.30, **Annex 43**, para. 50.

368 See UNCLOS, Art. 58.

369 Law No. 15720 of 11 November 1965: Law on Civil Aeronautics, **Annex 12 to the Memorial** (translation taken from United Nations Legislative Series, *National*

the Third Conference on the Law of the Sea, Peru's delegate informed the Conference that because the EEZ provisions did not provide for control of airspace to a seaward distance of 200 nautical miles, UNCLOS was in "conflict" with the Peruvian Constitution, and he was therefore voting in favour of UNCLOS only on an *ad referendum* basis[370].

2.171. Peru's Constitutional and legislative claim to the airspace above its entire "maritime dominion" has been enforced in practice. Peru has on a number of occasions interfered with freedom of overflight beyond twelve nautical miles from its coast, and consequently received a series of diplomatic protests from the United States of America[371]. An extreme example occurred on 24 April 1992, when Peruvian fighter planes attacked an unarmed United States aircraft 60 nautical miles off the Peruvian coast. This caused the death of one United States airman, the wounding of two others and the loss of the aircraft[372].

2.172. As recently as 2000, Peru passed legislation re-asserting its "full and exclusive sovereignty over the airspace that covers its territory and adjacent sea, up to the limit of 200 (two hundred) miles, according to the Political Constitution

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Legislation and Treaties Relating to the Law of the Sea, 1974, **Annex 164**). This publication records that this law was provided by Peru to the United Nations.

370 United Nations, *182nd Plenary Meeting of the Third United Nations Conference on the Law of the Sea*, 30 April 1982, 3.20 p.m., document A/CONF.62/SR.182, **Annex 50**, para. 90.

371 See J. A. Roach and R. W. Smith, *United States Responses to Excessive Maritime Claims*, 2nd edn, 1996, **Annex 309**, pp. 371-375.

372 *Ibid*., pp. 374-375; see also the Intervention by United States Senator Pell on freedom of overflight in the Peruvian airspace beyond twelve nautical miles, *United States Congressional Record*, 1995, Vol. 141, **Annex 221**, p. S9196.

of Peru"[373]. This is the zone that Peru would have the Court delimit, and expand to absorb the *alta mar* area, which is part of the high seas.

2.173. Peru's rights in respect of its continental shelf exist *ipso facto* and *ab initio*. No express proclamation is necessary[374]. By contrast, there is no rule that a State enjoys an EEZ without claiming one. Peru has not claimed an EEZ. Peru asserts in its Memorial that it "has consistently claimed an exclusive maritime domain. . ., which is in line with the geographical extension and the purpose of the institution of the EEZ"[375]. Despite this carefully crafted attempt to make its "maritime dominion" sound as much like an EEZ as possible for the purpose of these proceedings, Peru is not prepared to state that its "maritime dominion" is no more than an EEZ by another name. Nor could it make such a statement. Peru's Constitution and its legislative and executive actions, particularly with respect to the airspace above its "maritime dominion", indicate that Peru considers its "maritime dominion" to be more than an EEZ.

2.174. The Santiago Declaration is an international-law instrument cited by Peru as a basis for its "maritime dominion". Article 54 of Peru's 1993 Constitution recites that Peru exercises sovereignty and jurisdiction in its "maritime dominion", "in accordance with the law and treaties ratified by the State". Chief among those treaties is the Santiago Declaration. Indeed, it is specifically cited in Article 7 of a Supreme Decree made pursuant to the Peruvian General Law on Waters of 1969, as follows:

> "The rights of the State indicated by the Law shall be exercised, with respect to the 200-mile maritime zone

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373 Law No. 27261 of 9 May 2000: Law on Civil Aeronautics, **Annex 185**, Art. 3.

374 See *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 22, para. 19; UNCLOS, Art. 77(3).

375 Memorial, para. 3.10.

> adjacent to the coast of the national territory, in conformity with Supreme Decree No. 781 of 12 August 1947 and the Declaration on the Maritime Zone of 18 August 1952, an instrument which has the nature of an international agreement."[376]

2.175. Peru has also cited the Santiago Declaration in actions taken to enforce its claim to sovereignty over its "maritime dominion". A notable example was the incident involving the Onassis fleet, discussed at paragraphs 2.144-2.145 above.

2.176. To conclude on this matter, the stated basis for Peru's "maritime dominion" is the 1947 Peruvian Supreme Decree and the Santiago Declaration of 1952. Over time, more specific Constitutional, legislative and administrative acts have given effect to those foundational instruments. A number of these are listed in Peru's Memorial at paragraph 3.15, including the legislation in 1965 and 2000 pursuant to which Peru exercises jurisdiction over the airspace above its entire "maritime dominion". Peru's maritime claim is thus historically continuous. Neither customary law nor UNCLOS affords a foundation for Peru's "maritime dominion". Peru wishes to continue to rely on the Santiago Declaration as the international-law foundation for the sovereignty that it exercises to a minimum distance of 200 nautical miles. Peru cannot resile from the boundary delimitation agreed in that treaty.

B. CHILE'S MARITIME ZONES

2.177. All of Chile's maritime zones are in accordance with UNCLOS, which Chile signed in 1982 and ratified in 1997. In 1986 Chile passed domestic legislation setting forth a territorial sea of 12 nautical miles; a contiguous zone to

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[376] Supreme Decree No. 261-69-AP of 12 December 1969 on the Regulation of Titles I, II and III of Decree-Law No. 17752 General Law on Waters, **Annex 167**, Art. 7.

24 nautical miles; an EEZ to a distance of 200 nautical miles; and Chile's rights over its continental shelf[377]. The continental shelf appertaining to Chile's continental territory currently extends to 200 nautical miles. In May 2009 Chile submitted to the United Nations preliminary information indicative of the outer limits of the extended continental shelf beyond 200 nautical miles from Chile's continental and insular territories.

Section 9. Acknowledgment and Confirmation of the Maritime Boundary in the Agreement Relating to a Special Maritime Frontier Zone (1954)

A. INTRODUCTION

2.178. The entitlement to 200M maritime zones under the Santiago Declaration was challenged by several third States. To defend their claimed entitlements, a CPPS meeting was convened in October 1954, at which Chile, Ecuador and Peru affirmed their claims to 200M maritime zones and their exclusive right to take measures to preserve and exploit maritime resources within their respective zones. The recommendations approved by the CPPS at this meeting were revised and adopted by the three States at a diplomatic conference two months later, in Lima in December 1954.

2.179. For present purposes, the most relevant instrument adopted at the December 1954 conference was the Agreement Relating to a Special Maritime Frontier Zone, i.e. the Lima Agreement. It created a zone of tolerance on either side of the "maritime frontier" of adjacent States. This was for the benefit of

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[377] See Law No. 18,565 of 13 October 1986 Amending the Civil Code Regarding Maritime Spaces, **Annex 36 to the Memorial**. The translation by Peru erroneously states that Chile claims a territorial sea of "twelve hundred" nautical miles in Article 1 of that Law. The original Spanish text of this law provides for a territorial sea of "doce millas marinas": 12 nautical miles.

local fishermen with limited navigational aids who accidentally transgressed the maritime boundaries.

2.180. The basic predicate of the Lima Agreement was that Chile, Ecuador and Peru already had lateral maritime boundaries, or "frontiers", in place between them. Unlike many other instruments agreed between the parties to the Santiago Declaration, the Lima Agreement was not primarily concerned with the seaward extent of each State's maritime zone. It dealt solely with issues connected to the lateral delimitation of those zones. The provisions of the Lima Agreement are deemed to be "an integral and supplementary part of" the Santiago Declaration[378].

B. CHILE, ECUADOR AND PERU DEFENDED THEIR MARITIME ZONES IN 1954

2.181. Shortly after it was made, the Santiago Declaration was criticized by several States as being contrary to general international law[379]. In the face of this mounting opposition, the second meeting of the CPPS was convened in Santiago, Chile on 4-8 October 1954 (the ***1954 CPPS Meeting***). The CPPS Member States were then Chile, Ecuador and Peru.

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[378] Lima Agreement, **Annex 50 to the Memorial**, Art. 4.

[379] Protests addressed to the Ministry of Foreign Affairs of Peru: Note No. 101 of 20 September 1954 from the United States Ambassador to Peru, **Annex 62**; Note No. 34 (1271/11/54) of 31 August 1954 from the British Ambassador to Peru, **Annex 68**; Note No. 57/1954 of 4 October 1954 from the Legation of Sweden in Peru, **Annex 64**; Note No. 197 of 4 October 1954 from the Danish chargé d'affaires in Peru, **Annex 65**; Note of 29 September 1954 from the Legation of Norway in Chile, **Annex 63**.

Protests adressed to the Ministry of Foreign Affairs of Chile: Note No. 141 (1270/12/54) of 12 August 1954 from the British Embassy in Chile, **Annex 60**; Note of 29 September 1954 from the Legation of Norway in Chile, **Annex 63**.

2.182. The three States explicitly recognized that the main purpose of this meeting was to buttress and develop upon the agreements reached at the 1952 Conference. At the inaugural session of the 1954 CPPS Meeting, the Minister of Foreign Affairs of Chile stated that:

> "The right to proclaim our sovereignty over the sea zone that extends to two hundred miles from the coast is thus undeniable and inalienable. We gather now to reaffirm our decision to defend, whatever the cost, this sovereignty and to exercise it in accordance with the high national interests of the signatory countries to the Declaration.
>
> . . .
>
> We strongly believe that, little by little, the legal statement that has been formulated by our countries into the 1952 Agreement [the Santiago Declaration] will find its place in International Law until it is accepted by all Governments that wish to preserve, for mankind, resources that today are ruthlessly destroyed by the unregulated exercise of exploitative activities that pursue diminished individual interests and not collective needs."[380]

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[380] Minutes of the Inaugural Session of the 1954 CPPS Meeting, 4 October 1954, **Annex 35**, p. 3. The original Spanish text reads as follows:

> "El derecho a proclamar nuestra soberanía sobre la zona de mar que se extiende hasta doscientas millas de la costa es, pues, indiscutible e inalienable. Nos reunimos ahora para reafirmar nuestro propósito de defender hasta sus últimas consecuencias esa soberanía y a ejercitarla en conformidad con los altos intereses nacionales de los países signatarios del Pacto.
>
> [. . .]
>
> Tenemos plena fé en que poco a poco, la expresión jurídica que nuestros tres países han formulado en el Acuerdo del 52, irá ampliando su cauce en el Derecho Internacional hasta ser aceptada por todos los Gobiernos deseosos de preservar, para la humanidad riquezas que hoy son despiadadamente destruídas por el ejercicio irreglamentado de

2.183. In addition to the focus on defence of the Santiago Declaration, the agenda of the meeting included a wider range of issues concerning the maritime zones of the three States. The CPPS had identified the matters to be addressed during the 1954 CPPS Meeting as follows:

(a) "[l]egal defence of the rules of international maritime policy [of Chile, Peru and Ecuador] against objections by other governments and before international organizations and meetings";

(b) "[u]niform legal system of sanctions for violations within the maritime jurisdiction of the respective countries, in breach of the agreements of the [1952] Conference";

(c) "[o]rganization of the technical offices that should serve as Secretariats of the Permanent Commission [of the South Pacific]";

(d) "[a]ssimilation of the exploitation of maritime resources to the exploitation of mineral or agricultural resources on the continental or insular land areas for taxation purposes and for the regulation of External Trade";

(e) "[s]urveillance and control measures over the respective maritime zones"; and

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actividades explotadoras que solo corresponden a menguados intereses individuales y no a los de la colectividad."

(f) "[u]niform system regarding granting permits to foreigners for carrying out fishing and hunting, methods of control, etc"[381].

2.184. The establishment of a ten-mile zone of tolerance on either side of each maritime boundary was a new agenda item, proposed by the delegations of Ecuador and Peru and then approved by the CPPS with Chile's agreement. According to the proposal, a neutral zone would start from a point–

> "12 nautical miles from the coast, extending to a breadth of ten nautical miles on either side of the parallel which passes through the point of the coast that signals the boundary between the two countries."[382]

2.185. This proposal concerned all three States, and was to be dealt with by all three of them (as in fact it was, in the Lima Agreement).

2.186. The recommendations on the above matters approved by the CPPS at the 1954 CPPS Meeting in Santiago were then submitted to the Second Conference on Exploitation and Conservation of the Maritime Resources of South Pacific held two months later in Lima (the ***1954 Inter-State Conference***). Whereas the 1954 CPPS Meeting had been a meeting of the CPPS, the conference in December 1954 was a conference of the three States. The Minister of Foreign Affairs of Peru, Dr. David F. Aguilar Cornejo, summarized the purpose and aim of this conference in the following manner:

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381 Minutes of the Inaugural Session of the 1954 CPPS Meeting, 4 October 1954, **Annex 35**, p. 5.

382 Minutes of the Plenary Session of the 1954 CPPS Meeting, 8 October 1954 at 10.30 a.m., **Annex 36**, p. 11. The original Spanish text reads as follows: "12 millas marinas de la costa, de diez millas marinas de ancho a cada lado del paralelo que pasa por el punto de la costa que señala el límite entre los dos países."

> "Nothing can be more pertinent than the joint action of our countries in proclaiming as a norm of their international maritime policy their sovereignty over the adjacent sea up to two hundred miles. The Declaration of Santiago of 1952 represents the integration and solidarity of three nations which overcame individual action to strengthen an alliance as a superior phase of their international performance, returning to the old and well-known path of the union and the mutual cooperation, in defence of their national sovereignty and in protection of noble and high interests.
>
> . . .
>
> This Conference will solemnize the Regulations and Resolutions agreed by the Permanent Commission in Santiago giving them the form of international treaties in order to have the necessary legal instruments that impose, in the future, the appropriate sanctions on those who attempt to ignore our sovereignty and our eminent rights of control and jurisdiction over the Maritime Zone referred to in the national legislations and in the Santiago Declaration."[383]

2.187. Having discussed the recommendations of the CPPS, many of which were in the form of draft agreements, Chile, Ecuador and Peru concluded a suite of trilateral agreements covering a range of matters related to their respective maritime zones, as follows:

(a) Complementary Convention to the Declaration of Sovereignty on the Two-Hundred-Mile Maritime Zone[384];

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383 Minutes of the Inaugural Session of the 1954 Inter-State Conference, 1 December 1954, **Annex 37**, p. 2.

384 Complementary Convention, **Annex 51 to the Memorial**.

(b) Agreement Relating to Measures of Supervision and Control in the Maritime Zones of the Signatory Countries[385];

(c) Agreement Relating to the Granting of Permits for the Exploitation of the Maritime Resources of the South Pacific[386];

(d) Agreement on the System of Sanctions[387];

(e) Convention on the Annual Ordinary Meeting of the Permanent Commission of the South Pacific[388]; and

(f) the Lima Agreement or, in full, the Agreement Relating to a Special Maritime Frontier Zone[389].

2.188. In the process of negotiating the Complementary Convention the three States recorded their formal agreement on the correct interpretation of Article IV of the Santiago Declaration. That agreement was reached by the three States immediately prior to their discussion of the Lima Agreement, in the course of negotiating the Complementary Convention, and it is important both as a free-standing agreement and as background to the terms and effect of the Lima Agreement.

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385 Agreement Relating to Measures of Supervision and Control in the Maritime Zones of the Signatory Countries, signed at Lima on 4 December 1954, **Annex 4**.

386 Agreement Relating to the Granting of Permits for the Exploitation of the Maritime Resources of the South Pacific, signed at Lima on 4 December 1954.

387 Agreement on the System of Sanctions, signed at Lima on 4 December 1954.

388 Convention on the Annual Ordinary Meeting of the Permanent Commission of the South Pacific, signed at Lima on 4 December 1954.

389 Lima Agreement, **Annex 50 to the Memorial**.

C. AGREEMENT THAT MARITIME BOUNDARIES HAD ALREADY BEEN SETTLED IN 1952

2.189. On 2 December 1954 the First Session of Commission I of the 1954 Inter-State Conference was convened in Lima. Commission I considered and finalized the draft agreements adopted at the 1954 CPPS Meeting. A Chilean delegate chaired the session. Other delegates from Chile, as well as delegates from Peru and Ecuador, were in attendance. So was the Secretary-General of the CPPS.

2.190. The main instrument being prepared at the 1954 Inter-State Conference was the Complementary Convention. The primary purpose of that Convention was to reassert the claim of sovereignty and jurisdiction that had been made two years earlier in Santiago and to defend jointly the claim against protests by third States[390].

2.191. In the discussion leading to that Convention the Ecuadorean delegate–

> "moved for the inclusion in this Convention of a complementary article clarifying the concept of the dividing line of the jurisdictional sea, which has already been explained at the Conference of Santiago, but which would not be redundant to include herein."[391]

2.192. The Peruvian and Chilean delegates explained that a provision on delimitation in the Complementary Convention would in fact be redundant. They said "that Article 4 of the Declaration of Santiago is clear enough and, therefore,

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390 See Complementary Convention, **Annex 51 to the Memorial**, second paragraph.

391 Minutes of the First Session of Commission I of the 1954 Inter-State Conference, 2 December 1954 at 10.00 a.m., **Annex 38**, p. 3.

does not require further explanation."[392] The Ecuadorean delegate insisted on clarifying the text of the Santiago Declaration, considering that the existing language "was aimed at establishing the principle of delimitation of waters regarding the islands"[393]. As noted above, the three States had agreed in the 1952 Minutes that "the boundary line of the jurisdictional zone of each country be the respective parallel from the point at which the borders of the countries touches or reaches the sea"[394]. Given the Ecuadorean delegate's insistence that the maritime boundaries be acknowledged to apply between general maritime zones and not only where insular zones were involved, the Chairman asked if Ecuador would be content with recording in the minutes of the session the existence of an express agreement to that effect, instead of adding a new provision in the Complementary Convention. Ecaudor's delegate responded as follows:

> "[I]f the other countries consider that no explicit record is necessary in the [Complementary] Convention, he agreed to record in the Minutes that the three countries deemed the matter on the dividing line of the jurisdictional waters settled and that said line was the parallel starting at the point at which the land frontier between both countries reaches the sea."[395]

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392 Minutes of the First Session of Commission I of the 1954 Inter-State Conference, 2 December 1954 at 10.00 a.m., **Annex 38**, p. 3.

393 *Ibid*.

394 Minutes of the First Session of the Legal Affairs Commission of the 1952 Conference, 11 August 1952 at 4.00 p.m., **Annex 56 to the Memorial**, p. 2, discussed at paras 2.78-2.79 above. The original Spanish text reads as follows:

> "la línea limítrofe de la zona jurisdiccional de cada país fuera el paralelo respectivo desde el punto en que la frontera de los países toca o llega al mar."

395 Minutes of the First Session of Commission I of the 1954 Inter-State Conference, 2 December 1954 at 10.00 a.m., **Annex 38**, p. 3.

2.193. The Peruvian delegate agreed, further clarifying that "this agreement [on the dividing line of the jurisdictional waters] was already established in the Conference of Santiago as recorded in the relevant Minutes by the request of the Delegate of Ecuador"[396]. As mentioned at paragraph 1.33 above, Peru did not produce with its Memorial the minutes of the First Session recording this agreed interpretation of the Santiago Declaration.

2.194. On the following morning of the 1954 Inter-State Conference the minutes from the previous day were read. The Ecuadorean delegate sought an amendment to the minutes "concerning the concept of the dividing line", since "the Chairman had not proposed recording in the Minutes the statement made by the Delegate of Ecuador but that *the three countries had agreed* on the concept of a dividing line of the jurisdictional sea" (emphasis added)[397]. As the minutes record, "[w]ith this clarification, the Chairman declared the Minutes of the First Session approved". Peru does produce the minutes of this second day with its Memorial, but redacts the extracts just quoted[398].

2.195. These agreed minutes unequivocally confirm the common understanding of Chile, Ecuador and Peru that they had delimited their respective maritime boundaries in Article IV of the Santiago Declaration.

2.196. Later that same day the three States turned to the Lima Agreement.

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396 Minutes of the First Session of Commission I of the 1954 Inter-State Conference, 2 December 1954 at 10.00 a.m., **Annex 38**, p. 4.

397 Minutes of the Second Session of Commission I of the 1954 Inter-State Conference, 3 December 1954 at 10.00 a.m., **Annex 39**, p. 1.

398 See **Annex 57 to the Memorial**. A comparison of the first page of that Annex with the first page of **Annex 39** to this Counter-Memorial reveals the redaction.

D. TERMS AND EFFECT OF THE AGREEMENT RELATING TO A SPECIAL MARITIME FRONTIER ZONE (THE LIMA AGREEMENT)

2.197. The full name of the Lima Agreement is the *Agreement Relating to a Special Maritime Frontier Zone* — a point expanded upon at paragraph 2.202 below. The operative provision of the Lima Agreement which is relevant here is Article 1, which reads 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*."[399] (Emphasis added.)

2.198. The reason for this "special zone" of tolerance is given in the preambular recitals:

> "Experience has shown that innocent and inadvertent *violations of the maritime frontier* between adjacent States occur frequently because small vessels manned by crews with insufficient knowledge of navigation or not equipped with the necessary instruments have difficulty in determining accurately their position on the high seas".[400] (Emphasis added.)

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[399] Lima Agreement, **Annex 50 to the Memorial**, Art. 1. The original Spanish text reads as follows:

> "Establécese una Zona Especial, a partir de las 12 millas marinas de la costa, de 10 millas marinas de ancho a cada lado del *paralelo que constituye el límite marítimo entre los dos países.*" (Emphasis added.)

The English translation in the *UNTS* refers to "*a* maritime boundary". The authentic Spanish is "el límite marítimo", which is more accurately translated as "*the* maritime boundary", as has been used above. Nothing of substance in this case turns on this.

[400] Lima Agreement, **Annex 50 to the Memorial**.

2.199. Article 2 of the Lima Agreement, referring back to the recitals, provides that the "accidental presence" of any "small vessels manned by crews with insufficient knowledge of navigation or not equipped with the necessary instruments" in the zone of tolerance shall not be considered as a "violation" of the adjacent State's maritime zone. Article 2 also provides that to benefit from this zone of tolerance a vessel must be "a vessel of either of the adjacent countries". Thus, a Peruvian vessel that accidentally crosses to the south of the "parallel which constitutes the maritime boundary" between Chile and Peru, and is within the agreed zone of tolerance, shall not be considered to have violated the boundary. The same is true for Chilean vessels accidentally crossing to the north of the boundary line. The same rule applies to Ecuadorean and Peruvian vessels in respect of the maritime boundary between those two States. The zones of tolerance on either side of the maritime boundary between Chile and Peru are illustrated in **Figure 11**.

2.200. The minutes of the 1954 Inter-State Conference record the discussion which preceded the adoption of Article 1 of the Lima Agreement. This discussion took place one day after all three States had agreed that the existence of those boundaries had already been made clear in Article IV of the Santiago Declaration, and the same day as they finalized the negotiating record to reflect this[401]. The delegate of Ecuador, Dr. Salvador Lara, proposed an amendment to Article 1 of the Lima Agreement, which the minutes record as follows:

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

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401 See paras 2.191-2.195 above.

> 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.'"[402]

2.201. Dr. Salvador Lara's proposal was accepted. The words "the parallel which constitutes a maritime boundary between the two countries" in Article 1 of the Lima Agreement memorialize the common understanding of the three States that the maritime boundary between adjacent States parties follows a parallel of latitude.

2.202. Peru argues in its Memorial that the words "the two countries" in Article 1 of the Lima Agreement refer only to Ecuador and Peru[403]. Peru has not made the same argument in connection with the references to the "maritime frontier" in the title or recitals of the Lima Agreement. The context in which a treaty provision must be interpreted includes not only the specific article falling to be interpreted, but also the treaty as a whole[404]. The full name of the Lima Agreement is the Agreement Relating to a Special Maritime Frontier Zone. That was the title used by Peru's Congress when it approved the treaty in 1955[405]. The

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402 Minutes of the Second Session of Commission I of the 1954 Inter-State Conference, 3 December 1954 at 10.00 a.m., **Annex 39**, pp. 7-8.

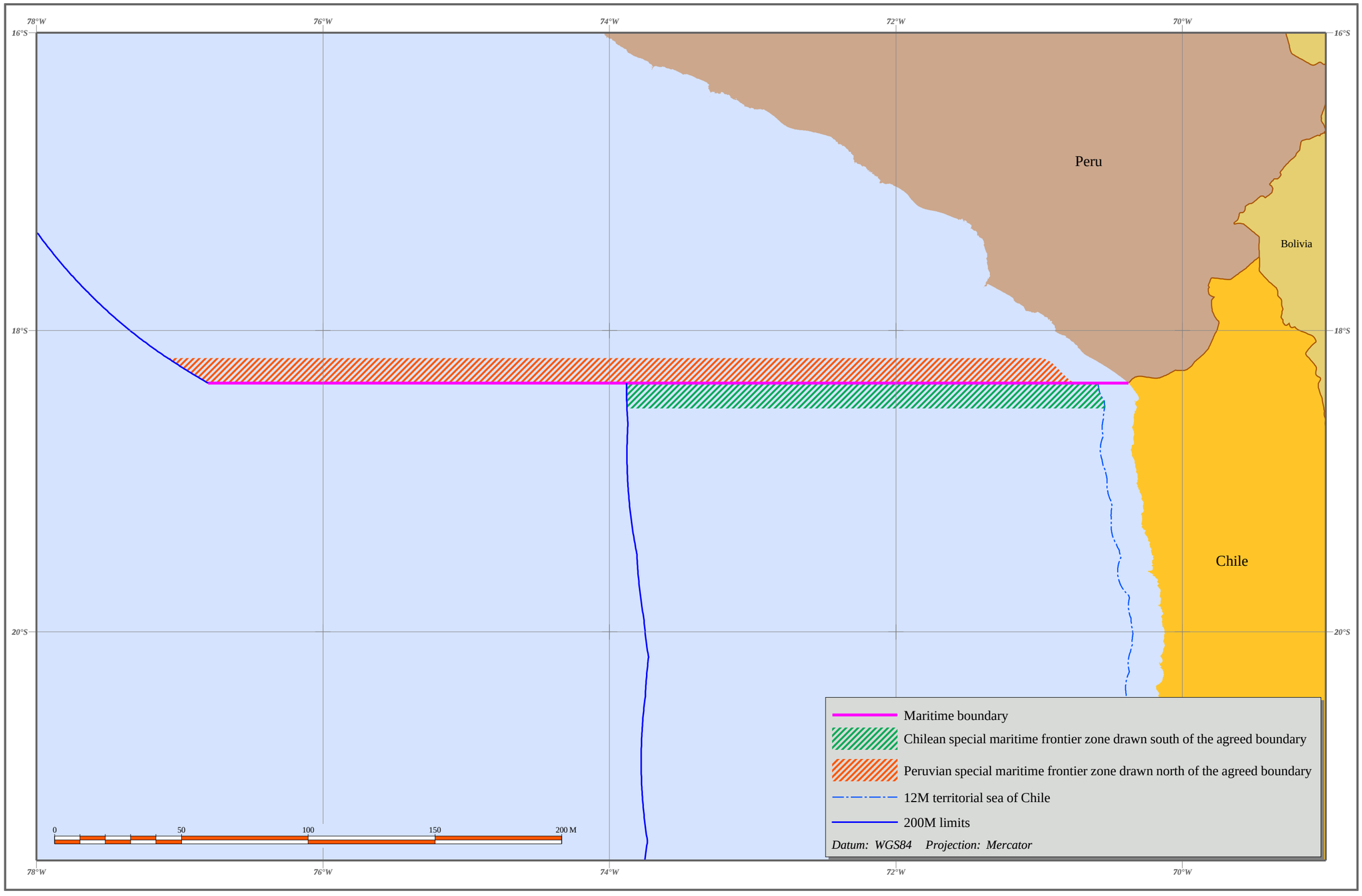
403 See Memorial, paras 4.103-4.104.

404 See *Competence of the ILO to regulate agricultural labour, Advisory Opinion, 1922, P.C.I.J., Series B, No. 2*, p. 23; *Case of the Free Zones of Upper Savoy and the District of Gex, 1932, P.C.I.J., Series A/B, No. 46*, p. 140; *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 106, para. 97; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993*, p. 50, para. 26; *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, para. 47.

405 See Legislative Resolution No. 12305 of 6 May 1955, enacted by the Peruvian President on 10 May 1955, **Annex 10 to the Memorial**.

Figure 11

Chile-Peru Special Maritime Frontier Zone under the Lima Agreement of 1954



Prepared for the Ministry of Foreign Affairs, Chile, by UKHO Law of the Sea Consultancy

short title used by Peru for this treaty in its Memorial is "the 1954 Agreement on a Special Zone"[406]. Peru's contracted title omits the words "maritime frontier".

2.203. The recitals to the Lima Agreement indicate that the three States considered it desirable to create zones of tolerance on either side of their maritime boundaries because "[e]xperience has shown that innocent and inadvertent *violations of the maritime frontier* between adjacent States occur frequently"[407] (emphasis added). There is no qualification of the "maritime frontier", nor is there any suggestion that the term "adjacent States" refers only to Ecuador and Peru.

2.204. In the explanation given by Dr. Salvador Lara for his proposal on the wording of Article 1 of the Lima Agreement, which was accepted without debate, he referred to "the neighbouring signatory countries"[408]. Chile and Peru are neighbouring signatory countries, and Ecuador and Peru are also neighbouring signatory countries. Article 1 refers to each of these pairs of adjacent countries as "the two countries [*los dos países*]".

2.205. The ordinary meaning of "the two countries" in Article 1 of the Lima Agreement is *the two States on either side of the parallel of latitude constituting a maritime boundary between those two States*. There are two such parallels governed by the Lima Agreement, and the identity of "the two countries" varies according to which parallel is under consideration in any particular instance. Those two States can be Ecuador and Peru, or they can be Chile and Peru.

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406 Memorial, paras 2.6 and 4.95-4.106.

407 Lima Agreement, **Annex 50 to the Memorial**, first recital.

408 Minutes of the Second Session of Commission I of the 1954 Inter-State Conference, 3 December 1954 at 10.00 a.m., **Annex 39**, p. 7.

2.206. The Lima Agreement provides that all of its provisions "shall be deemed to be an integral and supplementary part of"[409] the agreements reached in Santiago in 1952, of which the Santiago Declaration was the most prominent one. Thus, the Santiago Declaration is to be read together with the Lima Agreement, including the acknowledgment of the existing maritime boundaries in Article 1 of the latter Agreement. In the Lima Agreement the three States parties were acting on a common understanding that they had already delimited their maritime boundaries in the Santiago Declaration.

1. The approach to the Lima Agreement in Peru's Memorial

2.207. Peru presents a different version of how the Lima Agreement relates to the Santiago Declaration. Peru considers that the only delimitation effected by Article IV of the Santiago Declaration is between the maritime zones of islands lying within 200 nautical miles of the parallel passing through the point at which the land boundary of the States concerned reaches the sea, on the one hand, and the area of the general maritime zone of the adjacent State which abuts any such insular zones, on the other hand. Peru argues that since the only insular zones requiring delimitation are Ecuadorean, Article IV applies only between Ecuador and Peru[410]. Peru seeks to deal with Article 1 of the Lima Agreement, which refers to "the parallel which constitutes the maritime boundary between the two countries", by taking the phrase out of context and saying that it refers only to "*one* parallel between *two* countries"[411] — i.e. that it applies only to the "parallel which constitutes the maritime boundary"[412] between Ecuador and Peru. Peru

409 Lima Agreement, **Annex 50 to the Memorial**, Art. 4.

410 See Memorial, para. 4.77.

411 *Ibid*., para. 4.103 (emphasis in the original).

412 Lima Agreement, **Annex 50 to the Memorial**, Art. 1.

says that this is "readily understandable in the context of the 1952 Declaration of Santiago, which [the Lima Agreement] complemented"[413].

2.208. The reference to "the maritime boundary" in the Lima Agreement is unqualified. Islands are not mentioned anywhere in the Lima Agreement, in connection with the maritime boundary or otherwise. There is no support anywhere in the text of the Lima Agreement or any preparatory works or relevant subsequent State practice for the proposition that the maritime boundary to which the Lima Agreement refers is only one between Ecuador's insular maritime zones and the part of Peru's general maritime zone which those insular zones abut. As shown in **Figure 7** above, any such interpretation would not explain the full delimitation that Peru acknowledges to exist between itself and Ecuador. On Peru's present reading of the Santiago Declaration and the Lima Agreement, the special maritime frontier zone created under the Lima Agreement is explicable only in so far as it applies to the part of the Ecuador-Peru boundary within 200 nautical miles of an island. The application of the special maritime frontier zone to the part of the Ecuador-Peru maritime boundary that is not within 200 nautical miles of an Ecuadorean island cannot be explained on the interpretation of Article IV of the Santiago Declaration and Article 1 of the Lima Agreement advanced by Peru in its Memorial. Yet there is no indication in the Lima Agreement or anywhere else that the "maritime frontier" there acknowledged related only to insular zones. The only interpretation which accords with the unqualified language of the Lima Agreement is that Article IV of the Santiago Declaration effected a full delimitation, i.e., it also delimited the maritime boundary between general maritime zones. It did so between Ecuador and Peru and, equally, between Chile and Peru.

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413 Memorial, para. 4.103.

2.209. Peru also seeks to downgrade the importance of the Lima Agreement by arguing that the zones of tolerance were "a practical device for avoiding friction and the imposition of fines, not an international boundary"[414]. The zones of tolerance were indeed a practical device to avoid fining small-scale local fishermen with limited navigational aids who accidentally transgressed the boundary. But the basis on which such fines would otherwise have been imposed was transgression by those fishermen of the existing maritime boundaries expressly acknowledged in Article 1 of the Lima Agreement. The zones of tolerance were a practical device premised on the existing maritime boundaries. The parallels of latitude of those boundaries were used as the reference lines around which the zones of tolerance were created.

2. Other 1954 agreements confirm that a maritime boundary was in place

2.210. On the same day as the Lima Agreement was signed, the three States parties adopted a separate instrument (*aclaración*) clarifying, *inter alia*, certain of the provisions of that Agreement[415]. The *aclaración*, which must be taken into account in the interpretation of the Lima Agreement[416], states that "accidental presence" within the meaning of Article 2 of the Lima Agreement was to be "determined exclusively by the authorities of the country whose *maritime jurisdictional boundary* would have been transgressed" (emphasis added)[417]. This was a further acknowledgement, in a text adopted with the Lima Agreement, of the existence of maritime boundaries between all the States parties, not only between Peru and Ecuador.

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414 Memorial, para. 4.100.

415 Final Minutes of the 1954 Inter-State Conference, 4 December 1954, **Annex 40**.

416 See Vienna Convention, Art. 31(2)(a).

417 The original Spanish text reads as follows: "calificada exclusivamente por las autoridades del país cuyo límite marítimo jurisdiccional hubiere sido sobrepasado".

2.211. Other agreements signed at the 1954 Inter-State Conference also reflect the common understanding of the three States that they were exercising sovereignty and jurisdiction within their own maritime zones which had already been delimited in Santiago in 1952. For example, the Agreement Relating to Measures of Supervision and Control in the Maritime Zones of the Signatory Countries contains the following two provisions:

> "First
>
> It shall be the function of each signatory country to supervise and control the exploitation of the resources *in its Maritime Zone* by the use of such organs and means as it considers necessary.
>
> Second
>
> The supervision and control referred to in article one shall be exercised by each country *exclusively in the waters of its jurisdiction*."[418]
>
> (Emphasis added.)

2.212. To summarize, Chile, Ecuador and Peru had already delimited their maritime zones in 1952. In the Lima Agreement of 1954 the three States agreed to refrain from enforcing their "exclusive sovereignty and jurisdiction" in the case of inadvertent transgressions of the maritime boundary by small fishing vessels of the adjacent State. They did so because enforcement action against such accidental violations "always produces ill-feeling in the fishermen and friction between the countries concerned, which may affect adversely the spirit

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418 Agreement Relating to Measures of Supervision and Control in the Maritime Zones of the Signatory Countries, signed at Lima on 4 December 1954, **Annex 4**.

of cooperation and unity which should at all times prevail among the countries signatories to the instruments signed at Santiago" [419].

3. Contemporaneous understanding of the Lima Agreement in Peru

2.213. In Peru it was well understood at the time that the Lima Agreement was premised on the fact that Peru's maritime boundary with Chile was the "parallel at the point at which the land frontier of the States concerned reaches the sea"[420]. In a conference organized by the Association of Graduates of the Geographic Institute in Peru in 1956[421], Professor Martínez de Pinillos, an eminent geographer, presented a depiction of the Peruvian maritime zone with two parallels of latitude forming the lateral boundaries. The seaward limit was depicted as a line parallel to the coast at a constant distance of 200 nautical miles measured according to the geographic parallels, consistent with Peru's 1947 Supreme Decree. This depiction also contrasted Peru's *actual* maritime zone with a larger, *hypothetical* maritime zone that would result from that author's proposed method for constructing Peru's maritime zone, which was similar to the envelope-of-arcs-of-circles method (**Figure 12**).

2.214. Professor Martínez de Pinillos criticized Peru's maritime boundary with Chile. He expressly acknowledged that Peru's maritime boundary with Chile had been recognized in the Lima Agreement as being the parallel of latitude passing through the point where the Chile-Peru land boundary reaches

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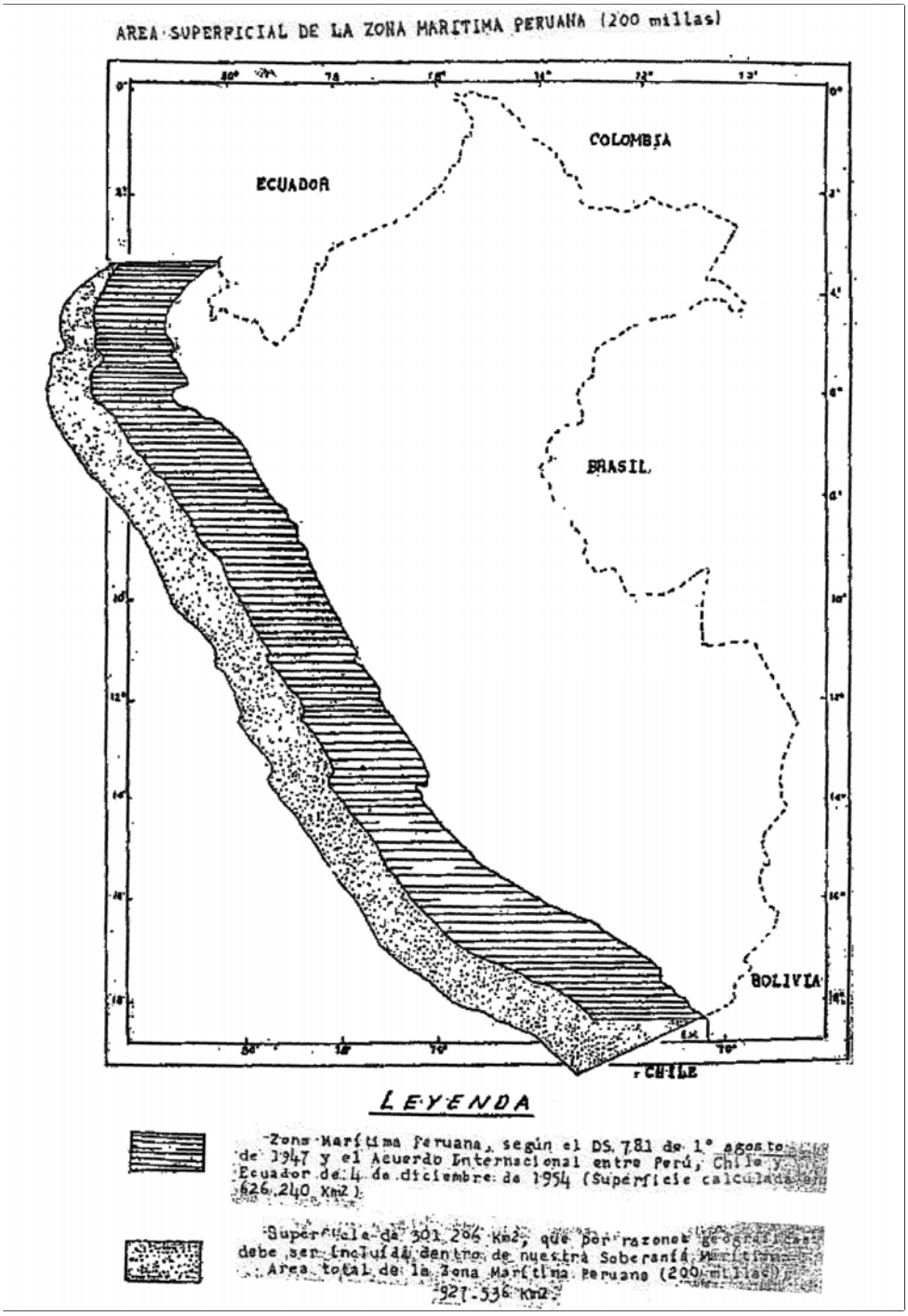
419 Lima Agreement, **Annex 50 to the Memorial**, second recital.

420 Santiago Declaration, **Annex 47 to the Memorial**, Art. IV.

421 This conference is reported in Peruvian press to have been attended by senior representatives of the diplomatic corps, alumni of the Peruvian Diplomatic Academy and many politicians. See "Señalan errores en medición del mar territorial peruano [Errors in the measurement of the Peruvian territorial sea are pointed out]", *El Comercio*, 23 May 1956, **Annex 247**. Also see P. Martínez de Pinillos, "Geografía y superficie de nuestro mar", in *Revista Geográfica del Perú*, December 1956, **Annex 291**, pp. 153-155.

Figure 12

Sketch-map of Peru's maritime dominion by Professor Martínez de Pinillos (1956)



Transcript of Legend:	Free translation:
Zona Marítima Peruana, según el DS 781 de 1° agosto de 1947 y el Acuerdo Internacional entre Perú, Chile y Ecuador de 4 de diciembre de 1954 (Superficie calculada en 626.240 Km2).	Peruvian Maritime Zone, according to Supreme Decree No.781 of 1 August 1947 and the International Agreement between Peru, Chile and Ecuador of 4 December 1954 (Area calculated of 626,240 Km2).
Superficie de 301.206 Km2, que por razones geográficas debe ser incluída dentro de nuestra Soberanía Marítima. Área total de la Zona Marítima Peruana (200 millas): 927.536 Km2.	Area of 301,206 Km2, which for geographical reasons must be included within our Maritime Sovereignty. Total area of the Peruvian Maritime Zone (200 miles): 927,536 Km2.

Source: P. Martínez de Pinillos, "Geografía y Superficie de Nuestro Mar", in *Revista Geográfica del Perú*, 1956

the sea[422]. He "objected" to this Agreement, as it "was at odds with our rights, as the coast of the South American continent forms an angle precisely at the point of our frontier with Chile and that the fair solution would be to draw the bisector of this angle from that point and not a parallel line from it"[423]. But, he said, Peru had failed to agree a bisector-line with Chile and that failure "had resulted in a significant cost for us in the past"[424].

2.215. It was publicly understood in Peru in the 1950s that Peru had agreed a maritime boundary with Chile following a parallel of latitude and that this boundary had certain disadvantages for Peru. Peru's Government was criticized for having agreed to that boundary. Notwithstanding the criticism, the Peruvian Government continued to acknowledge and enforce the agreed maritime boundary with Chile, as will be described in Chapter III. Doubtless the reason for Peru's continued adherence to the agreed delimitation was that the benefits of regional solidarity (discussed above) far outweighed the prospect of a unilateral, and hence weaker, claim to even greater ocean expanses.

E. Ratification and Application of the Lima Agreement

2.216. Peru ratified the Lima Agreement on 10 May 1955[425]. Ecuador ratified it some nine years later, on 9 November 1964[426]. Chile ratified it some three years thereafter, on 16 August 1967[427]. The Lima Agreement entered into force

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422 See "Señalan errores en medición del mar territorial peruano [Errors in the measurement of the Peruvian territorial sea are pointed out]", *El Comercio*, 23 May 1956, **Annex 247**.

423 *Ibid*.

424 *Ibid*.

425 See Legislative Resolution No. 12305 of 6 May 1955, enacted by the Peruvian President on 10 May 1955, **Annex 10 to the Memorial**.

426 See Decree No. 2556 of 9 November 1964, **Annex 210**.

427 See Decree No. 519 of 16 August 1967, **Annex 33 to the Memorial**.

on 21 September 1967[428], the date on which the last of the three States parties, Chile, deposited its instrument of ratification with the Secretary-General of the CPPS[429]. Peru argues in its Memorial that the thirteen-year period that it took Chile to ratify the Lima Agreement indicates that the Lima Agreement had little significance for Chile, and that use of the parallel of latitude by Chile and Peru was "essentially an *ad hoc* arrangement for dealing with problems that might arise concerning small fishing boats"[430].

2.217. There was a delay in the process leading to parliamentary approval and ultimately ratification in Chile[431], as there had been in Ecuador. Delays in ratification are common. Of itself, delayed ratification is of no consequence to the legal effect of a treaty once it has entered into force. The Lima Agreement, including its acknowledgement of the pre-existing maritime boundary, was ultimately ratified by all three of its signatory States and did enter into force for all three of those States.

2.218. The Lima Agreement created a zone of tolerance on each side of each maritime boundary, but it did not create those boundaries. Its significance in these proceedings is that it acknowledged that boundaries between all three States parties already existed, acknowledged that all these boundaries followed a parallel of latitude, and implemented the zones of tolerance north and south of each boundary parallel. Whether those zones of tolerance entered into effect quickly or slowly is irrelevant. The boundary whose existence was clearly

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428 Recorded in the United Nations *Treaty Series* at 2274 *UNTS* 527.

429 Instrument of ratification of the Agreement Relating to a Special Maritime Frontier Zone signed by the President of Chile on 21 September 1967, **Annex 124**.

430 Memorial, para. 4.115.

431 As explained at paragraphs 3.9-3.11 there were discussions between Chile and Peru in 1954-1955 and in 1961 about a potential bilateral regime different from the Lima Agreement.

acknowledged and acted upon was already in place throughout the period in which ratification of the Lima Agreement was pending in Chile and Ecuador. In fact, Peru's early ratification of the Agreement demonstrates that Peru had no hesitation in confirming its maritime boundary with Chile. Indeed, as Peru's Permanent Representative to the United Nations wrote to the Secretary-General of the United Nations in 1976, Peru considered that the Lima Agreement "entered into force for Peru, Chile and Ecuador on 10 May 1955, the date of ratification"[432]. That was the date of Peru's ratification.

2.219. The Lima Agreement did not actually enter into force for Chile until Chile had deposited its instrument of ratification with the Secretary-General of the CPPS in 1967. But Peru's belief that the Lima Agreement had entered into force for Chile upon Peru's ratification in 1955 may explain why prior to Chile's ratification, Peru invoked the Lima Agreement in requesting that Chile adopt measures to stop incursions by Chilean vessels north of the Chile-Peru maritime boundary. That request dates from 1962 and is worded as follows:

> "[T]he Government of Peru, *taking strongly into account the sense and provisions of the 'Agreement Relating to a Special Maritime Frontier Zone'*. . .wishes the Government of Chile, particularly through the competent authorities of the port of Arica, to adopt measures to put an end to these illegitimate incursions, and that the owners of fishing vessels be notified that they must refrain from continuing to fish north of *the Peru-Chile frontier*."[433] (Emphasis added.)

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[432] Note No. 7-1-SG/22 of 6 May 1976 from the Permanent Representative of Peru to the United Nations to the Secretary-General of the United Nations, **Annex 84**. The original Spanish text reads as follows: "entraron en vigor para Perú, Chile y Ecuador, el 10 de mayo de 1955, fecha de la ratificación."

[433] Memorandum No. 5-4-M/64 of 20 December 1962 from the Peruvian Embassy in Chile to the Ministry of Foreign Affairs of Chile, **Annex 73**.

2.220. The terms "Peruvian-Chilean frontier" are as unambiguous as they are unqualified. There was no suggestion that the "frontier" referred to was of a "provisional" or "functional" character, as Peru now suggests[434]. It is also plain from Peru's communication that it understood the Lima Agreement to be applicable, not only to the maritime boundary between Peru and Ecuador, but also to the maritime boundary between Peru and Chile. There is no suggestion in Peru's communication of any "*ad hoc* arrangement", as Peru now says[435].

2.221. Despite Peru's early reliance upon the Lima Agreement in its bilateral relations with Chile, Peru now asserts in its Memorial that whilst "the 1954 zone of tolerance was understood to apply to the waters between Peru and Ecuador, an informal practice, which was not set out in any international instrument, had arisen in the south"[436]. Peru's argument is that the Lima Agreement created zones of tolerance between Peru and Ecuador but not between Chile and Peru. That new argument leaves Peru with the difficulty of explaining its long-standing recognition of the applicability of the Lima Agreement between Chile and Peru. Peru attempts to do so by saying that it respects "the provisional 1954 line. . .on the basis that it is implementing a practical arrangement of a provisional nature in order to avoid conflicts between fishing vessels, not that it is observing an agreed international boundary"[437]. This is merely a sequence of unsupported assertions, contradicted both by the ordinary meaning of the Lima Agreement and by Peru's own invocation of the Lima Agreement in its bilateral relations with Chile.

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434 See, e.g., Memorial, paras 4.71 and 4.106.

435 *Ibid*., para. 4.115.

436 *Ibid*., para. 4.105.

437 *Ibid*., para. 4.106.

2.222. To mention one more example of such an invocation, the Bákula Memorandum of 1986, in which Peru suggested renegotiation of the agreed maritime boundary, specifically refers to the Lima Agreement, recalling "the existence of a special zone — established by the 'Agreement Relating to a Maritime Frontier Zone' — [which] referred to the line of the parallel of the point reached by the land border"[438]. That Peruvian memorandum was addressed solely to Chile and clearly acknowledged the application of the Lima Agreement between Chile and Peru, including with respect to the parallel of latitude.

Section 10. The Widespread Understanding that the Santiago Declaration delimited the Parties' Maritime Zones

2.223. The ordinary meaning of the Santiago Declaration, confirmed by the Lima Agreement, is that Chile and Peru have delimited their boundary by agreement, using the parallel of latitude passing through the point at which the land boundary reaches the sea. This is the meaning which has been given to the Santiago Declaration by third States (including Colombia, before it became a CPPS Member State in 1979), the United Nations and numerous publicists.

A. Position of Third States

2.224. The existence and course of the maritime boundary between Chile and Peru is of interest primarily to those two States. There is no overlapping claim by any other State. For States not party to the Santiago Declaration — and in particular those with long-distance fishing fleets and those that had a strategic interest in the preservation of narrow territorial seas — the salient issue was the extension of "exclusive sovereignty and jurisdiction" to a minimum of 200 nautical miles. The lateral boundaries between the parties to the Santiago

438 Bákula Memorandum, **Annex 76 to the Memorial**, fifth paragraph.

Declaration were of little or no importance to third States. Nevertheless, where third States have expressed a view on the maritime delimitation between Chile and Peru, they have acknowledged that the Santiago Declaration constitutes a maritime boundary agreement both between Chile and Peru and between Ecuador and Peru.

1. Colombia

2.225. The most notable example is Colombia. In 1975, prior to its adhesion to the CPPS four years later, Colombia expressed the understanding that the Santiago Declaration constituted a delimitation agreement between Chile, Peru and Ecuador.

2.226. Colombia concluded a delimitation agreement with Ecuador in 1975, under which "the line of geographical parallel traversing the point at which the international land frontier between Ecuador and Colombia reaches the sea"[439] constitutes the maritime boundary between the two States. The wording is equivalent to that which is found in Article IV of the Santiago Declaration.

2.227. The explanations given before the Colombian Congress in the ratification process of this agreement indicate Colombia's understanding that a practice exists in the region to use parallels of latitude to delimit adjacent maritime areas, including as between the three States parties to the Santiago Declaration. The Colombian Foreign Minister had this to say in Congress:

> "This system of delimitation [using parallels of geographic latitude], used frequently by several States, was in

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439 Agreement Concerning Delimitation of Marine and Submarine Areas and Maritime Co-operation between the Republics of Colombia and Ecuador, signed at Quito on 23 August 1975, 996 *UNTS* 237 (entered into force on 22 December 1975), **Annex 9**, Art. 1.

> particular chosen by the signatory countries of the Santiago Declaration for delimiting their respective maritime jurisdictions. . . It is evident that, in the Pacific Ocean, this line [of parallel] constitutes a clear, fair and simple frontier, which meets the interests of the two countries adequately."[440]

During the debate in Colombia's Congressional Commission on International Relations and National Defence, Senator Heraclio Fernández Sandoval had expressed a very similar view[441].

2. Limits in the Seas: *United States of America's Department of State*

2.228. The relevant issues of *Limits in the Seas*, published by the Bureau of Intelligence and Research of the United States Department of State, state that, pursuant to the Santiago Declaration, the maritime boundary between Chile and Peru[442], as well as that between Peru and Ecuador[443], follow a parallel of latitude[444]. The depiction of the Chile-Peru maritime boundary records that the

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440 Statement of Reasons of September 1975 by the Minister of Foreign Affairs of Colombia before the Colombian Congress in respect of the bill to approve the Agreement between Colombia and Ecuador concerning Delimitation of Marine and Submarine Areas and Maritime Co-operation, **Annex 214**.

441 See Presentation of 15 October 1975 by Senator Fernández before Colombia's Congressional Commission on International Relations and National Defence of the bill approving the Agreement concerning Delimitation of Marine and Submarine Areas and Maritime Co-operation between the Republics of Colombia and Ecuador, **Annex 215**.

442 See United States Department of State, Office of the Geographer, *Limits in the Seas, No. 86: Maritime Boundary: Chile-Peru*, July 1979, **Annex 216**.

443 See United States Department of State, Office of the Geographer, *Limits in the Seas, No. 42: Straight Baselines: Ecuador*, May 1972, **Annex 213**, p. 5: "Article IV of the 1952 Santiago Declaration on the Maritime Zone defines the maritime boundary between adjacent member states."

444 It is stated in *Limits in the Seas* that "this research does not represent an official acceptance of the United States Government of the line or lines represented on the charts or, necessarily, of the specific principles involved, if any, in the original drafting of the lines": **Annex 216**, p. 1.

United States of America understands a lateral maritime boundary constituted by a parallel of latitude to have been agreed by Chile and Peru. The relevant issues of *Limits in the Seas* were first published in 1979. Since then *Limits in the Seas* has confirmed the point on at least three subsequent occasions, in 1990[445], 1995[446], and 2000[447]. *Limits in the Seas* depicts the Chile-Peru maritime boundary as shown in **Figure 13**.

3. People's Republic of China

2.229. The People's Republic of China State Oceanic Administration Policy Research Office published a *Collection of International Maritime Delimitation Treaties* in 1989[448]. The sketch-map in this *Collection*[449], reproduced in **Figure 14**, indicates China's understanding that Chile and Peru have an agreed maritime boundary following a parallel of latitude.

4. Several States in pleadings before the Court

2.230. In several cases States have submitted pleadings to the Court, which were ultimately made publicly available, and which relied on the maritime

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445 See United States Department of State, Office of Ocean Affairs, *Limits in the Seas, No. 108: Maritime Boundaries of the World*, 1st Revision, 30 November 1990, **Annex 219**.

446 See United States Department of State, Office of Ocean Affairs, *Limits in the Seas, No. 36: National Claims to Maritime Jurisdiction*, 7th Revision, 11 January 1995, **Annex 220**.

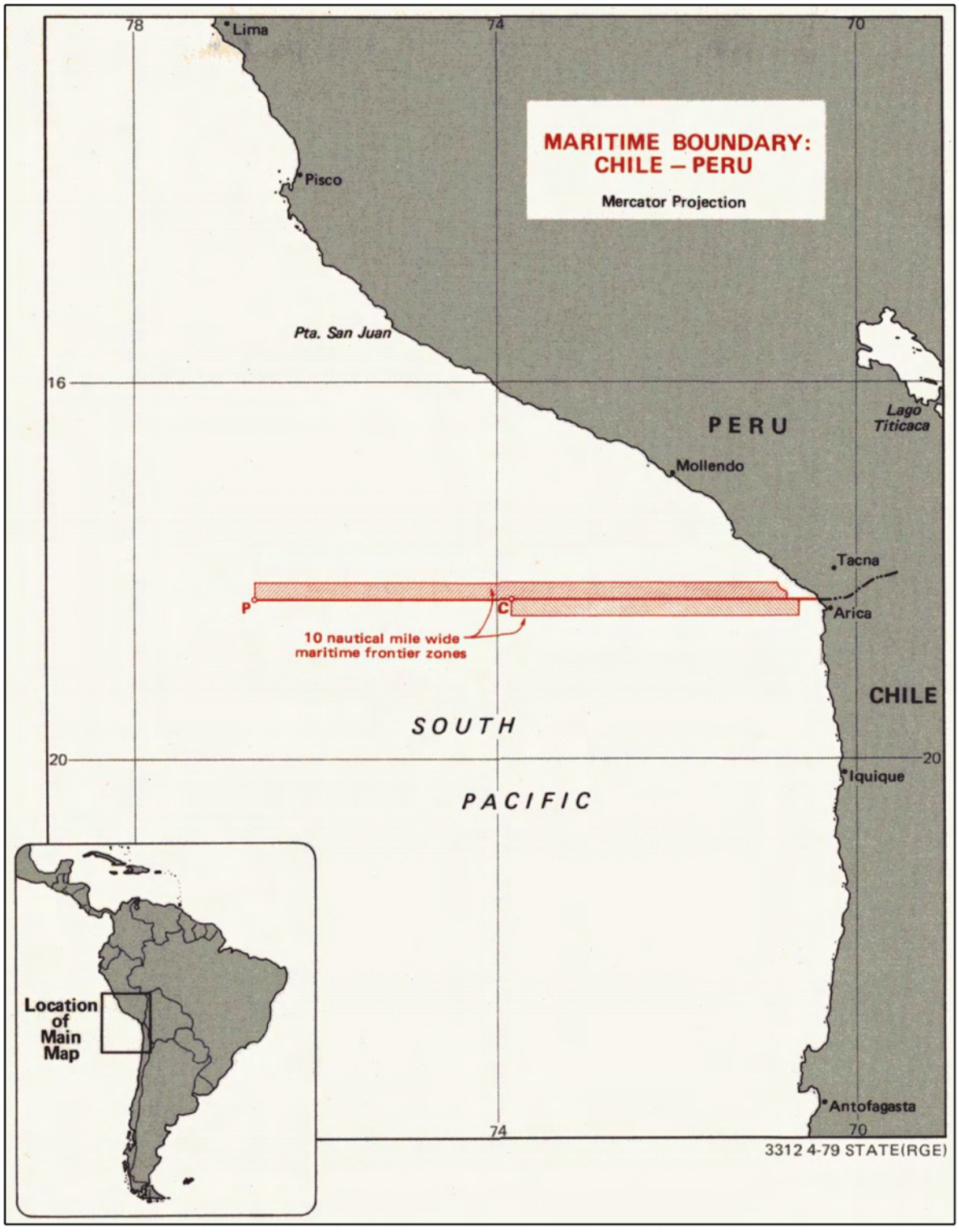
447 See United States Department of State, Office of Ocean Affairs, *Limits in the Seas, No. 36: National Claims to Maritime Jurisdiction*, 8th Revision, 25 May 2000, **Annex 222**.

448 People's Republic of China State Oceanic Administration Policy Research Office, *Collection of International Maritime Delimitation Treaties*, 1989, **Annex 218**.

449 A caveat to this Chinese publication states that "[t]he content of this book does not represent an official acceptance of the PRC of the boundaries represented": *Ibid.*, Preface.

Figure 13

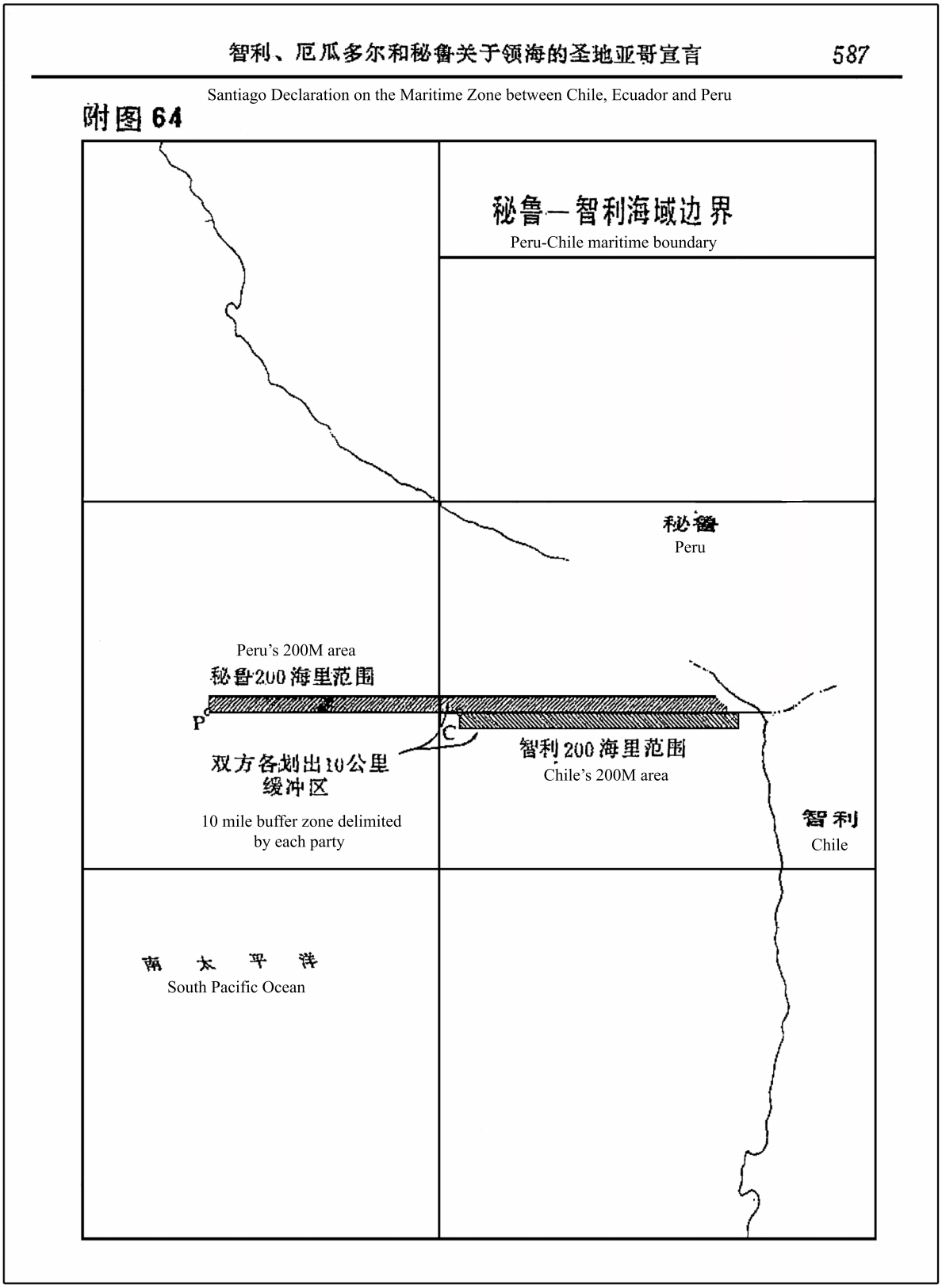
Sketch-map of the Chile-Peru maritime boundary by the United States Department of State (1979)



Source: United State Department of State, Office of the Geographer, *Limits in the Seas*, *No. 86 (Chile-Peru),* 1979

Figure 14

Sketch-map of the Chile-Peru maritime boundary by the People's Republic of China State Oceanic Administration Policy Research Office (1989)



Source: People's Republic of China State Oceanic Administration Policy Research Office, *Collection of International Maritime Delimitation Treaties*, 1989
(English translation added)

boundary between Chile and Peru as a boundary constituted by a parallel of latitude. Those cases span a period of more than 20 years, starting from the first case on maritime delimitation before the Court. They are outlined below.

2.231. As discussed at paragraph 2.163 above, in *North Sea Continental Shelf*, the Federal Republic of Germany referred to the unilateral proclamations of maritime zones by Chile and Peru in 1947, and to the Santiago Declaration and the Lima Agreement. Germany stated that Chile, Ecuador and Peru: "did not conclude separate treaties on the delimitation of their continental shelves. They agree, however, that the lateral boundaries between Chile and Peru and Peru and Ecuador follow the parallel of geographic latitude from the final point of the land frontier"[450]. This was part of the Federal Republic's case that equidistance had no status as an obligatory rule in customary law. Denmark and The Netherlands responded that the instruments cited by the Federal Republic formed "part of highly special understandings and agreements between the three States concerned"[451]. All States concerned in the proceedings accepted that Chile, Ecuador and Peru had delimited their respective maritime boundaries by agreement using parallels of latitude[452].

2.232. In the *Gulf of Maine* case, the United States of America cited the *Limits in the Seas* series, including the issues on the Chile-Peru boundary (No. 86, of 1979) and the Peru-Ecuador boundary (No. 88, of 1979) and

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450 *North Sea Continental Shelf (Federal Republic of Germany/Denmark)*, Reply submitted by the Government of the Federal Republic of Germany on 31 May 1968, Annex, "International and Inter-state Agreements concerning the Delimitation of Continental Shelves and Territorial Waters", Chile-Peru-Ecuador, *I.C.J. Pleadings, Vol. I*, p. 437.

451 *North Sea Continental Shelf* (*Federal Republic of Germany/Denmark*), Common Rejoinder submitted by the Kingdom of Denmark and the Kingdom of The Netherlands on 30 August 1968, *I.C.J. Pleadings, Vol. I*, p. 496, para. 68.

452 *Ibid*.

described the delimitation practice prevailing in the Pacific coast of the South American continent as adopting–

> "an approach similar in effect to the perpendicular to the general direction of the coast. These States [Chile, Peru, Ecuador and Colombia], which were the first States to assert a 200-nautical-mile maritime jurisdiction, extended their maritime boundaries along parallels of latitude from the terminal point of their land boundaries with the coast. This method produced east-west boundaries extending seaward for long distances, thereby giving effect to the general north-south trend of the coastal direction and disregarding local coastal irregularities."[453]

Canada contested that the Chile-Peru maritime boundary could be characterized as an example of drawing a line perpendicular to the general direction of the coast. But, equally, Canada acknowledged that the Santiago Declaration was a delimitation agreement which set forth a parallel of latitude as the boundary[454].

2.233. In the *Continental Shelf* case between Libya and Malta, Libya stated that Chile, Ecuador and Peru had agreed upon their maritime boundaries under the Lima Agreement, which "adopted the parallel of latitude from the terminal point of their land frontier"[455]. Malta produced an expert opinion by Professor Prescott, who acknowledged that the Santiago Declaration constituted

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453 *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Canada/United States of America*), Memorial of the United States submitted on 27 September 1982, *I.C.J. Pleadings, Vol. II,* p. 101, para. 265.

454 See *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Canada/United States of America*), Counter-Memorial of Canada submitted on 28 June 1983, *I.C.J. Pleadings, Vol. III*, p. 239, para. 639; Annex to the Reply of Canada submitted on 12 December 1983, *I.C.J. Pleadings, Vol. V*, p. 182, where Canada included the Santiago Declaration in the list of delimitation agreements.

455 *Continental Shelf* (*Libyan Arab Jamahiriya/Malta*), Counter-Memorial submitted by Libya on 26 October 1983, *I.C.J. Pleadings, Vol. II*, p. 110, footnote 5.

a delimitation agreement between Chile and Peru, as well as between Peru and Ecuador[456].

2.234. In the *Jan Mayen* case, Denmark used the Santiago Declaration as an example of a single-line, all-purpose delimitation of all maritime zones between the parties. Denmark also acknowledged that the Santiago Declaration constituted the delimitation agreement between Chile and Peru, as well as between Peru and Ecuador[457].

B. THE UNITED NATIONS

2.235. In 1991 the United Nations Office for Ocean Affairs and the Law of the Sea produced a compilation of boundary agreements concluded between 1942, when the United Kingdom (on behalf of Trinidad) and Venezuela signed the Gulf of Paria Treaty, and 1969, when the Court decided the *North Sea Continental Shelf* cases. To use the words of the introduction in the publication: "The present publication reproduces the texts of 27 maritime boundary agreements with illustrative maps covering the period 1942-1969"[458]. The publication reproduces the Santiago Declaration in full[459] and provides the

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456 See *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Expert Opinion by Dr. J. R. V. Prescott, Annex 4 to the Reply submitted by Malta on 12 July 1984, *I.C.J. Pleadings, Vol. I*, p. 245: see Table 4, p. 267 (the relevant agreements are referred to by their dates).

457 See *Maritime Delimitation in the Area between Greenland and Jan Mayen* (*Denmark v. Norway*), Memorial submitted by the Kingdom of Denmark on 31 July 1989, *I.C.J. Pleadings, Vol. I*, para. 364.

458 United Nations Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea – Maritime Boundary Agreements (1942-1969)*, 1991, **Annex 241**, p. v.

459 *Ibid*., pp. 87-88.

sketch-map (reproduced in **Figure 15**[460]), taken originally from Canada's 1983 pleadings in the *Gulf of Maine* case.

2.236. In 2000 the United Nations Division for Ocean Affairs and the Law of the Sea published a *Handbook on the Delimitation of Maritime Boundaries*. The *Handbook* specifically cites the agreement between Peru and Chile in 1952 as an example of the delimitation method that "uses parallels of latitude. . .to draw the delimitation line", noting that the operative parallel is determined by "the point where the land frontier reaches the sea"[461].

C. PUBLICISTS

2.237. As noted, the Ecuadorean plenipotentiary who signed the Lima Agreement in 1954 was Dr. Salvador Lara. In the foreword to a book authored by an Ecuadorean Navy officer and published in 2007, the year before Peru filed its Application in the present case, Dr. Salvador Lara wrote of the Lima Agreement:

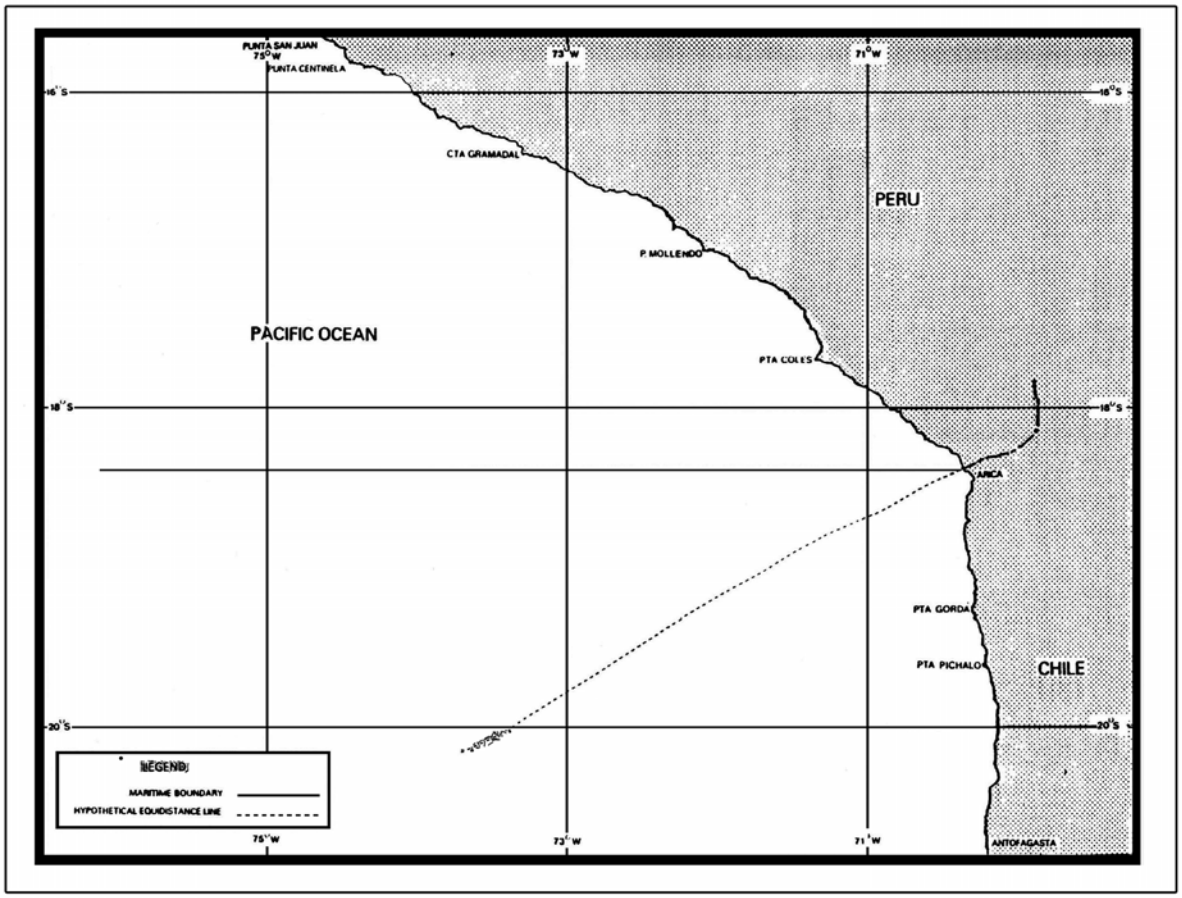
> "According to this Agreement, the maritime frontier [*frontera marítima*] between Ecuador and Peru and Chile and Peru was explicitly defined as the parallel that commences on the point where the land frontier [*frontera terrestre*] touches the Pacific Ocean, a rule that has lasted for several decades and that has had more than half a century of unquestioned validity for Peru, although

460 United Nations Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea – Maritime Boundary Agreements (1942-1969)*, 1991, **Annex 241**, p. 89.

461 United Nations, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, *Handbook on the Delimitation of Maritime Boundaries*, 2000, **Annex 242**, p. 57, para. 223.

Figure 15

Sketch-map of the Chile-Peru maritime boundary by the United Nations Office for Ocean Affairs and the Law of the Sea (1991)



Source: United Nations Office for Ocean Affairs and the Law of the Sea, *Maritime Boundary Agreements (1942-1969)*, 1991

> currently a dangerous interpretation regarding the maritime boundary with Chile is being advanced."[462]

2.238. In an academic work published in 1980 the former Minister of Foreign Affairs of Ecuador, Luis Valencia Rodríguez, commented specifically on Article IV of the Santiago Declaration and Article 1 of the Lima Agreement. He stated that "the boundary of the territorial waters between the neighbouring States is constituted by the parallel at the point at which the land frontier of those States reaches the sea"[463].

2.239. President Jiménez de Aréchaga wrote the report on Chile and Peru in the first volume of the collection edited by Professors Charney and Alexander, *International Maritime Boundaries*, which volume was published in 1993. He began his report with the following summary:

> "In a tripartite joint declaration issued on 18 August 1952 by Chile, Peru, and Ecuador it was declared that the general maritime zone of their countries shall be bounded by the parallel of latitude drawn from the point where the land frontier between the respective countries reaches the sea (Article IV).
>
> This delimitation line divides both the area of sea adjacent to the coasts of these countries and the sea floor and subsoil thereof (Articles II and III). It is an all-purpose delimitation line, extending not less than 200 nautical miles (n.m.) from the coast (Article II).

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462 Foreword by J. Salvador Lara in P. Goyes Arroyo, *Límite Marítimo: Ecuador-Perú*, 2007, **Annex 269**, p. xiii.

463 L. Valencia Rodríguez, *Análisis de la Posición Jurídica Ecuatoriana en las Doscientas Millas*, 1980, **Annex 313**, p. 17.

> There is some ambiguity in the wording of Article IV of the declaration which provides for the maritime zone of an island or group of islands. 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."[464]

2.240. In the body of his report President Jiménez de Aréchaga explained that:

> "The adoption of the method of parallels for purposes of delimitation may be explained by the fact that in 1952 the states that were parties to the tripartite declaration opened entirely new ground in the Law of the Sea by claiming a 200-mile territorial sea. In the absence of known principles or agreed rules of delimitation, they chose the method of the parallel of latitude drawn from the point where the land frontier reaches the sea. Such a method would seem to be the logical corollary to the fundamental argument invoked in support of their maritime claims, namely, the direct and linear projection of their land territories and land boundaries into the adjacent seas."[465]

2.241. The author acknowledged that the "boundary established in this case differs substantially from a hypothetical equidistant line" and that "the maritime area of Peru established by this agreement is much smaller than the one which

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[464] E. Jiménez de Aréchaga, "Chile-Peru", in J. I. Charney and L. M. Alexander (eds), *International Maritime Boundaries, Vol. I*, 1993, **Annex 280**, p. 793 (an addendum in *Vol. IV*, 2002, **Annex 282**, p. 2639, notes that in 2001 Peru sent a communication to the United Nations Secretary-General stating that Peru and Chile had not concluded a "specific" maritime delimitation treaty).

[465] E. Jiménez de Aréchaga, "Chile-Peru", in J. I. Charney and L. M. Alexander (eds), *International Maritime Boundaries, Vol. I*, 1993, **Annex 280**, p. 794.

would have resulted from an equidistant line"[466]. The report included a sketch-map showing the actual agreed boundary following the parallel of latitude, as compared to a hypothetical line of equidistance[467].

2.242. The final point to note from the Jiménez de Aréchaga report is that the author addressed the issue that Peru now seeks to agitate in the form of a claim to the *alta mar* area. He wrote that "[o]wing to coastal configurations, the Peruvian segment of the boundary extends further seaward than the Chilean segment", and calculated that the most seaward point on the parallel of latitude constituting Peru's segment of the maritime boundary "is more than 360 n.m. from the land boundary terminus"[468]. On this approach, which Chile submits is the correct approach, the parallel of latitude is an agreed limit south of which the Peruvian maritime zone cannot extend, regardless of Peru's coastal configuration.

2.243. Professor Reuter wrote in 1984 that:

> "La Déclaration du 18 août 1952 sur la zone maritime signée par le Chili, l'Equateur et le Pérou va conduire à tracer une ligne unique qui sert de frontière latérale à tous les espaces maritimes."[469]

2.244. Dr. Robert Hodgson treated the maritime boundaries between Chile, Peru, Ecuador and Colombia compendiously. In 1982 he wrote that:

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466 E. Jiménez de Aréchaga, "Chile-Peru", in J. I. Charney and L. M. Alexander (eds), *International Maritime Boundaries, Vol. I*, 1993, **Annex 280**, p. 795.

467 *Ibid*., p. 798.

468 *Ibid*., p. 796.

469 P. J.-M. Reuter, "Une ligne unique de délimitation des espaces maritimes?", in *Mélanges Georges Perrin*, 1984, **Annex 307**, p. 260.

> "These three maritime boundaries have been delimited by a series of declarations and a bilateral international agreement. The west coast of the continent of South America is constituted by a pair of relatively direct north-south lines. Several variations do occur in the general continuous trend; they, however, do not detract from the longitudinal expression of the coast and hence the lateral expression of the coastal fronts which the parallels of latitude create."[470]

Dr. Hodgson's approach is consistent with that taken by President Bustamante y Rivero in the *North Sea Continental Shelf* cases, discussed at paragraph 2.163 above. Writing judicially, President Bustamante y Rivero referred to effecting lateral delimitations which have "parallel directions and, in consequence, . . .obtaining shelves of a rectangular shape."[471]

2.245. Dr. Hodgson noted that Article IV of the Santiago Declaration delimited the maritime boundaries between Chile and Peru, and between Ecuador and Peru, using the parallel of latitude drawn from the point at which "the land frontier between the two countries reaches the sea"[472]. He went on to

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470 R. Hodgson, "The Delimitation of Maritime Boundaries between Opposite and Adjacent States through the Economic Zone and the Continental Shelf: Selected State Practice", in T. Clingan Jr. (ed.), *Law of the Sea: State Practice in Zones of Special Jurisdiction*, 1982, **Annex 272**, p. 296.

471 Separate opinion of President Bustamante y Rivero, *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 62.

472 R. Hodgson, "The Delimitation of Maritime Boundaries between Opposite and Adjacent States through the Economic Zone and the Continental Shelf: Selected State Practice", in T. Clingan Jr. (ed.), *Law of the Sea: State Practice in Zones of Special Jurisdiction*, 1982, **Annex 272**, p. 297. Also see R. Hodgson and R. Smith, "Boundaries of the Economic Zone", in E. Miles and J. K. Gamble, Jr. (eds), *Law of the Sea: Conference Outcomes and Problems of Implementation*, 1977, **Annex 271**, p. 190.

observe that the "use of the parallels of latitude was continued in the Ecuador-Colombia agreement of August 23, 1975"[473].

2.246. Professor Johnston and Dr. Valencia, in a series of which Judge Oda was the general editor, also treated the maritime boundaries between Colombia, Ecuador, Peru and Chile in consolidated fashion. In 1990 these authors stated that all of those boundaries–

> "draw artificial,. . .'geometric' boundaries of the astronomical kind, simply following the parallel of latitude which passes through the terminus of the parties' land boundary. This common method of delimitation was agreed upon in the 1952 Declaration on the Maritime Zone proclaimed jointly by Chile, Ecuador and Peru, which provided that each country should possess control over its adjacent waters to a distance of 200 nm and that these maritime zones should be divided by the appropriate parallels of latitude. In the case of the Chile-Peru boundary, the joint boundary commission has erected towers to mark the parallel."[474]

2.247. In its Memorial Peru relies on a different book by Professor Johnston for the proposition that most maritime boundary agreements were concluded after the First United Nations Conference on the Law of the Sea in 1958[475]. The extract which Peru quotes includes Professor Johnston's statement that in the 22 years following the Gulf of Paria delimitation in 1942, "only six more ocean

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473 R. Hodgson, "The Delimitation of Maritime Boundaries between Opposite and Adjacent States through the Economic Zone and the Continental Shelf: Selected State Practice", in T. Clingan Jr. (ed.), *Law of the Sea: State Practice in Zones of Special Jurisdiction*, 1982, **Annex 272**, p. 297.

474 D. M. Johnston and M. J. Valencia, *Pacific Ocean Boundary Problems – Status and Solutions*, 1991, **Annex 284**, pp. 75 and 77.

475 See Memorial, para. 4.7.

boundary agreements were negotiated"[476]. On the page following the one from which Peru chooses to quote, Professor Johnston says that of "seventy-six delimitation treaties examined, all except four are bilateral"[477]. Professor Johnston's reference for that statement begins as follows: "The exceptions are the tripartite boundary provisions adopted by Chile, Ecuador and Peru in 1952 and 1954. . ."[478]. Professor Johnston considered the Santiago Declaration to be one of the six delimitation treaties concluded in the period between 1942 and 1964.

2.248. Professor Lucchini and Michel Vœlckel, a former Comptroller General of the French Armed Forces, wrote in 1996 that–

> "le Chili, l'Equateur et le Pérou ont, par la Déclaration de Santiago, porté leurs choix sur la méthode du parallèle de latitude tracé du point où la frontière terrestre entre les Etats atteint la mer (point IV de la Déclaration)."[479]

2.249. Dr. Ahnish in 1993 identified the maritime boundaries established by the Santiago Declaration, as well as the boundary subsequently agreed between Ecuador and Colombia, as boundaries "drawn on parallels of latitude"[480].

2.250. In his Hague Academy lectures given in 1981, Professor Jagota referred to the Santiago Declaration commenting that: "The maritime boundary

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476 Memorial, para. 4.7, footnote 122, quoting D. M. Johnston, *The Theory and History of Ocean Boundary-Making*, 1988, **Annex 283**, p. 213.

477 D. M. Johnston, *The Theory and History of Ocean Boundary-Making*, 1988, **Annex 283**, p. 214.

478 *Ibid*., endnote 264, p. 390.

479 L. Lucchini and M. Vœlckel, *Droit de la Mer, Tome II: – Délimitation – Navigation Pêche*, 1996, **Annex 289**, p. 125; also see p. 148.

480 F. A. Ahnish, *The International Law of Maritime Boundaries and the Practice of States in the Mediterranean Sea*, 1993, **Annex 249**, p. 155.

between the parties to this Declaration was to follow the parallel of latitude drawn from the point where the land frontier between them reaches the sea"[481].

2.251. In their 1987 *Atlas of Seabed Boundaries*, Professor Conforti and others published the entirety of the text of the Santiago Declaration and the Lima Agreement[482], and then provided the sketch-map reproduced here as **Figure 16**, which indicates both the boundary line and the tolerance zone under the Lima Agreement[483].

2.252. Professor Prescott wrote in 1975 that "Chile, Peru and Ecuador have agreed that the boundaries between their respective territorial waters will be drawn along the parallels which intersect the coast at the termini of the land boundaries"[484]. He acknowledged that a "parallel of latitude is of course an arbitrary line" and that "because of the general direction of the coast, Peru forfeits territorial waters"[485]. He concluded that "[s]uch a loss is obviously considered minor compared with the benefit of having a clear boundary, easily determined by mariners"[486].

2.253. In a 1985 book, Professor Prescott wrote that:

> "Maritime boundaries have been drawn between Colombia and Ecuador, Ecuador and Peru and Peru and Chile. They

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481 S. P. Jagota, "Maritime Boundary", *Recueil des cours, Vol. 171*, 1981-II, **Annex 274**, pp. 117-118.

482 See B. Conforti and G. Francalanci (eds), *Atlas of the Seabed Boundaries*, *Part Two*, 1987, **Annex 257**, pp. 199-200.

483 B. Conforti and G. Francalanci (eds), *Atlas of the Seabed Boundaries*, *Part Two*, 1987, p. 203.

484 J. R. V. Prescott, *The Political Geography of the Oceans*, 1975, **Annex 304**, p. 103.

485 *Ibid*.

486 *Ibid*.

> share the common characteristics that they coincide with the parallel of latitude which passes through the terminus of the land boundary, and that a buffer zone has been created on each side of the boundary"[487].

He included the sketch-map shown in **Figure 17**.

2.254. Professor Prescott depicted the *alta mar* situation in that sketch-map, explaining that "[b]ecause of the westwards bulge in the Peruvian coast the claims to a zone 200 nautical miles from that coast terminate seawards of similar claims by Chile and Ecuador"[488].

2.255. Dr. G. J. Tanja reproduced Professor Prescott's sketch-map[489]. In the accompanying text, Dr. Tanja wrote that "Peru and Chile, and Ecuador and Peru have established maritime boundaries making use of the parallel of latitude and creating special zones on either side of the parallel or boundary for small private fishing vessels of both states"[490].

2.256. Professor Georges Labrecque considered that:

> "C'est à double titre que la frontière Chili/Pérou, de même que celle entre le Pérou et l'Équateur, sont tout à fait remarquables : elles peuvent être considérées, dix ans après l'accord de délimitation du plateau continental entre le Royaume-Uni (Trinité et Tobago) et le Venezuela,

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487 J. R. V. Prescott, *The Maritime Political Boundaries of the World*, 1985, **Annex 305**, p. 203. Also see J. R. V. Prescott and C. Schofield, *The Maritime Political Boundaries of the World*, 2nd edn, 2005, **Annex 306**, pp. 231 and 588.

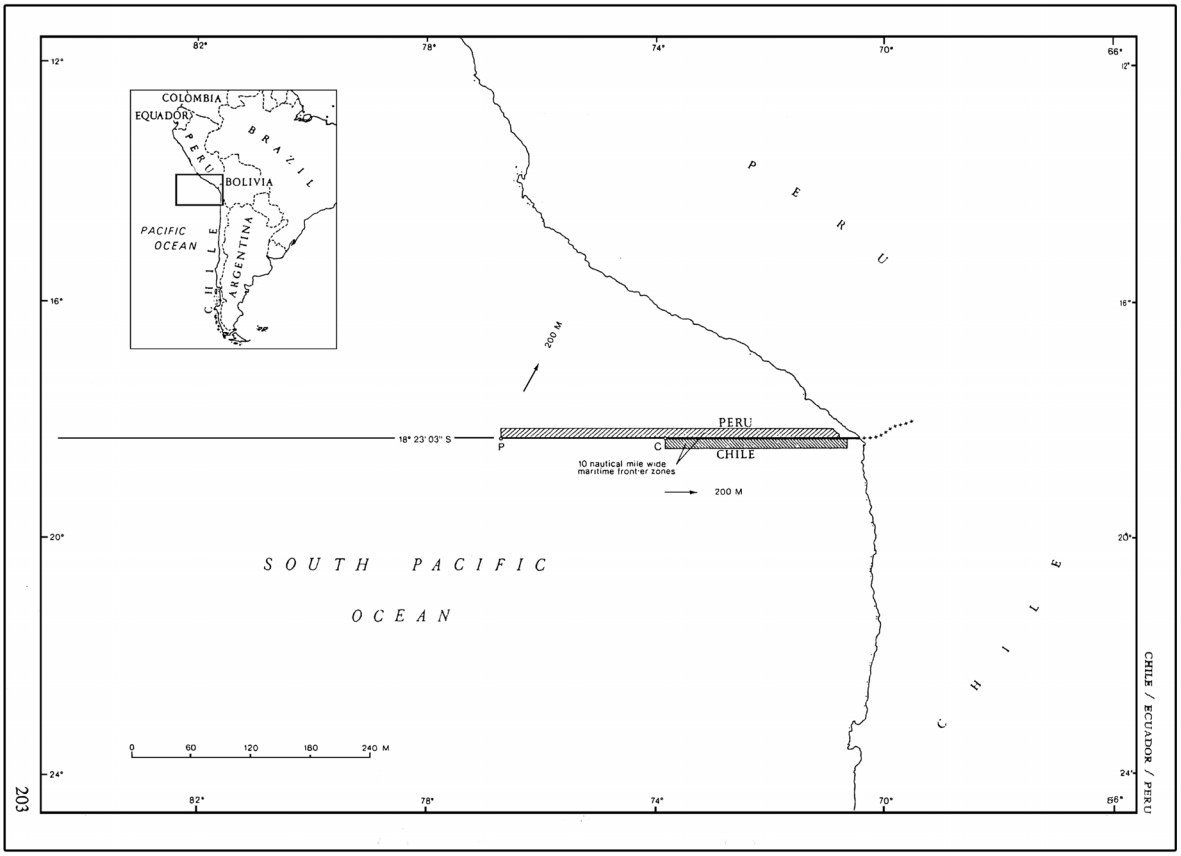
488 J. R. V. Prescott, *The Maritime Political Boundaries of the World*, 1985, **Annex 305**, pp. 203-204.

489 See G. J. Tanja, *The Legal Determination of International Maritime Boundaries*, 1990, **Annex 311**, p. 330.

490 *Ibid*., p. 148.

Figure 16

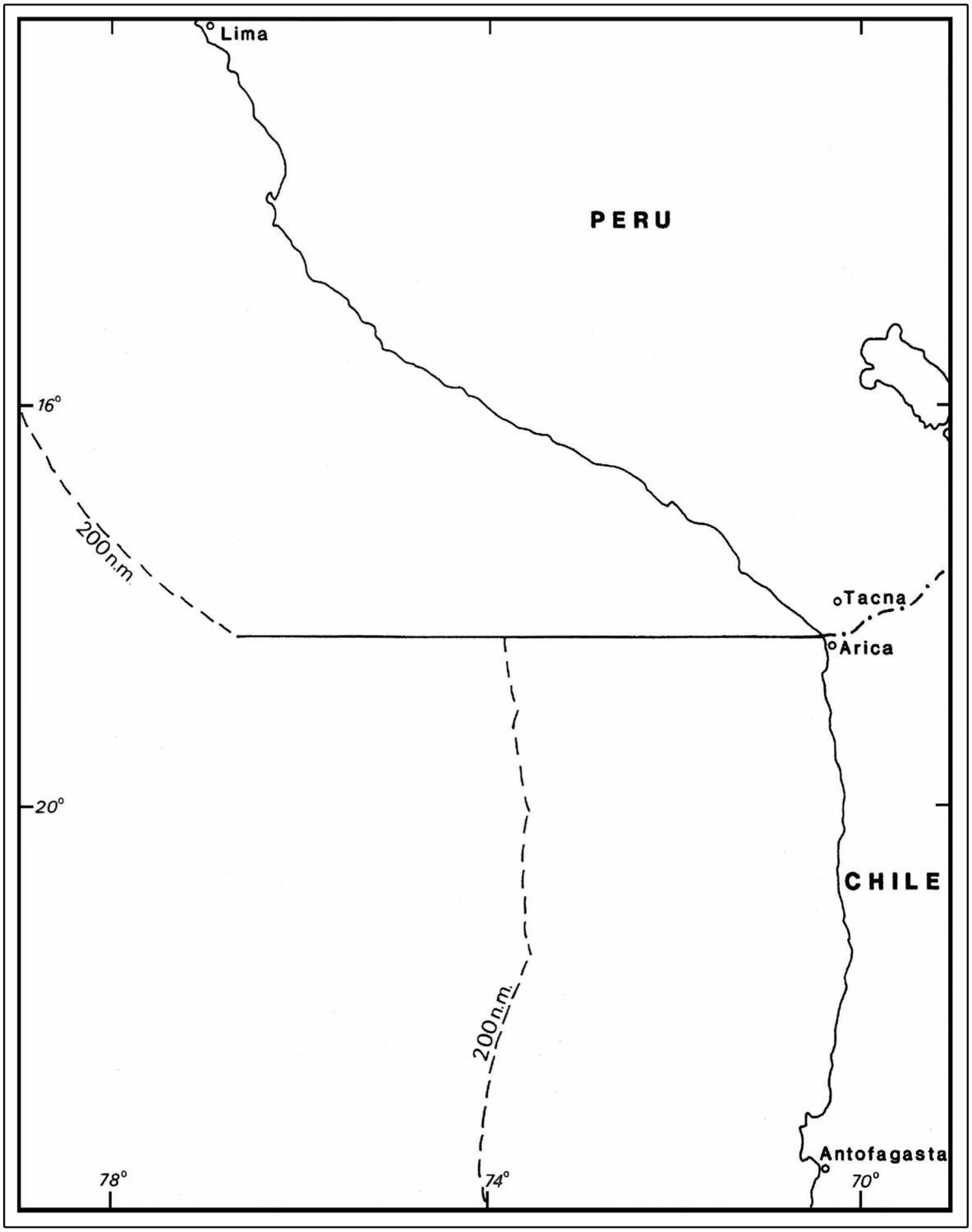
Sketch-map of the Chile-Peru maritime boundary by Professors Conforti and Francalanci (1987)



Source: B. Conforti and G. Francalanci (eds.), *Atlas of the Seabed Boundaries, Part Two*, 1987

Figure 17

Sketch-map of the Chile-Peru maritime boundary by Professor Prescott (1985)



Source: J.R.V. Prescott, *The Maritime Political Boundaries of the World*, 1985

> comme les deux premières frontières maritimes — *multifonctionnelles* — au monde, au-delà de la mer territoriale ; en outre, ces frontières-lignes sont assorties de *zones de tolérance*"[491]. (Emphasis in the original.)

2.257. Professor Labrecque provided a sketch-map which shows the parallel of latitude operating both as a boundary between abutting maritime zones and also as a limit restraining any Peruvian claim to the *alta mar* area[492].

2.258. Professor Labrecque specifically addressed the *alta mar* issue, with reference to Article IV of the Santiago Declaration, stating:

> "Étant donné la configuration particulière du littoral, qui change de direction au point terminal de la frontière terrestre, les 200 milles de frontière maritime se trouvent « prolongés », en quelque sorte, de 160 milles, pour délimiter latéralement la zone dévolue au Pérou. L'accord prévoit que la frontière maritime — qui s'éloigne considérablement d'une ligne d'équidistance stricte à l'avantage du Chili — coïncide avec le *parallèle* de latitude tiré du point terminal de la frontière terrestre où elle atteint la mer (article 4)."[493] (Emphasis in the original.)

2.259. In an account of State practice published in 1994, Rodman Bundy recounted examples of maritime boundaries that are constituted by lines of latitude, observing of this method that "one of its advantages lies in its

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491 G. Labrecque, *Les frontières maritimes internationales – Géopolitique de la délimitation en mer*, 2004, **Annex 286**, p. 178.

492 A notation on the sketch-map reproduced in **Annex 286**, p. 179, which reads "Falkland (R.-U.)", does not reflect the official position of the Republic of Chile.

493 G. Labrecque, *Les frontières maritimes internationales – Géopolitique de la délimitation en mer*, 2004, **Annex 286**, p. 183.

simplicity"[494]. He listed, *inter alia*, the Chile-Peru, Peru-Ecuador and Colombia-Ecuador maritime boundaries[495], and included the sketch-map of the Chile-Peru maritime boundary shown in **Figure 18**.

2.260. A Peruvian scholar, Professor Fernán Altuve – Febres Lores wrote a book titled *El Perú y la Oceanopolítica*, published by the Sociedad Peruana de Derecho in Lima in 1998. He acknowledges that "our maritime boundaries are measured, according to our own definition, on the basis of the parallels and not through the equidistance line"[496]. He provides the sketch-map shown in **Figure 19**, which shows the southern limit of Peru's "maritime dominion" as the parallel of latitude agreed in the Santiago Declaration, which is compared to a hypothetical line of equidistance. The sketch-map shows the parallel of latitude as precluding any claim by Peru to the *alta mar* area.

2.261. Professor Altuve – Febres Lores observes that the delimitation provisions in UNCLOS have no effect on Peru "because we concluded on 4 December 1954 an 'Agreement Relating to a Special Maritime Frontier Zone', which has been ratified by Peru, Ecuador and Chile, and which at Article 1 refers to '. . .the parallel which constitutes the maritime boundary between two countries. . .'"[497]. He goes on to observe that if Peru were to ratify UNCLOS, Article 74(4) would preserve the existing agreed maritime delimitation between Peru and Chile[498].

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494 R. R. Bundy, "State Practice in Maritime Delimitation", in G. Blake (ed.), *World Boundaries volume 5: Maritime Boundaries*, 1994, **Annex 254**, p. 31.

495 *Ibid*., p. 31.

496 F. Altuve – Febres Lores, *El Perú y la Oceanopolítica*, 1998, **Annex 250**, p. 63.

497 *Ibid*., p. 65.

498 *Ibid*., p. 66.

Figure 18

Sketch-map of the Chile-Peru maritime boundary by Mr. R. Bundy (1994)

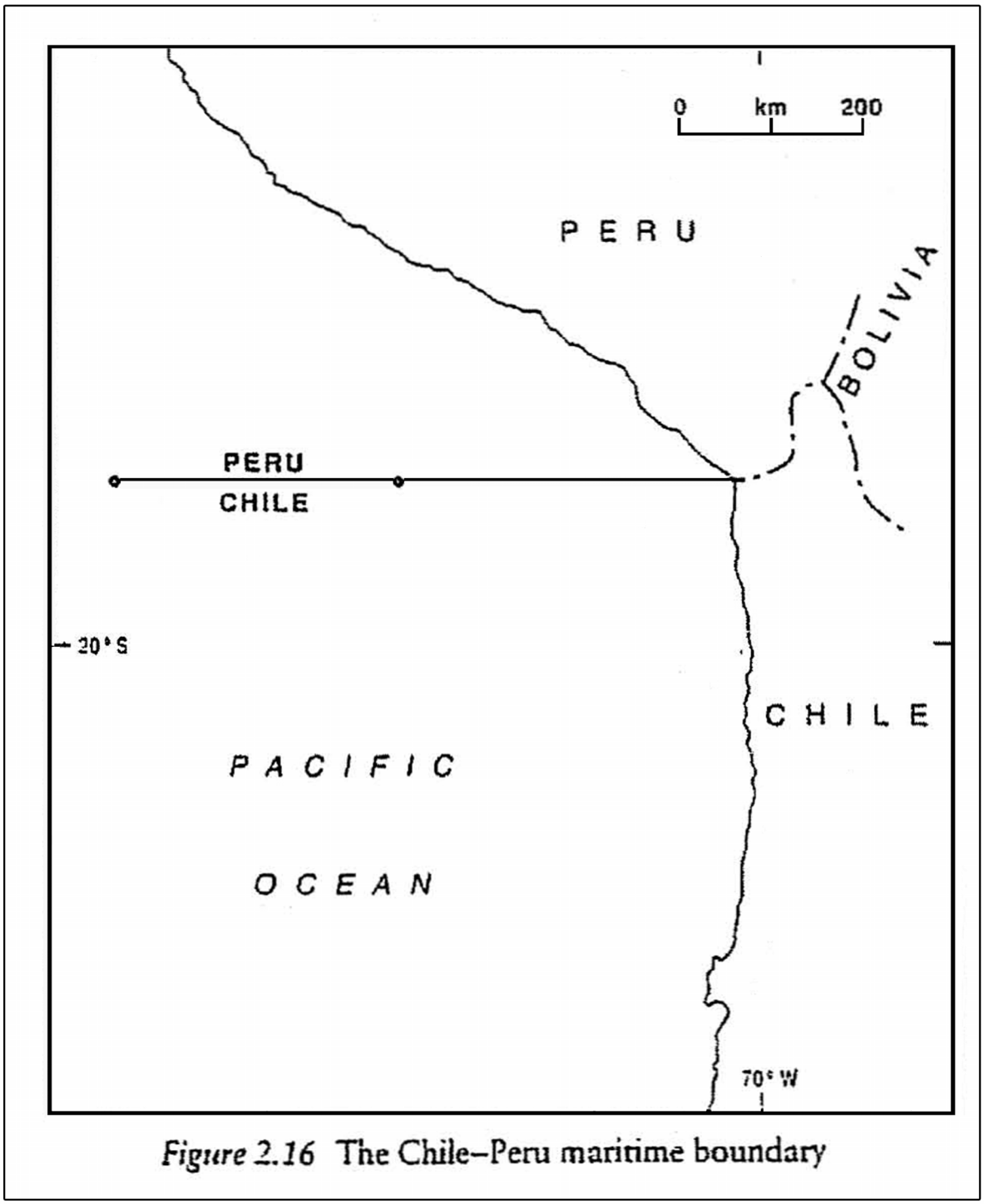
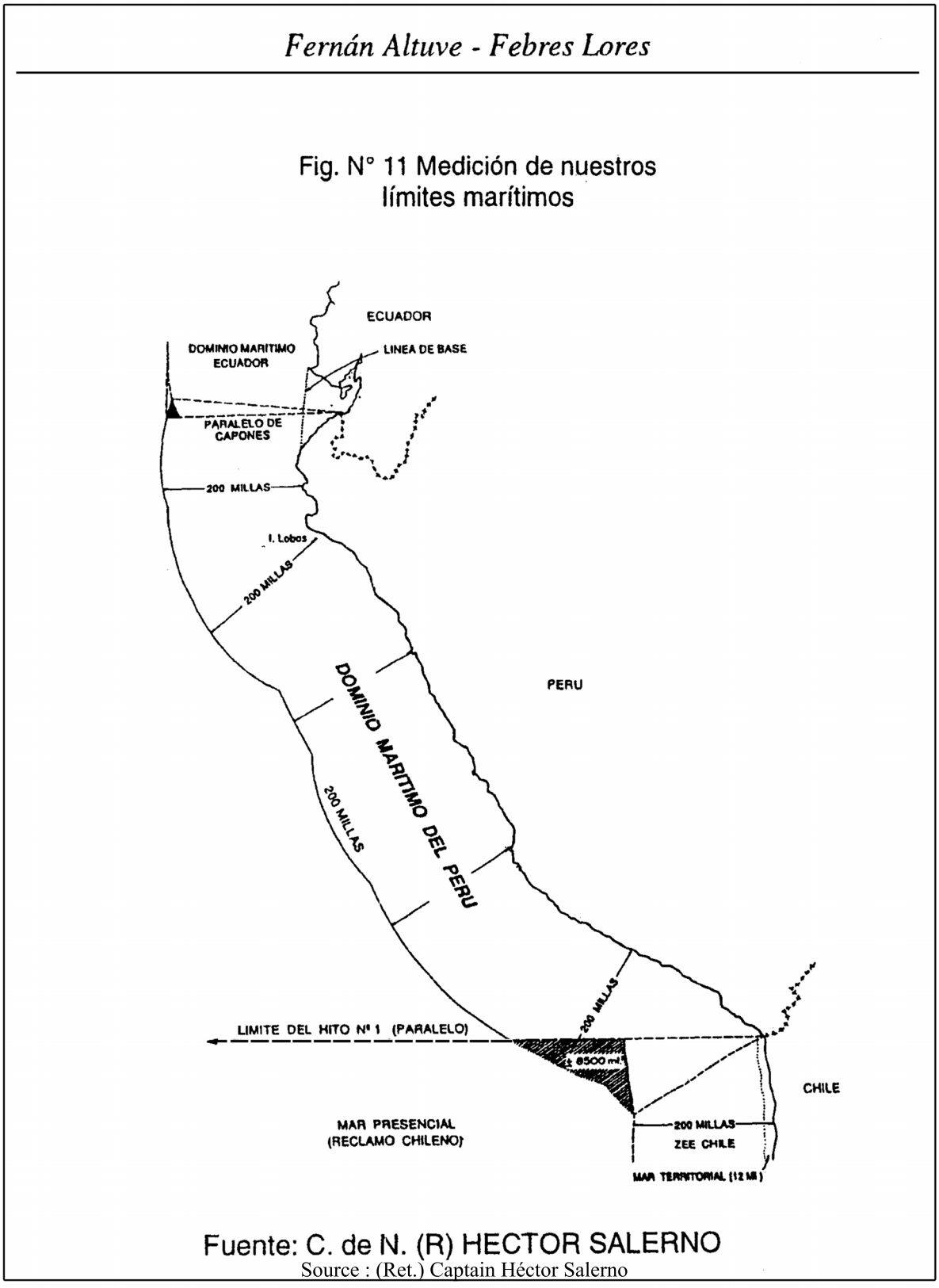


Figure 2.16 The Chile–Peru maritime boundary

Source: R. Bundy, "State Practice in Maritime Delimitation" in G. Blake (ed.), *World Boundaries Vol. 5: Maritime Boundaries*, 1994

Figure 19

Sketch-map of the Chile-Peru and Peru-Ecuador maritime boundaries by Professor Altuve − Febres Lores (1998)



Source : (Ret.) Captain Héctor Salerno

Source: F. Altuve − Febres Lores, *El Perú y la Oceanopolítica*, 1998

2.262. Space prevents the provision of extracts from the many other publicists from many different legal traditions who have also interpreted the Santiago Declaration and Lima Agreement as establishing the maritime boundary between Chile and Peru[499]. Some Peruvian authors have dissented from this view in recent years, but the broad consensus among publicists, both lawyers and geographers, from numerous regions and legal systems, is that the maritime boundary between Chile and Peru has long been settled.

Section 11. Conclusion

2.263. This Chapter began by explaining that the land boundary between the Parties was delimited and fully demarcated in 1929-1930. It then described the

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499 See, e.g., E. D. Brown, *Sea-Bed Energy and Mineral Resources and the Law of the Sea, Vol. III*, 1986, **Annex 253**, p. III.4.21; M. Evans, *Relevant Circumstances and Maritime Delimitation*, 1989, **Annex 259**, p. 131; G. Francalanci and T. Scovazzi (eds), *Lines in the Sea*, 1994, **Annex 262**, pp. 214-215; Kuen-Chen Fu, *Equitable Ocean Boundary Delimitation*, 1989, **Annex 264**, pp. 123, 142 and 299; Yuan Gujie, *Theory and Practice of International Maritime Delimitation*, 2000, **Annex 270**, p. 40; H. Jayewardene, *The Regime of Islands in International Law*, 1990, **Annex 275**, pp. 312 and 493; Zhou Jian, *International Law Case Studies on Island Sovereignty and Maritime Delimitation*, 1999, **Annex 277**, pp. 363-365; Gao Jianjun, *International Maritime Delimitation Study*, 2005, **Annex 278**, pp. 44 and 49; N. Marques Antunes, *Towards the Conceptualisation of Maritime Delimitation*, 2003, **Annex 290**, pp. 174-175; T. L. McDorman, K. P. Beauchamp, D. M. Johnston, *Maritime Boundary Delimitation: an Annotated Bibliography*, 1983, **Annex 292**, p. 191; K. G. Nweihed, *Frontera y Límite en su Marco Mundial*, 1992, **Annex 297**, p. 468; F. Orrego Vicuña, "International Ocean Developments in the Southeast Pacific: The Case of Chile", in J. P. Craven, J. Schneider and C. Stimson (eds), *The International Implications of Extended Maritime Jurisdiction in the Pacific*, 1989, **Annex 302**, p. 221; F. Orrego Vicuña, *The Exclusive Economic Zone: Regime and Legal Nature under International Law*, 1989, **Annex 301**, p. 206; F. M. Pfirter de Armas, "*¿Perú: la marcha hacia el oeste?*", in R. Zacklin (ed.), *El Derecho del Mar en Evolución: La Contribución de los Países Americanos*, 1975, **Annex 303**, p. 303; S. Rhee, "Equitable Solutions to the Maritime Boundary Dispute between the United States and Canada in the Gulf of Maine", *American Journal of International Law*, Vol. 75, 1981, **Annex 308**, p. 606, footnote 87; J. Zavala, *Consenso y Confrontación en la Delimitación de la ZEE y de la Plataforma Continental*, 1998, **Annex 317**, pp. 133, 135 and 295.

concordant unilateral proclamations of 200M maritime zones made by both Parties in 1947. The southern limit of Peru's 1947 claim was later agreed to form the Parties' maritime boundary in the 1952 Santiago Declaration. That was the parallel of latitude passing through the point at which the Parties' land boundary reaches the sea. That parallel of latitude remains the maritime boundary between the Parties for all purposes, and whatever the seaward extent of their maritime zones. In 1954 the Parties concluded the Lima Agreement as "an integral and supplementary part of"[500] the Santiago Declaration. In the Lima Agreement they unambiguously acknowledged that they had already delimited their maritime boundary. This Chapter closed by recounting examples of the extensive recognition of the settled maritime boundary between Chile and Peru by third States, by the United Nations, and by numerous publicists from diverse legal traditions. The next Chapter turns to the acknowledgement and implementation of the agreed maritime boundary by both Parties in their subsequent agreements and in their practice.

[500] Lima Agreement, **Annex 50 to the Memorial**, Art. 4.

CHAPTER III
ACKNOWLEDGEMENT AND IMPLEMENTATION OF THE AGREED BOUNDARY IN SUBSEQUENT AGREEMENTS AND IN PRACTICE

Section 1. Introduction

3.1. As established in Chapter II, Chile, Ecuador and Peru agreed in the Santiago Declaration of 1952 that their maritime zones were delimited laterally by parallels of latitude that pass through the points at which the land frontiers of the States concerned reach the sea. By that time, the Chile-Peru land boundary had been fully delimited and demarcated.

3.2. Peru argues in its Memorial that: (a) there is no agreed maritime boundary[501]; and (b) the parallel of latitude of Hito No. 1 was a provisional line solely and specifically for traffic control of fishing vessels, derived from an informal practice of Chile and Peru which was developed in the absence of any delimitation agreement[502]. This argument is in stark contrast with the position that both Peru and Chile have long adopted, as evidenced in their treaty and other practice. That is the subject of this Chapter. The Agreement Relating to a Special Maritime Frontier Zone (the Lima Agreement) is a prominent part of that practice. That Agreement was examined in Section 9 of Chapter II because it is expressed to be an "integral and supplementary" part of the Santiago Declaration.

3.3. Subsequent agreements between Chile and Peru, as well as the two States' unilateral and bilateral practice, all confirm the Parties' contemporaneous understanding that their maritime zones had been delimited fully and definitively, and that the boundary line followed the parallel of latitude passing

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501 See Memorial, para. 8.3.

502 *Ibid*., paras 4.105-4.106.

through Hito No. 1. These agreements and practice were based on the Santiago Declaration and the Lima Agreement. The practice of Ecuador, also a party to these two international agreements, is to the same effect. Furthermore, the Parties confirmed their understanding on the existence of a maritime boundary between them, not only through bilateral agreements and practice but also in the course of negotiations with third States on maritime issues.

3.4. As significant as the affirmative practice of the Parties, consisting of measures acting upon the agreed delimitation and giving effect to it, is the absence of incidents putting the agreed delimitation into question[503]. Neither Peru's Navy nor any other Peruvian State entity has transgressed the boundary or otherwise acted in defiance of it. There has been quiet possession on either side of the parallel of latitude; and, indeed, there has been co-operation and co-ordination between the two States in enforcing observance of that boundary. This strongly indicates the two States' concordant understanding about the existence and the course of the boundary line. For Chile's part, this understanding can be seen from a sketch-map which was part of the Chilean Navy's Rules of Engagement in its version of the early 1990s, reproduced as **Figure 20**. The sketch-map clearly depicts the maritime boundary as being the parallel of latitude of Hito No. 1, fully delimiting the Parties' respective maritime zones. It also depicts a 10M "Special Maritime Frontier Zone" on either side of the boundary.

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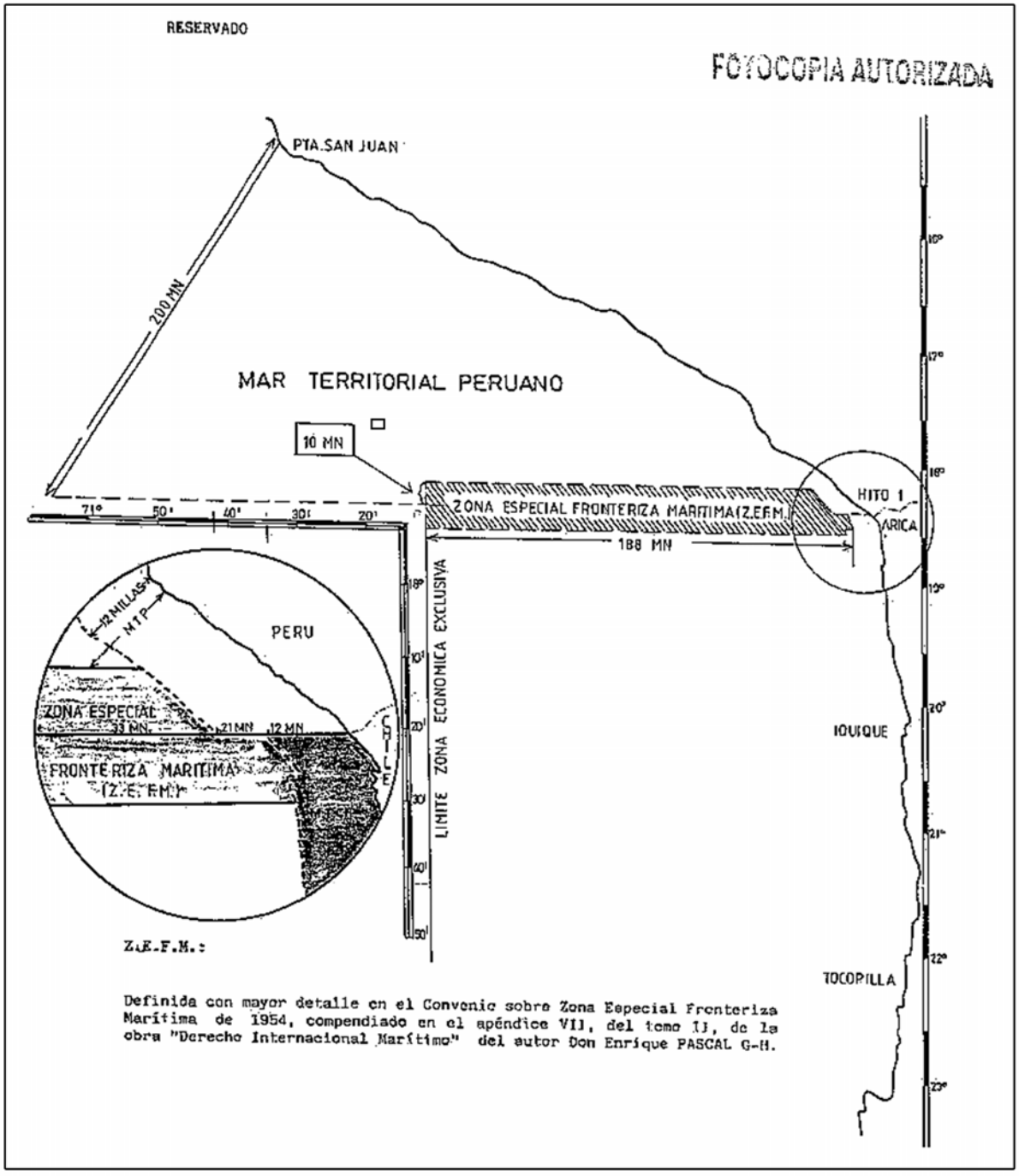
503 Minor incidents have been triggered by disagreements on the location of vessels, rather than the existence or course of the maritime boundary; see, e.g., Note No. (DSL) 6-4/112 of 6 November 2002 from the Ministry of Foreign Affairs of Peru to the Chilean Embassy in Peru, **Annex 101**, on an encounter between the Chilean Navy patrol ship *Fresia* and the Peruvian Coastguard ship *Río Zaña* in the maritime frontier on 15 October 2002.

Figure 20

Extract from the Rules of Engagement of the Chilean Navy (1990s)



Legend

Límite Zona Económica Exclusiva: EEZ limit
Mar Territorial Peruano: Peruvian Territorial Sea
Zona Especial Fronteriza Marítima (Z.E.F.M.): Special Maritime Frontier Zone

Z.E.F.M.:
Defined in more detail in the Agreement relating to a Special Maritime Frontier Zone of 1954, contained in appendix VII, volume II, of the work *Derecho Internacional Marítimo* by Mr. Enrique Pascal G-H.

Section 2. Implementation of the Boundary and Signalling along the Parallel of Latitude of Hito No. 1 (1968-1969)

3.5. Both Chile and Peru sought to enforce the maritime boundary vis-à-vis fishermen who crossed the boundary in pursuit of schools of fish. Incursions of this kind resulted in a series of complaints through diplomatic channels, negotiations on possible solutions and, ultimately, in the work of a new Chile-Peru mixed commission in 1968-1969 (the ***1968-1969 Mixed Commission***) for the construction of two lighthouses which, when aligned, were to signal the maritime boundary[504].

3.6. As is explained in this Section, the two alignment lighthouses (*faros de enfilación*) were constructed primarily for the benefit of mariners and fishermen, who in this way would be able to identify the maritime boundary without sophisticated navigational aids. The lighthouses were constructed as a practical solution for a specific purpose. However, their construction is predicated on a broader understanding by Chile and Peru that an all-purpose definitive boundary had been agreed, and that it followed the course of the Hito No. 1 parallel. The decision to build the lighthouses was prompted by concern in Chile and Peru about incursions into their "jurisdictional waters" — a term connoting maritime zones of sovereignty or exclusive jurisdiction. The Parties understood in 1968-1969 that the lighthouses were signalling the all-purpose maritime boundary between them. The lighthouses did not simply signal a line of a provisional nature, as Peru now argues[505]. The Parties further acknowledged

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[504] The Chile-Peru lighthouse system is not the only pair of alignment towers to signal a maritime boundary between two States. In 1980, Turkey and the Soviet Union decided to use "two leading marks and one sea buoy" to define the boundary line of their 12-mile territorial seas; see T. Scovazzi, "Turkey-Soviet Union (Territorial Sea)" in J. I. Charney and L. M. Alexander (eds), *International Maritime Boundaries, Vol. II,* 1993, **Annex 310**, pp. 1687-1691.

[505] See, e.g., Memorial, paras 4.106 and 4.127.

that the all-purpose maritime boundary had been established prior to 1968, and that the boundary was the parallel of latitude passing through Hito No. 1.

A. ACKNOWLEDGEMENT OF THE EXISTENCE OF THE BOUNDARY

3.7. As already noted[506], through the 1950s the fishing industry was becoming a strong contributor to both Chile's and Peru's economy. Both States are located in geographically strategic zones, dominated by the fisheries-rich Humboldt Current. Chilean and Peruvian fishing boats were exploring the waters in the vicinity of the boundary in pursuit of schools of anchovy, tuna and bonito. This resulted in continuous incursions of Chilean and Peruvian fishing boats into the waters of the other State. This kind of trespassing became a serious issue for both Peru and Chile.

3.8. In response to the recurring problems, in 1961 the Chilean maritime authorities formally demanded of Chilean fishermen not to cross into Peruvian territorial waters[507]. An internal document of Chile from 1971 records confirmation by the Maritime Governor of Arica that the managers of fishing companies and the directors of the Unions of masters, mechanics (*motoristas*) and crews of fishing vessels had been repeatedly warned, verbally and in writing, not to cross the "boundary parallel [*paralelo limítrofe*]"[508]. For its part, Peru instructed, and has continued until very recently to instruct, its fishermen not to cross the parallel of Hito No. 1. The stamp affixed by the Peruvian authorities on

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506 See paras 2.136-2.140 above.

507 See Letter No. 12115/1 of 10 February 1961 from the Maritime Governor of Arica to (*inter alios*) fishing companies INDO and EPERVA, **Annex 118**; Letter No. 12115/2 of 11 February 1961 from the Maritime Governor of Arica to the President of the Union of Fishermen in Arica, **Annex 119**.

508 Note No. 12115/6 of 12 May 1971 from the Maritime Governor of Arica to the Director of International Relations of the Ministry of Foreign Affairs of Chile, **Annex 128**, para. d.

declarations submitted by fishermen reads: "Captain and crew members are reminded of the prohibition on sailing to the south of the parallel 18° 21' 03" S"[509].

3.9. Chile attempted to secure an arrangement with Peru under which Chilean and Peruvian fishing vessels would be allowed to fish in certain areas of the maritime zone of the other State without being treated as transgressors. The first attempt by Chile was made in 1954-1955. Following a démarche by Chile[510], in early 1955 the Parties agreed to instruct their respective maritime authorities to allow Chilean and Peruvian fishermen to fish in the waters of the other State[511]. This agreement was not memorialized, so as not to affect the Lima Agreement, which had just been concluded[512]. Peru's Government was understood by Chile to be prepared to clarify the position in the form of an instruction to Peru's maritime authorities[513]. This agreement was ultimately not put into effect, but the record indicates that the discussion between the Parties was predicated upon their understanding that their maritime zones had been delimited and that the Lima Agreement was to apply to establish a zone of tolerance along the boundary line.

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509 See examples of "Declaration of Weighing Anchor by Artisanal Fishing Vessels" (*Declaración de Zarpe Embarcaciones Pesqueras Artesanales*) in 2002 and 2003, stamped by the Harbour Master of Ilo, **Annex 203**.

510 See Confidential Note No. 68 of 27 November 1954 from the Ministry of Foreign Affairs of Chile to the Chilean Ambassador to Peru, **Annex 112**.

511 See Confidential Note No. 6 of 31 January 1955 signed for the Minister of Foreign Affairs of Chile to the Chilean Ambassador to Peru, **Annex 113**. Confidential Note No. 94/15 of 3 February 1955 from the Chilean Ambassador to Peru to the Minister of Foreign Affairs of Chile, **Annex 114**.

512 See Confidential Note No. 94/15 of 3 February 1955 from the Chilean Ambassador to Peru to the Minister of Foreign Affairs of Chile, **Annex 114**.

513 See Cable No. 33 of 31 March 1955 from the Chilean Ambassador to Peru to the Minister of Foreign Affairs of Chile, **Annex 116**.

3.10. Subsequently, in 1961, the Chilean Government proposed to the Peruvian Government that each State grant the other special fishing concessions within an area extending 50 miles to the north and south of "the frontier zone of both countries [*la zona fronteriza de ambos países*]"[514]. The Peruvian national section of the CPPS[515] analysed Chile's proposal in 1961 and agreed to it in principle[516]. The report of Peru's national section acknowledged the existence of a "frontier line" between the two countries:

> "The reasons that motivated it [i.e. Chile's proposal to grant special fishing concessions], namely, the movement of the fish schools along the frontier line [*línea fronteriza*] and its effects on the industries established in the ports near the frontier, is a proven fact which affects the fishing industries of Ilo [in Peru] and Arica [in Chile]."[517]

3.11. Ultimately, no agreement as proposed by Chile was concluded. That is of no moment here. What matters is that both Chile and Peru confirmed in official correspondence and represented to each other the existence of a "frontier line" dividing their respective maritime zones. That is squarely at odds with Peru's present position.

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514 Note No. 142 of 20 June 1961 from the Chilean Ambassador to Peru to the Minister of Foreign Affairs of Peru, **Annex 72**.

515 Each CPPS Member State has set up a national section, which is a permanent working body comprising senior members of various Ministries and authorities, for the purpose of coordinating its policies towards the CPPS.

516 See Report of the Peruvian section of the CPPS, quoted in Confidential Letter No. 1043/72 of 27 September 1961 from the Chilean chargé d'affaires in Peru to the Ministry of Foreign Affairs of Chile, **Annex 120**. In the last paragraph of the report, the Peruvian national section stated that, agreeing in principle with Chile's proposal, it decided to forward that proposal, with its favourable opinion, to various ministries within the Peruvian government for further consideration.

517 *Ibid*.

3.12. In the meantime, incursions by fishermen into maritime zones of both Parties continued. There was a series of diplomatic notes complaining of such incursions. In its complaints Peru referred to "continuous transgressions of [Peru's] maritime frontier committed by Chilean fishing vessels"[518]; and used a number of terms indiscriminately to refer to the maritime zone which, Peru claimed, had been transgressed into: "Peruvian waters"[519], "territorial waters"[520] and "jurisdictional waters"[521]. All of these terms denote a plenitude of "sovereignty and jurisdiction" in the sense of the Santiago Declaration: no document bears out Peru's present allegation that the maritime zones delimited by the parallel of Hito No. 1 were merely fisheries zones. Nor does any document suggest that the boundary line was less than permanent.

3.13. Peru considered that the parallel marked the southern limit of its maritime zone. It was only one aspect of Peru's rights of sovereignty and jurisdiction that Peru did not allow Chilean vessels to engage in fishing in its maritime zone without authorization. Thus, in 1964, the Harbour Master of Mollendo-Matarani in southern Peru (approximately 85 miles north of the parallel of the boundary) informed the Harbour Master of Arica in Chile that, "in view of the continuous violation of the maritime frontier [*frontera marítima*] of Peru", the Peruvian authorities would apply Article 133 of the Regulation of

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518 Memorandum of 3 December 1965 from the Embassy of Peru in Chile to the Ministry of Foreign Affairs of Chile, **Annex 69 to the Memorial**, para. 1.

519 Memorandum No. 5-4-M/64 of 20 December 1962 from the Peruvian Embassy in Chile to the Ministry of Foreign Affairs of Chile, **Annex 73**.

520 Memorandum of 3 December 1965 from the Embassy of Peru in Chile to the Ministry of Foreign Affairs of Chile, **Annex 69 to the Memorial**.

521 Memorandum of 27 September 1967 from the Ministry of Foreign Affairs of Peru to the Chilean Embassy in Peru, **Annex 77**.

Captaincies and Merchant Navy, under which foreign vessels fishing in Peru's territorial waters (*aguas territoriales peruanas*) were to be prosecuted[522].

3.14. Furthermore, Peru's reliance on the Lima Agreement in the correspondence at the time[523] confirms Peru's understanding that the boundary followed a parallel of latitude. And this parallel could only have been the one which passes through the point at which the land frontier reaches the sea; as Peru acknowledges in its Memorial[524], the parallel referred to in Article 1 of the Lima Agreement is the same parallel as that referred to in Article IV of the Santiago Declaration.

3.15. The Parties' authorities on the ground understood this. An internal Chilean document of January 1963 records a joint visit by the Maritime Governor of Arica and the Peruvian Consul in Arica to the "frontier boundary marker on the coast". The officials used navigational instruments to observe the direction of the "Parallel of Latitude corresponding to the Concordia Line"[525]. Another internal Chilean document from 1967 records a unilateral measure taken

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522 Note No. V.1000-491 of 20 November 1964 from the Harbour Master of Mollendo-Matarani to the Maritime Governor of Arica, **Annex 74**, para. 3. The text of Article 133 is quoted in this note and reads as follows: "It is prohibited for foreign vessels to fish in the Peruvian territorial waters. Violation of this article shall result in the seizure of the vessel, its fishing equipment and any shipment as contraband, and shall be punished pursuant to the provisions governing this matter."

523 See Memorandum No. 5-4-M/64 of 20 December 1962 from the Peruvian Embassy in Chile to the Ministry of Foreign Affairs of Chile, **Annex 73**; see paras 2.219-2.221 above.

524 See Memorial, paras 4.103 and 4.104.

525 Note No. 12115/5 of 30 January 1963 from the Maritime Governor of Arica to the Director of the Coast and Merchant Navy, **Annex 121**, para. 5.

by Peru, apparently to indicate the maritime-boundary line through the alignment of cement monoliths and a set of poles[526].

3.16. One memorandum from Peru in 1966[527] also confirms Peru's understanding that the maritime boundary was a parallel of latitude. The memorandum relates to an incident involving an alleged incursion of a Peruvian patrol boat into Chilean waters. On 23 March 1966, the Chilean Ministry of Foreign Affairs informed the Embassy in Lima that on 22 March the Peruvian patrol ship *Diez Canseco* had intercepted the Chilean fishing vessels *Mariette* and *Angamos* and fired warning shots at them. According to the Chilean Navy, these vessels had actually been fishing "south of the boundary with Peru at latitude 18º 25' and longitude 70º 26', roughly 5 miles from the Chacalluta airport."[528] The Chilean Government lodged no formal complaint, but it did request an explanation of the reasons for which the Peruvian patrol boat had crossed the boundary and opened fire.

3.17. In its response[529], Peru denied that *Diez Canseco* had crossed into Chilean waters in the course of its pursuit of one of the Chilean vessels which it had sighted. To substantiate its position, Peru provided the exact locations of *Diez Canseco* at 8.00 a.m., 8.25 a.m. and 8.35 a.m. on the day of the incident, by

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526 See Note No. 21 of 2 November 1967 from the Governor of Arica to the Minister of the Interior of Chile, **Annex 126**, para. 1.

527 Memorandum of 8 June 1966 from the Peruvian Embassy in Chile to the Ministry of Foreign Affairs of Chile, **Annex 75**.

528 Cable No. 48 of 23 March 1966 from the Ministry of Foreign Affairs of Chile to the Chilean Embassy in Peru, **Annex 122**.

529 Memorandum of 8 June 1966 from the Peruvian Embassy in Chile to the Ministry of Foreign Affairs of Chile, **Annex 75**.

reference to coordinates of those locations and the distance from the "frontier line"[530]:

(a) At 8.00 a.m. "the position of [*Diez Canseco*] was 18º 14' [S], 70º 36' W; i.e., 7 miles north of the frontier line [*línea fronteriza*] and at a distance of 1 mile from the coast". At this point *Diez Canseco* caught sight of one Chilean vessel sailing one mile from the coast, three and a half miles north of the "frontier line", as well as two other Chilean vessels sailing three miles from the coast and two miles north of the "frontier line".

(b) At 8.25 a.m., *Diez Canseco* was "at 18° 18' [S], 70° 30' W (3 miles north of the frontier line and one and a half mile away from the coast)". Here, *Diez Canseco* fired 16 warning shots at one of those Chilean vessels.

(c) At 8.35 a.m., *Diez Canseco* "was located at 18º 19' [S], 70º 28' W; i.e., 2 miles north of the frontier line." Here, it stopped its pursuit because the Chilean vessel which it pursued had gone back into Chilean waters[531].

These three positions of *Diez Canseco* are shown in **Figure 21** as Point A, Point B and Point C respectively.

3.18. On the basis of standard navigational principles, it is assumed that one mile in Peru's memorandum is equal to one minute of latitude. Point A is thus

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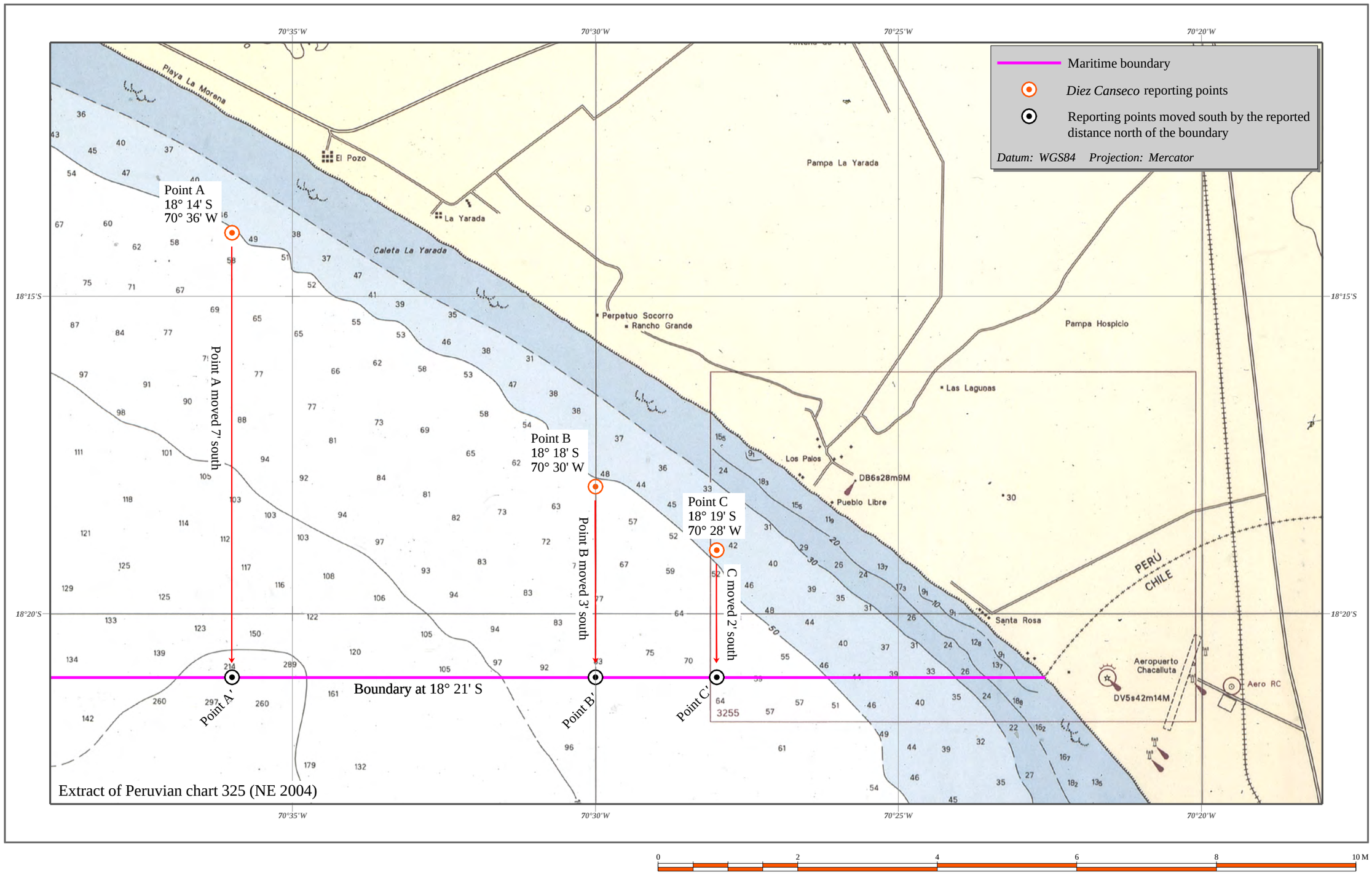
530 Memorandum of 8 June 1966 from the Peruvian Embassy in Chile to the Ministry of Foreign Affairs of Chile, **Annex 75**, para. 2.

531 *Ibid*., para. 2.

Figure 21

Boundary implied by Peru's report of the *Diez Canseco* incident, plotted on an extract of Peruvian chart 325



Prepared for the Ministry of Foreign Affairs, Chile, by UKHO Law of the Sea Consultancy

seven minutes to the north of the maritime-boundary line envisaged by Peru in its memorandum and, similarly, Points B and C are three and two minutes, respectively, to the north of that boundary line. The "frontier line" referred to in Peru's memorandum can be ascertained by moving, on a chart, Point A, Point B and Point C to the south by seven, three and two minutes respectively (Point A', Point B' and Point C') and identifying a line which passes through Point A', Point B' and Point C'. As shown in **Figure 21**, the "frontier line" which can be derived from these data is the parallel of latitude of 18° 21' S. This is the Chile-Peru maritime boundary envisaged in Peru's memorandum.

B. The Parties' Agreement to Signal the Maritime-Boundary Line

3.19. Despite the understanding between the Parties regarding the existence and course of the maritime boundary, contemporaneous documents suggest that fishermen and the authorities alike had practical difficulty in identifying at sea the precise position of the boundary parallel by reference to a point on the coast. There was some confusion as to which landmark should be used for that purpose, because Hito No. 1 (120 cm in height) was not at all conspicuous and would be impossible to see except from positions very close to the coast. An internal Chilean document from 1967 indicates that ship masters and officials used various landmarks as reference points for the maritime boundary (for example, the more visible control tower of the Chacalluta Airport, which is very close to the parallel of 18° 21' 03" S)[532].

3.20. None of the lines that may have been actually used at the time, as a result of relying on a variety of more conspicuous landmarks than Hito No. 1, materially deviated from the parallel of latitude of Hito No. 1. More importantly

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[532] Note No. 397 of 26 September 1967 from the Minister of National Defence of Chile to the Minister of Foreign Affairs of Chile, **Annex 125**, p. 1.

for present purposes, no doubt was raised by either Chile or Peru that their maritime boundary was the Santiago Declaration Article IV line, i.e. a parallel of latitude "at the point at which the land frontier of the [two States] reaches the sea". Nevertheless, it became crucial to resolve the practical difficulty for mariners and fishermen by signalling the precise parallel of latitude that constitutes the boundary.

3.21. As will be seen in this Section, the Parties specified by agreement that the maritime boundary between them followed the parallel of latitude of Hito No. 1. They did so without any reservation as to the finality, permanence, and all-purpose nature of the boundary line. They jointly decided to use a prominent feature, namely a pair of alignment lighthouses, to be constructed in a way that would permanently mark the parallel of latitude. Nowhere in the relevant diplomatic correspondence or agreed minutes from that time did Peru state that the line thus signalled was either a provisional line or for a limited, specific purpose, i.e., fishing.

3.22. The initiative to signal the maritime boundary came from Peru. In February 1968, Peru's Minister of Foreign Affairs indicated to the Chilean chargé d'affaires in Lima that Peru considered it appropriate–

> "for both countries, to proceed to build posts or signs of considerable dimensions and visible at a great distance, at the point at which the common border reaches the sea, near boundary marker number one [Hito No. 1]."[533]

[533] Note No. (J) 6-4/9 of 6 February 1968 from the Minister of Foreign Affairs of Peru to the Chilean chargé d'affaires in Peru, **Annex 71 to the Memorial**.

3.23. Chile accepted Peru's proposal in March 1968[534]. Pursuant to the agreement constituted by this exchange of notes, Peruvian and Chilean delegates met at the frontier area in April 1968.

3.24. In the 1968 Minutes, which the delegates of Chile and Peru jointly prepared on 25 and 26 April 1968, the delegates recorded that they were instructed to undertake–

> "an on-site study for the installation of leading marks visible from the sea to materialize *the parallel of the maritime frontier originating at Boundary Marker number one (No. 1)*."[535] (Emphasis added.)

The Parties thus explicitly recorded their understanding that (a) there was a "maritime frontier" between the two States, which (b) followed the parallel of latitude passing through Hito No. 1.

3.25. The Parties' delegates recorded their joint understanding that their task was to signal the *existing* maritime boundary. Their joint understanding is important to a proper interpretation of the agreement that was ultimately reached between Peru and Chile in connection with the signalling of the maritime boundary. The heads of both delegations at the meeting in April 1968 were

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534 See Note No. 81 of 8 March 1968 issued by the Chilean chargé d'affaires in Peru to the acting Minister of Foreign Affairs of Peru, **Annex 72 to the Memorial**.

535 1968 Minutes, **Annex 59 to the Memorial**, first paragraph. The italicized part reads in the original Spanish as follows: "el paralelo de la frontera marítima que se origina en el Hito número uno (No. 1)".

senior Foreign Ministry officials who were responsible for international-boundary matters[536]; they were not technical staff.

3.26. On the basis of their common understanding about the existence and course of the maritime boundary, the Parties' delegates agreed jointly to propose to the two Governments that two marks be built–

> "with daylight and night signalling; the front mark would be placed in the surroundings of Boundary Marker [Hito] No. 1, in Peruvian territory; the rear mark would be placed at approximately 1,800 metres away from the front mark, *in the direction of the parallel of the maritime frontier*"[537]. (Emphasis added.)

3.27. This proposal was accepted by both Governments, through a further exchange of diplomatic notes[538]. The note from Peru records its approval of the terms of the 1968 Minutes "in their entirety". In the same exchange of notes, the Parties also recognized the need to verify the location of Hito No. 1 against the astronomical coordinates which had been determined by the 1929-1930 Mixed Commission and recorded in the Act of Plenipotentiaries[539], given the importance of this boundary marker for the purpose of signalling the maritime boundary. Thus, the Parties agreed to establish the 1968-1969 Mixed

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536 Minister Jorge Velando Ugarteche, Chief of Boundaries Division of the Ministry of Foreign Affairs of Peru; and Mr. Alejandro Forch Petit, Chief of the International Boundary Division of the Ministry of Foreign Affairs of Chile.

537 1968 Minutes, **Annex 59 to the Memorial**, para. 1.

538 See Note No. (J) 6-4/43 of 5 August 1968 from the Secretary-General of the Ministry of Foreign Affairs of Peru (signing for the Foreign Minister) to the Chilean chargé d'affaires in Peru, **Annex 74 to the Memorial**; Note No. 242 of 29 August 1968 from the Embassy of Chile in Peru to the Ministry of Foreign Affairs of Peru, **Annex 75 to the Memorial**.

539 See para. 2.15 above.

Commission, which they charged with verifying the position of Hito No. 1 and determining the location and specifications of the two signalling marks.

3.28. The Parties' commitment, as a matter of international law, to build two permanent signalling marks (which, as noted, took the form of alignment lighthouses) in accordance with specified technical specifications was recorded by the 1968-1969 Mixed Commission in the 1969 Act, concluded in August 1969[540]. There the Mixed Commission also confirmed that the pillar of Hito No. 1 had been moved from its original location, and recommended that it be rebuilt[541]. A joint report which was prepared by the heads of the Chilean and Peruvian delegations, and which accompanied the 1969 Act, again records a clear understanding that a "maritime boundary [*límite marítimo*]" was in place. The 1968-1969 Mixed Commission was instructed by the Governments of Chile and Peru to signal that *límite marítimo*[542].

3.29. For its part, Peru explicitly stated in this process that it was agreeing with Chile the technical means of permanently signalling a maritime boundary which was already in existence and which was not qualified in any of the ways that Peru now proposes (temporary, for limited purposes, etc.). In the note to Chile conveying Peru's approval of the 1968 Minutes, Mr. Javier Pérez de Cuéllar, then the Secretary-General of the Ministry of Foreign Affairs of Peru, stated that the signalling marks were "physically to give effect to the parallel of the maritime frontier [*materializar el paralelo de la frontera marítima*]"[543]. This

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540 1969 Act, **Annex 6**.

541 *Ibid*., sections D and F.1.

542 Joint report by the heads of the Chilean and Peruvian delegations accompanying the 1969 Act, **Annex 6**, first paragraph.

543 Note No. (J) 6-4/43 of 5 August 1968 from the Secretary-General of the Ministry of Foreign Affairs of Peru (signing for the Foreign Minister) to the Chilean chargé d'affaires in Peru, **Annex 74 to the Memorial**.

squarely contradicts the statement in Peru's Memorial that the purpose of the lighthouses was "to identify the location of the land boundary near the shore"[544]. The contemporaneous official correspondence clearly indicates that the intention was to signal the maritime boundary, not the land boundary. The land boundary was relevant only in so far as Hito No. 1 serves as the reference point for the parallel of latitude which constitutes the maritime boundary.

3.30. A subsequent note from Peru informing Chile of the composition of its delegation to a meeting of the 1968-1969 Mixed Commission unambiguously recorded Peru's official position that this Commission was tasked with–

> "verify[ing] the position of boundary marker number one [Hito No. 1] and fix[ing] the definitive location of the two alignment towers that were to signal the maritime boundary [*límite marítimo*]"[545].

The head of the Peruvian delegation to the 1968-1969 Mixed Commission, Mr. Velando Ugarteche, later wrote that he contributed to the peace and friendship between Chile and Peru by "construct[ing] towers and lighthouses *for signalling the maritime frontier* and avoiding incidents provoked by fishing motor boats and vessels" (emphasis added)[546].

3.31. Again, there is no indication at all in any of the diplomatic documents or the bilateral instruments in 1968-1969 that the boundary line being signalled was simply a provisional "*ad hoc*" line for specific practical problems, as Peru

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544 Memorial, para. 4.121.

545 Note No. 5-4-M/76 of 13 August 1969 from the Peruvian Embassy in Chile to the Ministry of Foreign Affairs of Chile, **Annex 78**.

546 J. Velando Ugarteche, "La Salida al Mar de Bolivia", *Expreso*, 19 May 1987, reproduced in a collection of his written work, 1988, **Annex 248**, p. 34.

now argues[547]. In the process of signalling the boundary in 1968-1969, the 1968 Minutes and the exchange of notes in August 1968 referred to the "parallel of the maritime frontier [*paralelo de la frontera marítima*]"[548]; and the 1969 Act referred to the "maritime boundary [*límite marítimo*]"[549]. These terms in agreed official texts are plain and unqualified.

3.32. True, the boundary needed signalling because accurate navigation off this low-lying and featureless coast was particularly difficult before the advent of affordable satellite navigation (in the latter part of the 1990s). But it is a complete *non sequitur* to say that the line being signalled therefore applied only to fishing or was somehow provisional. If Peru had held its present position in 1968-1969, one would have expected it to have expressly reserved its position. Yet, at no point in the course of the many joint instruments, diplomatic exchanges and joint work in 1968 and 1969 did Peru suggest that the two lighthouses to be constructed were to mark a mere provisional line. Nor did Peru suggest that the line signalled by the lighthouses was to be applied only for the purpose of controlling fishing vessels.

3.33. The process of building alignment lighthouses was initiated by Peru, which had wished to exercise full control over resources in its maritime zone and to protect them from exploitation by fishermen from other States, including Chile. Peru was fully aware of the definitive character of the line which it agreed

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547 See, e.g., Memorial, para. 4.127.

548 1968 Minutes, **Annex 59 to the Memorial**, first paragraph; Note No. (J) 6-4/43 of 5 August 1968 from the Secretary-General of the Ministry of Foreign Affairs of Peru (signing for the Foreign Minister) to the Chilean chargé d'affaires in Peru, **Annex 74 to the Memorial**, first paragraph; Note No. 242 of 29 August 1968 from the Embassy of Chile in Peru to the Ministry of Foreign Affairs of Peru, **Annex 75 to the Memorial**, first paragraph.

549 1969 Act, **Annex 6**, first paragraph; also see the joint report by the heads of the Chilean and Peruvian delegations accompanying the 1969 Act, **Annex 6**, first paragraph.

to signal. Peru's diplomatic note to Chile of 13 August 1969[550], as well as a Peruvian Supreme Resolution of the same date appointing the Peruvian delegation to the 1968-1969 Mixed Commission[551], both confirm Peru's intention to have the lighthouses erected in order "to signal the maritime boundary [*señalar el límite marítimo*]"[552]. "Maritime boundary" is, again, a plain and unqualified term.

3.34. Chile had the same understanding of the definitive nature of the line signalled by the two lighthouses, as well as of the reason for their erection. A statement made by a deputy during the relevant extraordinary session of the Chilean Chamber of Deputies, in December 1969, acknowledged that the lighthouses to be built by Chile and Peru would demarcate the maritime zones of the two States, so helping to reduce continuing problems with fishermen[553]. The Chilean Navy also conveyed to the Peruvian naval authorities its understanding that the lighthouses were to be installed to signal the "maritime boundary" [*límite marítimo*]"[554].

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550 Note No. 5-4-M/76 of 13 August 1969 from the Peruvian Embassy in Chile to the Ministry of Foreign Affairs of Chile, **Annex 78**.

551 Supreme Resolution No. 0478-69-RE of 13 August 1969, **Annex 165**.

552 *Ibid*., first paragraph; Note No. 5-4-M/76 of 13 August 1969 from the Peruvian Embassy in Chile to the Ministry of Foreign Affairs of Chile, **Annex 78**, first paragraph. In its Memorial, Peru fails to present these documents and to explain the mandate and work of the 1968-1969 Mixed Commission.

553 See Statement by Mr. Palza of 3 December 1969 on the "Installation in Arica (Tarapaca) of the alignment lighthouse for demarcating the maritime boundary zone with Peru", Record of the 16th Extraordinary Session of the Chilean Chamber of Deputies, **Annex 127**, pp. 2245-2246. Mr. Palza's constituency included Chile's frontier area with Peru.

554 Letter No. 12610/28 of 28 July 1970 from the Director of the Hydrographic Institute of the Chilean Navy to the Director of Hydrography and Lighthouses of Peru, **Annex 80**.

3.35. The lighthouses were indeed put into operation by Chile and Peru, in 1972[555]. Both Chile and Peru called their respective lighthouse "*faro de enfilación*", or alignment lighthouse. These lighthouses were not to indicate any natural or man-made obstacles to navigation, but to signal a line at sea. The only line which existed in these waters was the maritime boundary between the two States. The lighthouses were aligned along the parallel of latitude of Hito No. 1, thereby signalling the maritime boundary (see the aerial photo of the two lighthouses in **Figure 22**).

3.36. Peru now suggests, astonishingly, that the lighthouses should have been visible from a distance of 200 nautical miles from the coast if they had been intended to mark the maritime boundary[556]. This would have required installations of some 10,000 metres in height (and conditions of perfect visibility). Leaving aside the impracticality of such an endeavour, such mammoth installations would have been pointless. The Parties were concerned with visibility within the first twelve nautical miles from the coast, up to the point where the zone of tolerance under the Lima Agreement commenced[557] and where many of the incursions were reported. The Parties from the outset intended that the lights "would have approximately a 15-mile visibility"[558]. As illustrated in **Figure 23**, when coming into operation in 1972, the Peruvian and

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555 The commencement of operation of the Chilean lighthouse was announced in the Notice to Mariners (*Noticia a los Navegantes*) issued by the Hydrographic Institute of the Chilean Navy (Notice No. 57 of 1972) contained in Volume 5 of the collection of notices of 1972, p. 4, **Annex 129**. Notice No. 152 of 1972 issued by the same institute (contained in Volume 11 of the collection of notices of 1972, p. 7, **Annex 130**) records that the commencement of operation of the Peruvian lighthouse was announced by Peru through Notice to Mariners (*Aviso a los Navegantes*) No. 6 of 1972.

556 See Memorial, para. 4.124.

557 See Lima Agreement, **Annex 50 to the Memorial**, Art. 1.

558 1968 Minutes, **Annex 59 to the Memorial**, para. 2(c).

Chilean lighthouses had a range of 13.2M and 22M respectively[559], thus ensuring clear visibility within the first twelve nautical miles.

3.37. To conclude, in 1968-1969 the Parties clearly intended to signal their definitive, all-purpose maritime boundary (*límite marítimo*). No other reading accords with the repeated, unqualified and unreserved reference to a *límite marítimo* or a *frontera marítima* in the record from 1968-1969. The joint proposal of the Parties' delegates in April 1968 that signalling lighthouses be built along the parallel of latitude of Hito No. 1 was fully agreed by the two Governments. Neither Chile nor Peru disputed or qualified the delegates' express understanding that the parallel of latitude of Hito No. 1 constituted the maritime boundary. Both Chile and Peru recognized the binding force of the 1968 Minutes and the 1969 Act, by actually building the two lighthouses on the latitude of Hito No. 1 and putting them into operation (see **Figure 22** above). Lighthouses continued to perform their signalling role until the Peruvian lighthouse collapsed in an earthquake in 2001. Peru has yet to build a new lighthouse despite Chile's request that it do so[560].

3.38. This series of agreements constitutes subsequent practice showing the Parties' concordant interpretation of Article IV of the Santiago Declaration in their bilateral relations. It is fundamentally inconsistent with Peru's recent attempt to deny the existence of an all-purpose *límite marítimo* with Chile.

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559 See Notice to Mariners No. 57 of 1972 by the Hydrographic Institute of the Chilean Navy, **Annex 129**; Notice No. 152 of 1972 issued by the same institute, **Annex 130**. In subsequent documents of Peru and Chile, the ranges of their lighthouses were stated to be nine and 14 nautical miles: Hydrographic and Oceanographic Services of the Chilean Navy, *List of Lights*, 17th edn, 2008, **Annex 159**; Directorate of Hydrography and Navigation of Peru, *List of Lights*, 9th edn, 1998, **Annex 181**.

560 See Aide-mémoire by the Ministry of Foreign Affairs of Chile, transcribed in the Message of 25 January 2002 from the same Ministry to the Chilean Embassy in Peru, **Annex 100**: the message records that the aide-mémoire was provided to the Peruvian chargé d'affaires in Chile on the date of the message.

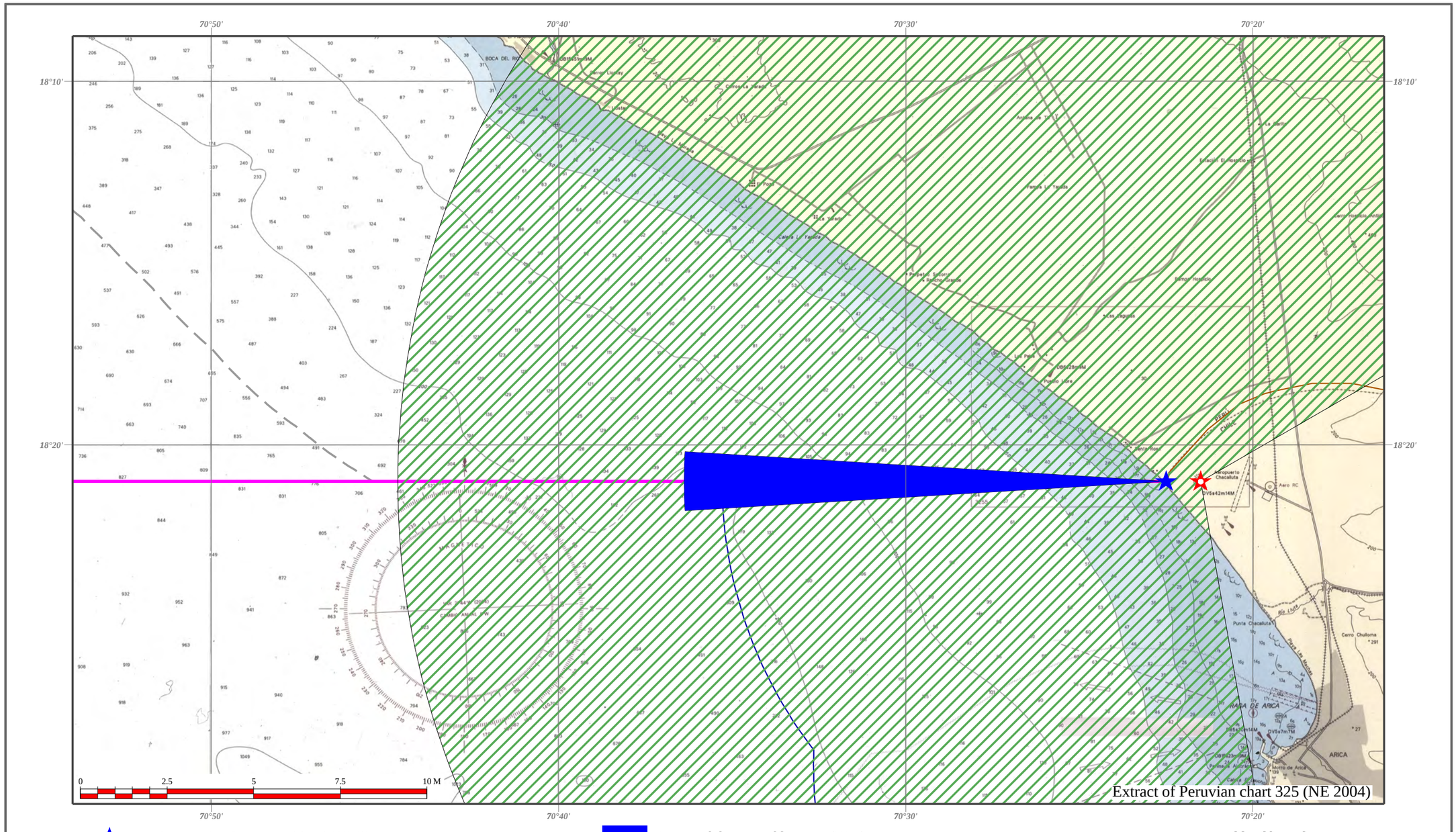
Figure 22

Signalling of the maritime boundary through alignment of the Chilean and Peruvian lighthouses on Hito No. 1

Prepared by the Ministry of Foreign Affairs of Chile

Figure 23

Operation of Chilean and Peruvian lighthouses signalling the maritime boundary



Prepared for the Ministry of Foreign Affairs, Chile, by UKHO Law of the Sea Consultancy

C. THE SIGNALLING OF THE BOUNDARY WAS A MEASURE IMPLEMENTING THE SANTIAGO DECLARATION

3.39. The Parties shared a common understanding that the legal basis of the maritime boundary was to be found in the Santiago Declaration and the Lima Agreement. In completing the signalling work, they were simply implementing their delimitation agreement. Neither of them raised any question on that point in 1968-1969. Earlier, in 1965, Chile had complained to Peru about a fishing fleet of approximately 70 vessels that had been sighted "15 miles to the south of the Chilean-Peruvian boundary and 45 miles to the west of the Port of Arica"[561]. Chile indicated that this was "not consistent with the provisions contained in the Declaration on the Maritime Zone signed at Santiago on 18 August 1952 by the Governments of Chile, Peru and Ecuador"[562]. Peru did not suggest, let alone formally protest, that Chile was wrong to rely on the Santiago Declaration in connection with the "Chilean-Peruvian boundary [*límite chileno-peruano*]".[563]

3.40. There is a clear linkage between the parallel referred to in the texts of the Santiago Declaration and the Lima Agreement and the parallel of latitude which the Parties decided to signal by the two lighthouses in 1968-1969. In their exchange of notes in February and March 1968 (recounted at paragraphs 3.22-3.23 above), the Parties agreed to build marks "at the point at which the common border reaches the sea"[564]. This wording is almost identical to the wording in Article IV of the Santiago Declaration, "at the point at which the land frontier of

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561 Memorandum of 6 October 1965 by the Ministry of Foreign Affairs of Chile, **Annex 68 to the Memorial**, para. 1. The Spanish term *límite* is translated as "boundary", instead of "border" as in Peru's Memorial.

562 *Ibid*., para. 2.

563 *Ibid*., para. 1.

564 Note No. (J) 6-4/9 of 6 February 1968 from the Minister of Foreign Affairs of Peru to the Chilean chargé d'affaires in Peru, **Annex 71 to the Memorial**; Note No. 81 of 8 March 1968 issued by Chilean chargé d'affaires in Peru to the acting Foreign Minister of Peru, **Annex 72 to the Memorial**.

the States concerned reaches the sea". This was no mere coincidence. The point at which the land boundary reaches the sea determines the parallel of latitude forming the maritime boundary under the Santiago Declaration. This parallel is also the one referred to in Article 1 of the Lima Agreement, as Peru confirms in its Memorial[565].

3.41. The Parties' reliance on the Santiago Declaration and the Lima Agreement is also apparent from the origin of the 1968-1969 process. In 1962, Peru had invoked the Lima Agreement in protesting against continuous border-crossings by Chilean vessels and requesting Chile to take action to stop illegal transgressions into Peruvian waters[566]. It was Peru that first proposed the construction of two signalling marks to address the continuing problems of border-crossings by vessels of both States[567], and this triggered the joint work in 1968-1969. The Parties intended to take measures to implement the Lima Agreement. This Agreement, in turn, gives effect to the position under the Santiago Declaration, that the parallel of latitude passing through "the point at which the land frontier. . .reaches the sea" is the maritime-boundary line. Peru's newly minted argument that the parallel arose out of an informal practice of Chile and Peru, rather than deriving from the Santiago Declaration or the Lima Agreement[568], is groundless. There is no trace of it in the record of the 1968-1969 process or the many diplomatic exchanges that preceded that process.

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565 See Memorial, para. 4.103.

566 See paras 2.219-2.220 above; and Memorandum No. 5-4-M/64 of 20 December 1962 from the Peruvian Embassy in Chile to the Ministry of Foreign Affairs of Chile, **Annex 73**.

567 See para. 3.22 above.

568 See Memorial, para. 4.105.

D. Choice of Hito No. 1 as the Reference Point for Determining the Course of the Boundary Line

3.42. As recounted in paragraphs 2.9-2.16 above, the Parties agreed in 1930 that the determination and marking of their land boundary was complete. The most seaward land boundary marker, Hito No. 1, had already been agreed in the 1930 Final Act and then also memorialized in the Act of Plenipotentiaries. The 1930 Final Act specifies the astronomical coordinates of Hito No. 1 (18° 21' 03" S and 70° 22' 56" W) and describes the location of Hito No. 1 as being on the "seashore [*orilla del mar*]"[569]. Similarly, the Act of Plenipotentiaries of August 1930 listed the boundary markers "starting in order from the Pacific Ocean", again recording that Hito No. 1, the first boundary marker in that list, was placed on the seashore[570].

3.43. When the authorized delegates of the Parties met in 1968 to undertake the work of signalling the maritime boundary they referred to "the parallel of the maritime frontier" and added that the parallel which was to be marked by the lighthouses was "that which corresponds to the geographical location. . .for Boundary Marker No. 1."[571] Subsequently, the 1968-1969 Mixed Commission recorded that its functions were, as the full official title of the Commission indicated, to verify the "original geographical position" of Hito No. 1 and "physically to give effect to the parallel that passes through the aforementioned

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569 1930 Final Act, **Annex 54 to the Memorial**; see the description of the first *hito*.

570 Act of Plenipotentiaries, **Annex 55 to the Memorial**; see the description of the first *hito*. Cf. *Case concerning the boundary markers in Taba between Egypt and Israel*, Award, 29 September 1988, *RIAA*, Vol. XX, p. 67, para. 244, for the Tribunal's finding that the word "on the shore" in the relevant land-boundary agreement meant that the boundary pillar was to be at a distance not far from the shore and visible from the shore. The Tribunal also found that a boundary pillar situated at a distance of approximately 170 metres from the shore could reasonably be understood as lying on the seashore.

571 1968 Minutes, **Annex 59 to the Memorial**, penultimate paragraph.

Boundary Marker number one" in order "to signal the maritime boundary"[572]. The Commission fulfilled its functions[573].

3.44. The Parties thus consensually identified Hito No. 1 as the reference point for the parallel "at the point at which the land frontier. . .reaches the sea" for purposes of Article IV of the Santiago Declaration. The Parties wished to fix the course of their maritime boundary with certainty, precision and permanence. The parallel of Hito No. 1 serves this purpose. The Chilean and Peruvian delegates who met in April 1968 observed the location of Hito No. 1 on the ground, and the 1968-1969 Mixed Commission conducted a survey to reconfirm the correct location of that boundary marker on the coast. (To be clear, the record indicates no disagreement between the Parties prior to 1968 on whether a point other than Hito No. 1 should be used for Article IV purposes[574]. As noted[575], the record indicates only that there were practical difficulties with identifying the operative parallel of latitude at sea, because Hito No. 1 was not conspicuous enough.)

3.45. There are examples elsewhere of the use of a fixed point on the coast, set back from the physical low-water line, as a reference point for a maritime boundary. Chile and Argentina use such a point[576]. So did the Court in the

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572 1969 Act, **Annex 6**, title of the document and first paragraph.

573 The 1969 Act, *ibid*., recorded that the Mixed Commission "topographically determine[d] the parallel that runs through Boundary Marker number one. . . The parallel having been determined, the two points at which the front and rear signalling towers shall be erected were physically marked on this line": Section B.2.

574 Prior to 1968, Dr. Vergaray Lara of Peru used Hito No. 1 in 1962 as the reference point for determining the parallel forming the southern limit of Peru's maritime zone under its Supreme Decree of 1947: see para. 2.37 above.

575 See paras 3.19-3.20 above.

576 See Treaty of Peace and Friendship between Chile and Argentina, signed at Vatican City on 29 November 1984, 1399 *UNTS* 89 (entered into force on 2 May 1985), **Annex 15**, Art. 10 and accompanying Map No. II.

Continental Shelf (*Tunisia/Libyan Arab Jamahiriya*) case[577], and the UNCLOS Tribunal in *Guyana v. Suriname*[578]. There are several other examples[579], but this factual proposition hardly requires extensive citation.

3.46. In its Memorial Peru purports to rely on a unilaterally defined "Point Concordia" as the beginning of the maritime boundary which Peru proposes. Peru asserts that this point is the exact present intersection of the low-water line and the continuation of the arc that forms the last part of the land boundary[580]. Peru says that this point is the same point as its southernmost baseline point, Point 266[581].

3.47. Chile wishes to make only three brief observations on Peru's assertions about Point Concordia and Point 266. First, these are unilateral pronouncements of Peru, which can produce no effect vis-à-vis Chile to the extent that they purport to change the agreed course of the maritime boundary. Chile has never agreed to Peru's assertions, and it has duly objected to Point

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577 See *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, pp. 93-94 and the map at p. 81, implemented in the Agreement between the Libyan Arab Socialist People's Jamahariya and the Republic of Tunisia to Implement the Judgment of the International Court of Justice in the Tunisia/Libya Continental Shelf Case, signed at Benghazi on 8 August 1988 (entered into force on 11 April 1989), in J. I. Charney and L. M. Alexander (eds), *International Maritime Boundaries*, *Vol. II*, 1993, **Annex 17**, pp. 1679-1680.

578 See *Guyana v. Suriname*, Award, Permanent Court of Arbitration, 17 September 2007, pp. 97-98, paras 307-308.

579 See, e.g., Agreement between France and Spain, signed at Bayonne on 30 March 1879, **Annex 1**; Exchange of Notes Constituting an Agreement between the Government of Brazil and the Government of Uruguay on the Definitive Demarcation of the Sea Outlet of the River Chui and the Lateral Maritime Border signed at Montevideo on 21 July 1972, 1120 *UNTS* 133 (entered into force on 12 June 1975), **Annex 7**.

580 See Memorial, paras 2.2, 2.8 and 6.32-6.46.

581 *Ibid*., para. 2.13.

266[582]. Second, once the Parties acknowledged that the parallel of Hito No. 1 constitutes the maritime boundary, "the demarcated boundary line would prevail over the Agreement if a contradiction could be detected"[583]. In light of the Parties' agreement to use Hito No. 1 as the reference point for the maritime boundary, it is immaterial whether another point could have been chosen by the Parties. It is not for Peru now unilaterally to choose a point different from Hito No. 1. This is because "once demarcated jointly by the parties concerned, the demarcation is considered as an authentic interpretation of the boundary agreement even if deviations may have occurred"[584] (and here of course deviations have not occurred). Third, based on the coordinates that Peru gives in its 2005 baselines law, Point 266 is not on the low-water line as shown on its relevant official chart[585], as one may see in **Figure 24**.

3.48. In summary, the signalling work that was commenced in 1968 and completed in 1972 unequivocally indicates the existence of the Parties' understanding that a maritime boundary was by that time already in place, and that the boundary line was the parallel of latitude passing through Hito No. 1.

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582 See, e.g., Note No. 17,192/05 of 28 October 2005 from the Minister of Foreign Affairs of Chile to the Peruvian Ambassador to Chile, **Annex 106**.

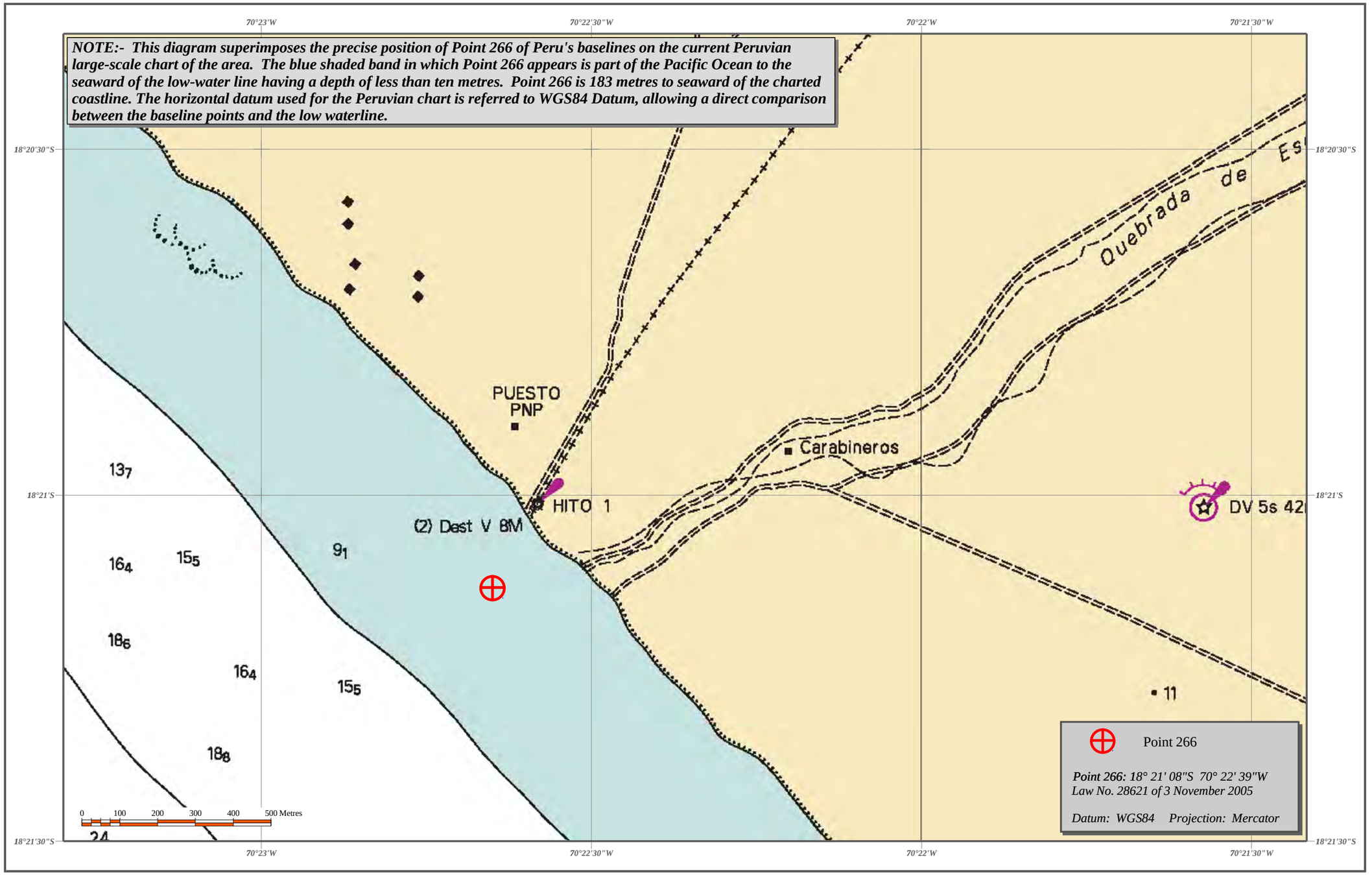
583 *Case concerning the boundary markers in Taba between Egypt and Israel*, Award, 29 September 1988, *RIAA*, Vol. XX, pp. 56-57, para. 210. In this case, one of the disputed issues was whether three geographic locations referred to in the 1906 land-boundary agreement between the Egyptian Khediviate and the Turkish Sultanate had been incorrectly identified during the demarcation process, resulting in contradictions between the boundary as actually demarcated by pillars and the terms of the agreement. The tribunal concluded that there was no contradiction, and went on to decide that, in the event of any such contradiction, the line formed by the demarcation pillars would prevail over the line described in the agreement, given that the line had been demarcated by the Egypt-Turkey Boundary Commission.

584 *Case concerning the boundary markers in Taba between Egypt and Israel*, Award, 29 September 1988, *RIAA*, Vol. XX, p. 56, para. 210.

585 Under Article 5 of UNCLOS, the low-water line for the purpose of measuring the territorial sea is the line as marked on "large-scale charts officially recognized by the coastal State."

Figure 24

Point 266 of Peru's baselines plotted on Peru's current large-scale chart (chart 3255, 3rd edition 1985, revised 30 October 2002)



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That line was recognized as the maritime boundary between the maritime zones of Chile and Peru, that is, as an all-purpose maritime boundary.

Section 3. The Maritime Boundary in Subsequent Legislation of Chile and Peru

3.49. As discussed in Chapter II, the maritime boundary between Chile and Peru was established under the Santiago Declaration, which reflected the existing claims under the Parties' concordant unilateral proclamations in 1947. The Lima Agreement confirmed the existence of that agreed boundary. Both Chile and Peru have incorporated these two international agreements into their respective domestic legal systems[586]. This section outlines subsequent legislation of Chile and Peru which indicates the two States' acknowledgment of the existence of a maritime boundary. In many cases the legislation does not describe the course of the boundary, but it can be ascertained by reference to the Santiago Declaration and the Lima Agreement, both of which were already (as they remain today) part of the two States' internal law.

A. CONFIRMATION OF THE PERIMETER OF PERU'S MARITIME ZONE (1955)

3.50. Shortly after the conclusion of the Lima Agreement in December 1954, Peru took a further step to confirm the perimeter of its maritime zone. Peru's 1955 Supreme Resolution (already touched upon at paragraphs 2.119-2.122 above) was intended to ensure that Peru's maritime zone was correctly depicted in cartographic and geodesic work. The Supreme Resolution states in its preamble that–

> "it is necessary to specify in cartographic and geodesic work the manner of determining the Peruvian maritime

[586] See paras 2.58 and 2.216 above.

> zone of 200 miles referred to in the Supreme Decree of 1 August 1947 and the Joint Declaration signed in Santiago on 18 August 1952 by Peru, Chile and Ecuador"[587].

The preamble confirms Peru's understanding at the time that its maritime zone was established by the Supreme Decree of 1947 and the Santiago Declaration, and that these two instruments created one single maritime zone for Peru[588].

3.51. The operative part of the 1955 Supreme Resolution defines the perimeter of Peru's maritime zone by setting out its outward limit and lateral boundaries in the following manner:

> "1 – The said zone [Peru's maritime zone] shall be limited at sea by a line parallel to the Peruvian coast and at a constant distance of 200 nautical miles from it;
>
> 2 – In accordance with clause IV of the Declaration of Santiago, the said line *may not extend beyond that of the corresponding parallel at the point where the frontier of Peru reaches the sea*."[589]
>
> (Emphasis added.)

Thus, the line constituting the 200M outward limit of Peru's maritime zone, as defined in operative clause 1, terminates:

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587 1955 Supreme Resolution, **Annex 9 to the Memorial**, preambular recital.

588 This position was also confirmed by Peru during a meeting between the CEP States and the United States of America in Buenos Aires to discuss practical issues relating to tuna fishing in the South-East Pacific Ocean: Official Communiqué of 22 August 1969 issued by the Ministry of Foreign Affairs of Peru, **Annex 166**.

589 1955 Supreme Resolution, **Annex 9 to the Memorial**, operative paragraphs.

(a) in the north, at the point where the line meets the parallel of latitude at the point at which the Peru-Ecuador land boundary reaches the sea; and

(b) in the south, at the point where the line meets the parallel of latitude at the point at which the Peru-Chile land boundary reaches the sea.

3.52. These two parallels of latitude form the lateral boundaries of Peru's maritime zone, with Ecuador to the north, and with Chile to the south.

3.53. The lateral boundaries of the Peruvian maritime zone were confirmed in the 1955 Supreme Resolution as a matter of domestic implementing law[590]. Peru expressly acknowledged in operative clause 2 of the 1955 Supreme Resolution (quoted at paragraph 3.31 above), that the specification of its lateral maritime boundaries in domestic law was by way of compliance with and implementation of Article IV of the Santiago Declaration.

3.54. Peru now contends that operative clause 2 of the 1955 Supreme Resolution refers only to the lateral boundary between the maritime zones generated by Ecuadorean islands (not Ecuador's mainland) and Peru's continental territory[591]. The contention is difficult to credit. The purpose of the Supreme Resolution was to ensure that Peru's "maritime zone" would be correctly depicted in cartographic and geodesic work. Peru suggests that the Supreme Resolution left all of the southern limit of Peru's maritime zone

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590 In a collection of national and international instruments on the law of the sea, published by the Peruvian Foreign Ministry, the 1955 Supreme Resolution is described as Peruvian legislation on the "delimitation of the 200-mile maritime zone": Ministry of Foreign Affairs of Peru, *Instrumentos Nacionales e Internacionales sobre Derecho del Mar*, 1971, **Annex 170**, p. 23.

591 See Memorial, para. 4.113, read with paras 4.76-4.78.

undefined; and also left undefined the northern limit of Peru's maritime zone, except as against zones created by Ecuadorean islands in the Gulf of Guayaquil — without so much as mentioning either of these significant limitations in its text. Yet the text of the Supreme Resolution neither states nor implies any such limitation. Such a suggestion by Peru is also irreconcilable with its own stated premise, reflected from the outset in its 1947 Supreme Decree, that it was the duty of the State "to determine [*fijar*] in an irrefutable manner" its maritime dominion[592].

3.55. One needs to look no further than the words of Dr. García Sayán to confirm that the 1955 Supreme Resolution refers to both the northern and southern lateral boundaries. Dr. García Sayán stated that, under this Supreme Resolution, the line constituting the outward limit of Peru's maritime dominion does not extend beyond the "corresponding *parallels* 'at the point where the frontier of Peru reaches the sea'" (emphasis added)[593]. The use of plural — "parallels" — is hardly accidental.

3.56. The 1955 Supreme Resolution says that "[i]n accordance with clause IV of the Declaration of Santiago" the line constituting the seaward limit of Peru's maritime zone "may not extend beyond that of the corresponding parallel at the point where the frontier of Peru reaches the sea"[594]. The "parallel at the point where the frontier of Peru reaches the sea" is expressed as being the lateral limit of Peru's maritime zone in generally applicable terms, without any mention of islands. That unqualified application of "the parallel" is expressed as being "[i]n accordance with clause IV of the Santiago Declaration". This shows

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592 1947 Peruvian Supreme Decree, **Annex 6 to the Memorial**, final recital.

593 E. García Sayán, *Notas sobre la Soberanía Marítima del Perú – Defensa de las 200 millas de mar peruano ante las recientes transgresiones*, 1955, **Annex 266**, p. 28.

594 1955 Supreme Resolution, **Annex 9 to the Memorial**, operative paragraphs.

that Peru's present reading, restricting the application of Article IV of the Santiago Declaration to delimitation of the maritime zones of islands vis-à-vis a continental maritime zone, is inconsistent with how Peru understood Article IV in 1955. In 1955 Peru clearly recognized that Article IV of the Santiago Declaration set forth the northern and southern lateral limits of its maritime zone, and that was the manner in which Peru gave effect to Article IV in its internal law.

3.57. Peru's resolve to ensure that its land territory and maritime zone were correctly depicted is also evident in Supreme Decree No. 570 of 1957. As will be seen in Section 7 (paragraphs 3.144 *et seq*.) below, Peru's Foreign Ministry has in fact exercised the power granted by this Supreme Decree to authorize depictions of the Peruvian maritime zone where the southern lateral boundary is the parallel of latitude passing through Hito No. 1.

B. Domestic Legislation and Other Official Texts Recognizing the Maritime Boundary

1. Chile

3.58. A number of legislative or regulatory instruments recognize or give effect to the maritime boundary with Peru, in various contexts. Several of those texts simply refer to the maritime boundary, without specific coordinates, because it was unnecessary to provide coordinates in the relevant instrument itself.

3.59. In Decree No 1,190 of 1976 on the Organization of the Maritime Search and Rescue Service of the Chilean Navy, the area of responsibility was defined as follows:

> "1. The Maritime Area under national responsibility, for the purpose of this Regulation, consists of *all the waters under national maritime jurisdiction* and the waters of the

> Pacific Ocean, between those [waters] and the *18º 20'8 S parallel to the North*, the 120º W meridian to the West, the Antarctic Territory to the South and the waters of Paso Drake.
>
> a) First District of Maritime Search and Rescue:
>
> Corresponds to the Northern Naval District, from *the Northern Boundary parallel* to the latitude 24º 00' S."[595]
>
> (Emphasis added.)

3.60. The northern limit of this area "under national maritime jurisdiction" is the parallel of latitude "18° 20'8 S", which is the latitude of Hito No. 1[596].

3.61. Decree No. 408 of 1986 on the prohibition of the use of certain fishing equipment defined the area to which the prohibition applies as–

> "a strip of sea between the coast and an imaginary parallel line situated one mile out at sea, drawn between the following latitudes: *to the north, the parallel which constitutes the northern maritime boundary* and, to the south, 32º 00' 00" Latitude South." [597] (Emphasis added.)

This Decree confirms the position that the northern lateral boundary of Chile's waters follows a parallel of latitude.

3.62. Supreme Decree No. 453 of 1989 created a new Fourth Naval Zone of the Chilean Navy in the northernmost part of the Chilean maritime zones. Article

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595 Decree No. 1,190 of 29 December 1976 on the Organization of the Maritime Search and Rescue Service of the Chilean Navy, **Annex 132**, Title II, para. 1.

596 See the defintion of Hito No. 1 in the Glossary, p. ix above.

597 Decree No. 408 of 17 December 1986 on the Prohibition of Use of Fishing Equipment for Dragging and Fencing in the Indicated Area and Repealing the Specified Decree, **Annex 134**, Art. 1.

1 of this Supreme Decree defines the Fourth Naval Zone as the area "between the northern international boundary and the parallel of 26° South"[598].

3.63. Under Supreme Decree No. 991 of 1987, the jurisdiction of the Maritime *Gobernación* of Arica was defined as the area "from the Chile-Peru international political boundary [*límite politico international*] in the north to the parallel 19° 13' 00" S (Punta Camarones) in the south"[599]. Peru claims in its Memorial that "[t]here was no indication of what, in juridical terms, this 'international political limit' was, or the legal basis for it, or of where it was thought to be located."[600] Yet this term is commonly used to refer to international boundaries of one State with neighbouring States[601]. It would have been obvious to Peru that "international political boundary" meant something different from a physical or geographical boundary — i.e., a line dividing the jurisdictional areas of the two States. Peru lodged no protest to Supreme Decree No. 991 of 1987, nor did it address any query to Chile as to the import of the term "international political boundary".

3.64. The concept has also been explained to Peru in plain terms. For example, in 1995 the Chilean and Peruvian Navies agreed on a set of procedures for the treatment of fishing vessels of one State captured in the maritime zone of the other. The agreed procedures included steps to be followed in respect of

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598 Supreme Decree No. 453 of 3 May 1989 Creating the Fourth Naval Zone, **Annex 136**, Art. 1.

599 Supreme Decree No. 991 of 26 October 1987 Fixing the Jurisdiction of the Maritime Gobernaciones of the Republic and Establishing the Harbour Authorities and their Respective Jurisdictions, **Annex 37 to the Memorial**, Art. 1. Chile's translation.

600 Memorial, para. 4.134.

601 For example, the treatise of 1985 by Professor Prescott on the maritime boundaries of the world is entitled *The Maritime Political Boundaries of the World* (**Annex 305**). The term "limit" (*límite*) is often used in practice to denote a frontier; see, e.g., J. Basdevant (ed.), *Dictionnaire de la Terminologie du Droit International*, 1960, p. 376, *sub voc*. "Traité de limites".

small fishing vessels found more than twelve nautical miles from the coast and less than ten nautical miles on either side of the International Political Boundary (*límite político internacional* – "*LPI*")[602]. More recently, in February 1999, the Deputy Harbour Master of Arica reported to the Peruvian Consul in Arica that a Peruvian vessel had been found at a location three miles into the Chilean territorial sea where the two alignment lighthouses were visible. The Deputy Harbour Master then stated that those lighthouses "indicate the parallel of Hito No. 1, which constitutes the international political boundary"[603]. As explained above, the Parties agreed in 1968 to signal the maritime boundary by a pair of alignment lighthouses in order to implement their delimitation agreement. The legal basis for the "international political boundary" was thus apparent to Peru. Lastly, when notifying that Peruvian fishing vessels were captured in Chilean waters, the Harbour Master of Arica provided his counterpart in Ilo and the Consul General of Peru in Arica with the coordinates of the locations where the vessels were captured and the distance from the "international political boundary"[604]. Peru was able to ascertain the precise location of the international political boundary.

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602 "Procedure for the exchange of Chilean or Peruvian fishing boats, apprehended undertaking fishing activities to the north or to the south of the Special Maritime Frontier Zone, between the Harbour Master of Ilo and the Maritime Governor of Arica", attached as Annex A to the Final Minutes of Understanding of the Fourth Bilateral Meeting between the Commanders of the Frontier Naval Zones of Chile and Peru, 13 July 1995, **Annex 21**.

603 Fax No. 024 of 25 February 1999 from the Deputy Harbour Master of Arica to the Consul of Peru in Arica, **Annex 88**. See below at para. 3.102 on the correspondence between Arica and Ilo and the use of the term "international political boundary".

604 Fax No. 408/99 of 24 September 1999 from the Harbour Master of Arica to the Harbour Master of Ilo and the Consul General of Peru in Arica, **Annex 89**, first paragraph. Such communications from the Harbour Master of Arica to the Harbour Master of Ilo were used to compile the information in the Appendix (also see paras 3.95-3.96 below).

3.65. In summary, although Peru now claims that the term "international political boundary" is unclear, it did not raise any issue when the term was employed in Supreme Decree No. 991 in 1987, nor did it protest or reserve its position when it received the February and September 1999 communications specifying the parallel of Hito No. 1 as the international political boundary. Both the central authorities in Lima and the consular official in Arica were in receipt of those documents, and both were well placed to react if they thought it appropriate. They did not.

3.66. Chile's General Law on Fisheries and Aquaculture of 1991 contains the following provision which acknowledges the northern limit of Chile's maritime zone:

> "Extractive fishing activities with fishing equipment, fishing tackle or other fishing tools which affect the seabed are prohibited in a strip of the territorial sea within one nautical mile measured from the baselines, from *the northern boundary of the Republic* to the parallel of latitude 41° 28.6' S."[605] (Emphasis added.)

3.67. As noted in Chapter II, Chile specified the width of its territorial sea at twelve nautical miles and declared an EEZ of 200 nautical miles by amendment to the Civil Code in 1986[606]. The amending statute, Law No. 18,565, provides in Article 2 that "[t]he maritime delimitations referred to in Articles 593 and 596 of the Civil Code [respectively specifying the width of the territorial sea and the contiguous zone and declaring an EEZ] *shall not affect the current maritime*

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605 Law No. 18,892 (as amended), General Law on Fisheries and Aquaculture, consolidated text published in Decree No. 430 of 21 January 1992, **Annex 137**, Art. 5.

606 See Law No. 18,565 of 13 October 1986 Amending the Civil Code Regarding Maritime Spaces, **Annex 36 to the Memorial**.

boundaries"[607] (emphasis added). Although the terminology for defining the maritime zones of Chile follows that under UNCLOS since 1986, the international boundaries have naturally remained the same, including the northern boundary established under the Santiago Declaration.

3.68. Chile's understanding of the location and course of the maritime boundary with Peru was made known to mariners through official *Sailing Directions* (*Derroteros de la Costa*). The first revision after the signalling work of 1968-1969 was published in 1980. This edition of the *Sailing Directions* clearly states that the maritime boundary was the parallel of Hito No. 1[608]. Peru did not protest that statement, which has been repeated in the later editions, in 1988, 1995 and 2001[609]. Nor did Peru protest Chile's later depiction of the maritime boundary in its official nautical charts in 1992 and 1994[610].

3.69. In its Memorial, Peru places weight on Chile's Supreme Decree No. 210[611], which established benthonic management areas along the northern coast of Chile. In those areas Chile regulates the harvesting of living resources found on or under the seabed. The northernmost benthonic management area is depicted in Figure 4.4 (page 165) of Peru's Memorial. A number of areas of this kind were created under Supreme Decree No. 210 (as amended by subsequent

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607 Law No. 18,565 of 13 October 1986 Amending the Civil Code Regarding Maritime Spaces, **Annex 36 to the Memorial**, Art. 2. Chile's translation.

608 Hydrographic Institute of the Chilean Navy, *Derrotero de la Costa de Chile*, *Vol. 1: From Arica to Chacao Canal*, 6th edn, 1980, Chap. I, **Annex 133**, p. 1.

609 See *Derrotero de la Costa de Chile*, *Vol. 1: From Arica to Chacao Canal*, 7th edn, 1988, **Annex 135**, p. 1; 8th edn, 1995, **Annex 140**, p. 1; 9th edn, 2001, **Annex 149**, p. 1.

610 See para. 1.44 above.

611 Supreme Decree No. 210 of 4 May 1998, **Annex 40 to the Memorial**. See Memorial, para. 4.135.

legislation), as shown in **Figure 25**. These benthonic management areas are very small and created locally to control harvesting of shellfish.

3.70. The shape and location of Chile's northernmost benthonic management area are thus unrelated to the maritime boundary and the parallel of latitude passing through Hito No. 1. It is wrong to suggest, as Peru does, that the shape and location of this benthonic management area show that the maritime boundary should be a line of equidistance[612]. As shown in **Figure 25**, this management area is located entirely, and properly so, within Chile's territorial sea. On the side of the coast, its limit is a straight line keeping just one mile off the coast. Its outer limit is a straight line that bears no relation to the seaward limit of Chile's territorial sea. Its northern limit is a straight line drawn at right angles to the beach and extending just one mile out to sea. That line represents neither the maritime boundary nor any hypothetical line of equidistance. It represents only the required spatial extent for management of specific marine resources in one particular area.

3.71. Peru has similarly protected areas, and these areas too are located entirely, and properly so, within its maritime dominion, keeping to the north of the parallel of Hito No. 1. A sketch-map produced by the Ministry of Production of Peru in 2008 (see **Figure 26**) shows several marine-resources management areas along the coast of Tacna, including an "area authorized for aquaculture [*area habilitada para acuicultura*]". This area is shown in **Figure 26** as a long stretch along the coast with blue lines indicating its contours. It is bounded to the south by a line effectively corresponding to a parallel of latitude 18° 20' 57" S (WGS84)[613], approximately three seconds (or 110 metres) to the north of the

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612 See Memorial, paras 4.135 and 4.130.

613 The southern limit of this area is a line connecting two points at sea with latitude 18° 20' 56.796" S and 18° 20' 56.908" S (WGS84) respectively: information from the Directorial Resolution No. 462-2007/DCG of 12 October 2007, available at the

parallel of Hito No. 1 (18° 21' 00" S when referred to WGS84 Datum). Similarly, when the Sea Institute of Peru (IMARPE) identified and delimited the southernmost natural bank of benthonic resources along the coast of Tacna, the southern limit of this bank (named *Los Palos* in **Figure 26**) was defined by a line keeping a few hundred metres to the north of the parallel of Hito No. 1[614]. These two areas along the coast of Tacna are depicted in **Figure 27**, together with Chile's northernmost benthonic management area established under Supreme Decree No. 210. As **Figure 27** clearly shows, the marine-resources management areas of both Peru and Chile have been designed to respect the maritime boundary which Peru disputes in these proceedings.

2. Peru

3.72. Apart from the 1955 Supreme Resolution (see paragraphs 3.50-3.56 above), Peru's acknowledgement of the northern and southern boundaries of the Peruvian "maritime dominion" is evidenced in the Regulation of Captaincies and Maritime, Fluvial and Lacustrine Activities, issued in 1987[615]. This regulates activities in the Peruvian "maritime dominion" and internal waters, and determines the geographic scope of the Peruvian authorities' maritime jurisdiction.

3.73. A provision in this Regulation divides Peru's "maritime dominion" into Maritime Districts (*Distritos Marítimos*) for administrative purposes. The

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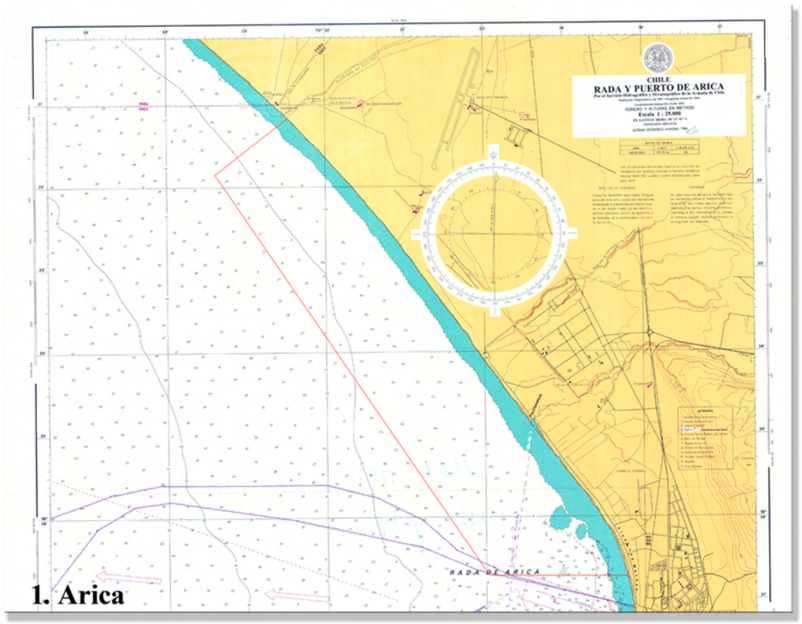
website of the Ministry of Production of Peru, 2008, **Annex 202** (see the coordinates of vertices H and I).

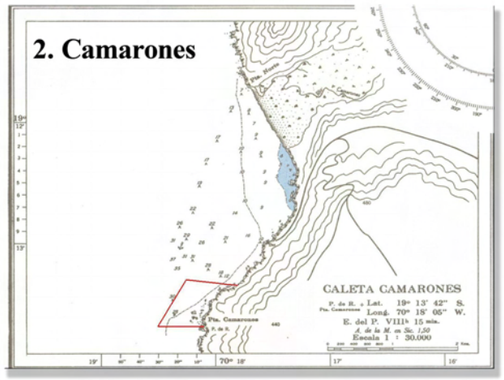
614 See IMARPE, Coastal Laboratory of Ilo, *Identificación y Delimitación de Bancos Naturales de Recursos Bentónicos en el Litoral de la Región Tacna*, 2003, **Annex 196**, p. 63.

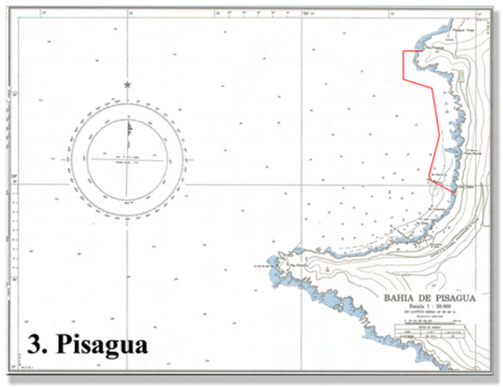
615 Approved by Supreme Decree No. 002-87-MA of 11 June 1987, **Annex 174**.

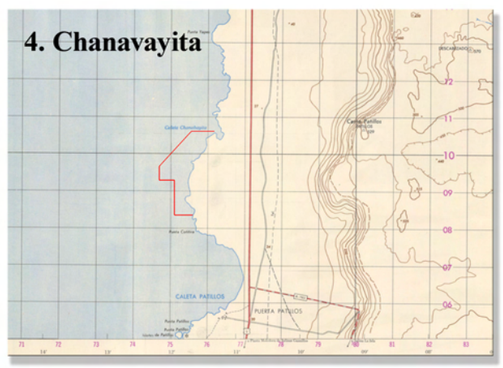
Figure 25

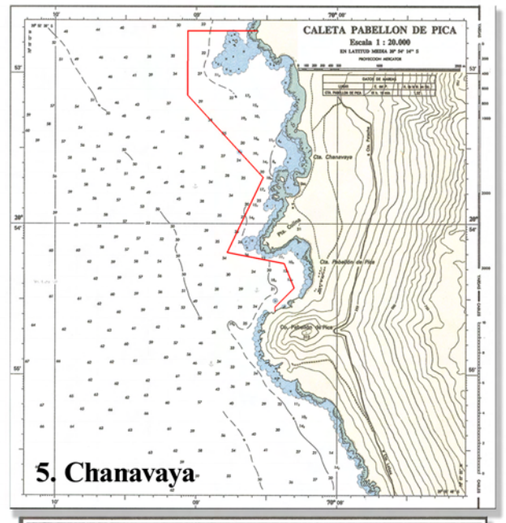
Chile's benthonic management areas under Supreme Decree No. 210 of 4 May 1998 (as amended)

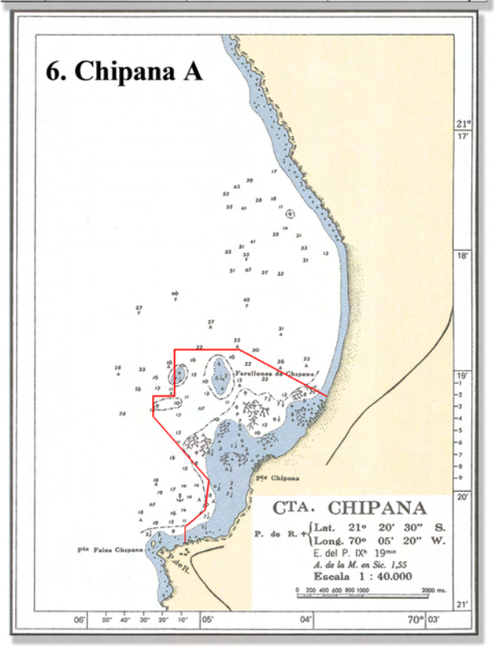


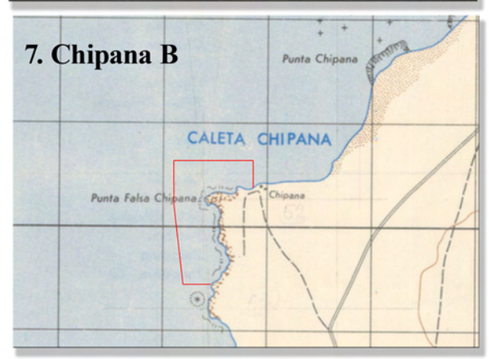


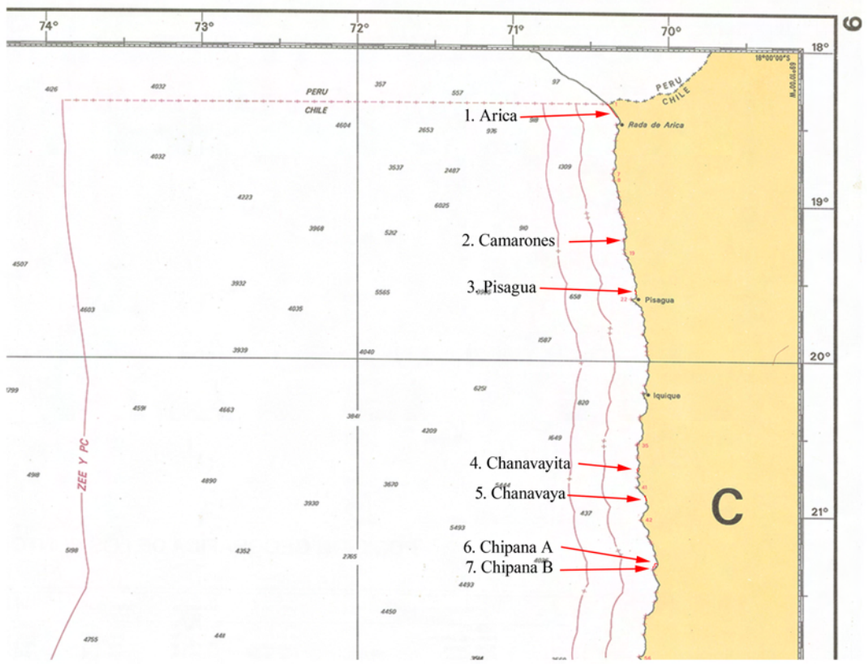








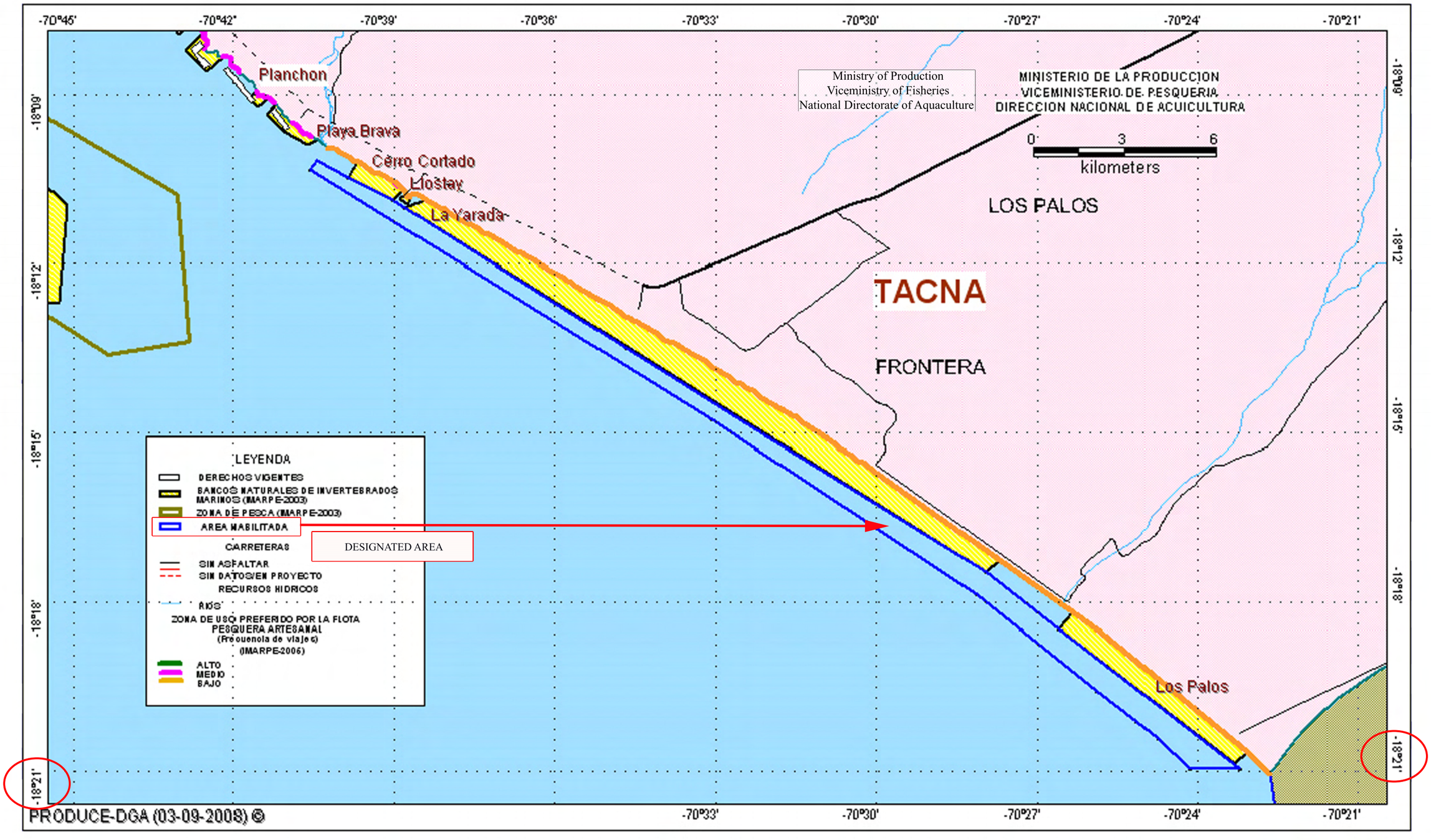




Prepared by the Ministry of Foreign Affairs of Chile

Figure 26

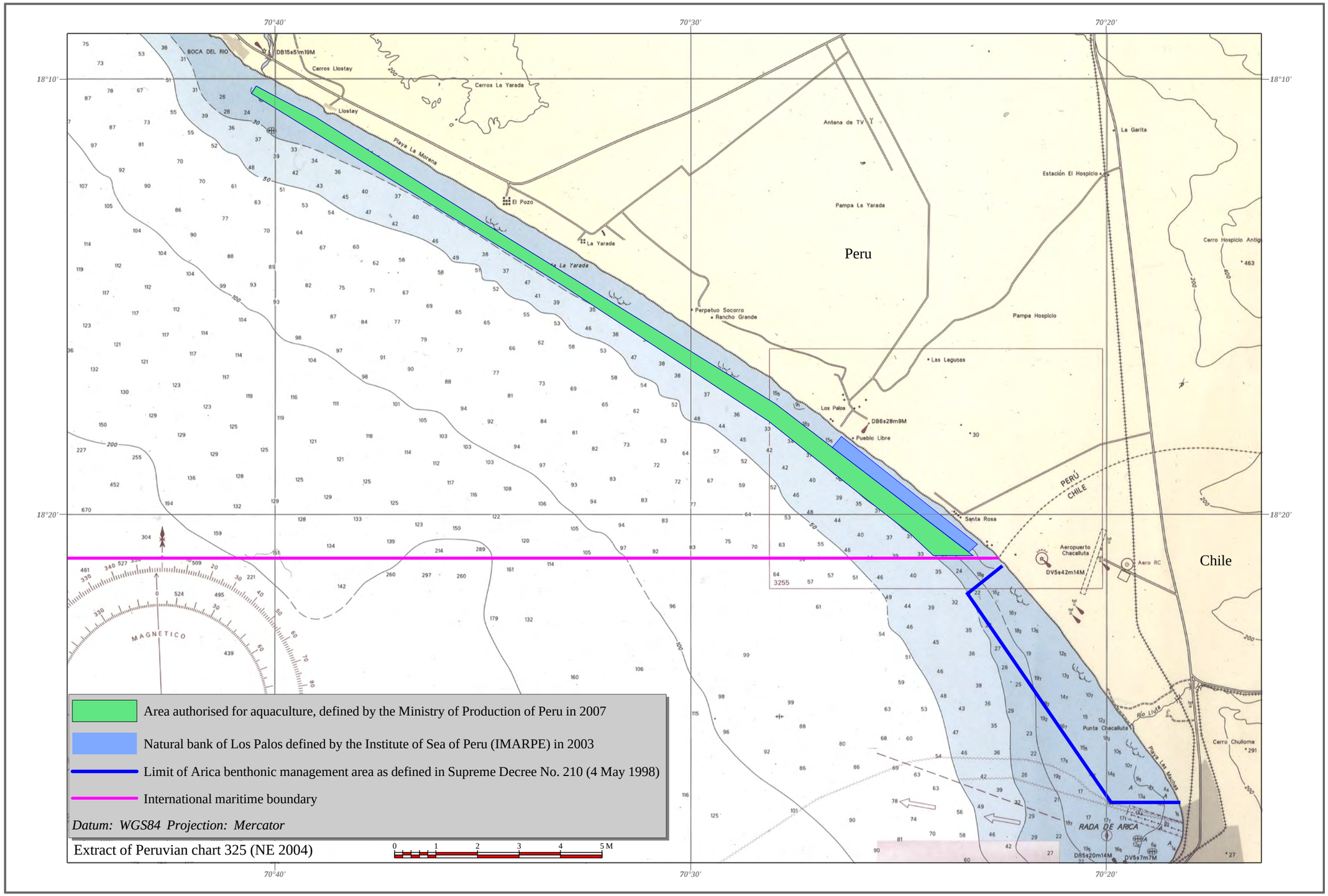
Marine-resources management areas in Peru's southernmost region of Tacna



Source: Official website of the Ministry of Production of Peru <http://www.produce.gob.pe/descarga/produce/dna/catastro/tacna/maricultura/lospalos.jpg>

Figure 27

Diagram showing nearshore marine-resources management areas of Chile and Peru in the vicinity of the maritime boundary



Prepared for the Ministry of Foreign Affairs, Chile, by UKHO Law of the Sea Consultancy

northernmost Maritime District (No. 11) covers an area commencing in the north at the "maritime frontier with Ecuador [*frontera marítima con el Ecuador*]"[616]. The southernmost Maritime District (No. 31) covers an area limited in the south by "the frontier boundary between Peru and Chile [*límite fronterizo entre Perú y Chile*]"[617]. The two boundaries are treated on a footing of equality. Nothing suggests that one is permanent and all-purpose while the other is provisional and for fisheries purposes only.

3.74. The same Regulation sets forth the jurisdiction of the Captaincies of Peru's major ports. The Captaincy of the major port nearest the boundary with Ecuador, Talara, is responsible for an area commencing in the north at the maritime frontier with Ecuador. The Captaincy of Ilo, which is Peru's southernmost major port, has jurisdiction over an area extending "to the frontier with Chile to the South"[618].

3.75. The Regulation of the Law on the Control and Surveillance of Maritime, Fluvial and Lacustrine Activities of 2001 continues to recognize the existence of maritime frontiers with both Ecuador and with Chile[619]. There is no indication in either the 1987 or the 2001 edition of this Regulation that the "frontiers" there referred to were relevant only in respect of controlling fishing

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616 Regulation of Captaincies and Maritime, Fluvial and Lacustrine Activities, approved by Supreme Decree No. 002-87-MA of 11 June 1987, **Annex 174**, Chapter II, Section III, Clause A-020301.

617 *Ibid*.

618 *Ibid*., Chapter II, Section IV, Clause A-020401.

619 Regulation of the Law on the Control and Surveillance of Maritime, Fluvial and Lacustrine Activities, approved by Supreme Decree No. 028 DE/MGP of 25 May 2001, **Annex 192**, Part A, Chapter I, Section III (Jurisdiction of Captaincy Districts) and Section IV (Jurisdiction of the Captaincies).

vessels but not in respect of the several other responsibilities of the Captaincies in the "maritime dominion"[620].

3.76. The Regulation itself does not specify the precise location of the maritime boundaries, either with Chile or with Ecuador. However, the perimeter of Peru's "maritime dominion" is set forth in the 1947 Peruvian Supreme Decree, the Santiago Declaration and the 1955 Supreme Resolution, and so far as relevant here all these texts indicate the parallels of latitude at the points at which the land boundaries with Chile (to the south) and Ecuador (to the north) reach the sea.

Section 4. Exercise of Jurisdiction by Chile and Peru in their Respective Maritime Zones

3.77. As will be illustrated in this Section, Chile and Peru have continuously exercised jurisdiction on their respective sides of the parallel of latitude of Hito No. 1 and acknowledged each other's entitlement to do so. Such exercise of jurisdiction is manifest in the control of entry into the Parties' maritime zones by foreign ships and the prosecution of foreign vessels illegally fishing in their maritime zones. However, quiet possession on either side of the parallel is evident in other areas, unrelated to fisheries or maritime traffic, such as authorization of scientific research. Peru's understanding of the all-purpose nature of the boundary is also evidenced in Peru's control of the airspace above its "maritime dominion", which is bounded in the south by the same parallel of latitude.

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620 Such as policing, suppressing illegal activities (illegal fishing, smuggling, drug trafficking, etc.) and preventing and mitigating maritime pollution; see the Regulation of Captaincies and Maritime, Fluvial and Lacustrine Activities, approved by Supreme Decree No. 002-87-MA of 11 June 1987, **Annex 174**, Chapter I, Section IV, Clause A-010401.

A. CONTROL OF ENTRY INTO MARITIME ZONES AT THE BOUNDARY PARALLEL

3.78. Peru requires ships entering into its "maritime dominion" to report to maritime authorities upon entry in those waters. Chile has the same reporting requirement in respect of its territorial sea and EEZ, but only on the basis of reciprocity (i.e., for ships whose flag state imposes such a requirement on Chilean-flag ships). The lines in the sea which are used to determine points of entry are the limits of the sovereignty and jurisdiction of Peru and Chile, including their lateral boundary. Those lines are therefore more than "provisional" lines for controlling fishing vessels.

3.79. Peru was first to set forth procedures for controlling entry into its maritime dominion. In 1972, it issued a note to all diplomatic missions notifying them of the authorization procedure to be followed by foreign ships. Peru stated that it would apply this procedure to foreign ships wishing to "carry out investigations" within its maritime zone of 200 nautical miles[621]. This procedure was thus applied to ships engaged in activities other than fishing.

3.80. Ships were required to give to the Peruvian authorities advance notice of the areas in which they wished to undertake research activities. This requirement was possible to impose and require compliance with because the maritime zone of Peru had a definite perimeter. The fact that the note was circulated to all diplomatic missions (including that of Chile) strongly indicates Peru's desire to control, not only entries from the high seas to the west but also crossings of the lateral boundary from the south.

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621 Circular Note No. (Du)-2-6-GG/17 of 7 June 1972 from the Ministry of Foreign Affairs of Peru to all diplomatic missions accredited to Peru, attached to the letter 4/1 of 11 August 1972 from J. M. Skinner of the British Embassy in Peru to M. Elliot of the British Foreign and Commonwealth Office, **Annex 82**.

3.81. The obligation to give advance notice to the Peruvian authorities of entry into the Peruvian maritime dominion was confirmed in the second edition of *Sailing Directions* issued in 1988 by the Directorate of Hydrography and Navigation of the Peruvian Navy[622]. It states that all ships, domestic and foreign, navigating in the "Peruvian waters (200 miles) from the northern parallel 03° 24' N [or] the southern parallel 18° 21' S" must comply with the notification obligation. This obligation is stated to apply in an area bounded by two parallels of latitude, the "northern parallel" and the "southern parallel". In the second edition of Peru's *Sailing Directions* of 1988, the latitude of Hito No. 1 was notated as 18º 20.8' S[623]; thus Peru was using the parallel of Hito No. 1 as the southern lateral boundary of its "maritime dominion".

3.82. The notification obligation was based on the "system of information on position and security in the 'maritime dominion' of Peru" (SISPER, in its Spanish-language acronym), approved by a resolution of the Directorate General of Captaincies and Coastguard[624]. SISPER was revised through Resolutions of the same Directorate-General in 1991 and 1994[625]. All these versions of SISPER require both Peruvian and foreign vessels to follow the notification procedure, whether they are in transit, visiting Peruvian ports or engaged in various activities (not limited to fishing) in Peruvian waters. The notification obligation

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622 Directorate of Hydrography and Navigation of the Navy, *Derrotero de la Costa del Perú*, 2nd edn, 1988, **Annex 175**, p. 12, section 1.34.

623 *Ibid*., p. 103, section 4.55.

624 This resolution is reproduced (without reference) in the *Derrotero de la Costa del Perú* of the Directorate of Hydrography and Navigation of the Navy, 2nd edn, 1988: *Ibid*., p. 12, section 1.35.

625 See Directorial Resolution No. 347-91-DC/MGP of 20 December 1991 of the Directorate-General of Captaincies and Coastguard of Peru, **Annex 178**; Directorial Resolution No. 0313-94/DCG of 23 September 1994 of the Directorate-General of Captaincies and Coastguard of Peru, **Annex 180**.

and the process required are not limited to fishing boats or vessels flying the flag of Chile[626].

3.83. Annex 3 to the 1991 version of SISPER contains the necessary elements of a "Sailing Plan Report" which must be submitted to the relevant Harbour Master by shipping agents. One of these elements is the estimated time at which the ship will cross the "jurisdictional parallels" of 03º 24' S or 18º 20' 08" S[627]. This reflects the Peruvian authorities' understanding that Peru's "maritime dominion" is bounded by lines following parallels of latitude — "jurisdictional parallels" — both to the north and the south. Both the 1991 and the 1994 versions of SISPER also contain the format of the report which a ship is required to transmit to the authorities "at the time of entry into the Peruvian Maritime Dominion"[628], as well as model reports. In both 1991 and 1994 versions, the point of entry in one of the model reports had the following latitude: "1820.8S"[629].

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626 See Directorial Resolution No. 347-91-DC/MGP of 20 December 1991 of the Directorate-General of Captaincies and Coastguard of Peru, **Annex 178**, Art. 1; Directorial Resolution No. 0313-94/DCG of 23 September 1994 of the Directorate-General of Captaincies and Coastguard of Peru, **Annex 180**, Annex (1), Art. 1.

627 Directorial Resolution No. 347-91-DC/MGP of 20 December 1991 of the Directorate-General of Captaincies and Coastguard of Peru, **Annex 178**, Annex (3).

628 Directorial Resolution No. 0313-94/DCG of 23 September 1994 of the Directorate-General of Captaincies and Coastguard of Peru, **Annex 180**, Annex 4, 1st case; in its 1991 version, reporting was required upon entry into the "Peruvian jurisdictional waters": **Annex 178**, Appendix 1 to Annex 1, 1st case.

629 Directorial Resolution No. 347-91-DC/MGP of 20 December 1991 of the Directorate-General of Captaincies and Coastguard of Peru, **Annex 178**, Appendix 2 to Annex (1); Directorial Resolution No. 0313-94/DCG of 23 September 1994 of the Directorate-General of Captaincies and Coastguard of Peru, **Annex 180**, Appendix 1 to Annex (4).

3.84. The third edition of Peru's *Sailing Directions* in 2001 reproduced the SISPER provisions as approved in 1994[630]. The 2001 edition does not explicitly state that Peru's waters lie to the north of the parallel of latitude 18º 21' S, but it still contains the same model report to the authorities upon entry into the Peruvian "maritime dominion", with a point of entry from the south with coordinates "1820S / 07620W"[631].

3.85. Peru has imposed a similar reporting requirement upon foreign warships. A Peruvian Regulation[632] requires foreign warships planning to enter Peru's "maritime dominion" to provide advance notice and, among other things, to identify their proposed route and the estimated dates of entry into and exit from Peru's waters[633]. Warships are also required to report upon actual entry into and exit from "waters under the sovereignty and jurisdiction of Peru"[634], whatever the purpose of their voyage. This Regulation does not define the perimeters of the Peruvian "maritime dominion", but there is no indication that any line other than the parallel of latitude of Hito No. 1 applies.

3.86. Chile, for its part, does not require all ships to report upon entry into its waters. As noted, Chile does, however, impose such a reporting requirement on ships "registered in the countries which require Chilean vessels to comply

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630 Directorate of Hydrography and Navigation of the Navy of Peru, *Derrotero de la Costa del Perú*, 3rd edn, 2001, **Annex 193**, p. 17, section 4.4.

631 *Ibid*., p. 20, Appendix to Annex (3).

632 Regulation on the Visit and Stay of Foreign Warships at National Ports and Transit through the Waters under the Sovereignty and Jurisdiction of Peru, originally approved by Supreme Decree No. 004-77-MA of 22 March 1977 and modified by Supreme Decree No. 080-93-MGP of 26 October 1993, **Annex 171**.

633 *Ibid*., para. B-301(d).

634 *Ibid*., para. C-407.

with similar or equivalent provisions"[635]. The specific requirement in such cases is that ships report their position and sailing plan upon entry into waters under Chile's jurisdiction.

B. Capture and Prosecution of Unauthorized Foreign Vessels

3.87. As Peru stated as early as 1964[636], fishing in the waters north of the parallel of the boundary is punishable as illegal entry into Peruvian waters and a violation of Peru's sovereignty. Such transgressions are not regarded as simple matters of breaking a traffic rule for fishing vessels, as Peru now seems to argue.

3.88. Chile similarly took enforcement actions against Peruvian vessels illegally entering into its maritime zone and illegally fishing. Owing to the routine nature of incidents involving transgressions by Peruvian vessels into Chilean waters and enforcement actions taken in respect of such incidents, records of capture (and in many cases prosecution) are not maintained beyond a limited number of years. The records available, nevertheless, demonstrate Chile's consistent practice of capture and prosecution of unauthorized vessels in the south of the parallel of Hito No. 1 over a long period of time.

3.89. This Subsection summarizes the practice of Peru and Chile in enforcing the maritime boundary through capture and prosecution of foreign vessels illegally entering into their respective maritime zones. Chile's enforcement actions, as will be seen, were acknowledged by Peru without any protest or reservation, until very recently — contrary to what would have been

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635 Title III, para. 1 of Decree No. 1,190 of 1976 on the Organization of the Maritime Search and Rescue Service of the Navy of Chile, inserted by Decree No. 704 of 29 October 1990, **Annex 138**, Sole article, para. 6.

636 See para. 3.13 above.

the case had Peru believed that there was no maritime boundary in place, or that the relevant incidents occurred in disputed waters.

1. Peru

3.90. The record available to Chile on Peru's prosecution of incursions by Chilean vessels shows Peru's enforcement of a boundary line which divides the maritime zones of the two States, confirming the permanent character of the line. For example, the Harbour Master of Ilo issued two substantially identical resolutions on 5 June 1989[637], imposing fines on two Chilean vessels which had been found in Peruvian waters. The Resolutions stated that the vessels were found at the same location, to the north of the "frontier line of the Republic of Chile, in the jurisdictional waters of Peru"[638]. This line was also described as the "dividing line of the maritime frontier"[639].

3.91. The terminology used in decisions of the Harbour Master of Ilo appears to have changed since 2000, perhaps with a prospective claim before the Court in mind. The authorities started describing the line that Chilean vessels were said to have crossed as the "Line of Special Treatment"[640]. The contrast is stark with the language in earlier decisions, which referred to the "frontier line"

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637 See Resolution No. 006-89-M of 5 June 1989 by the Harbour Master of Ilo (***Resolution No. 006-89-M***), **Annex 176**; Resolution No. 007-89-M of 5 June 1989 by the Harbour Master of Ilo (***Resolution No. 007-89-M***), **Annex 177**.

638 Resolution No. 006-89-M, **Annex 176**, first paragraph; Resolution No. 007-89-M, **Annex 177**, first paragraph. The quoted passage reads in Spanish: "línea fronteriza de la República de Chile, en aguas jurisdiccionales del Perú".

639 Resolution No. 006-89-M, **Annex 176**, third recital; Resolution No. 007-89-M, **Annex 177**, third recital.

640 Resolution No. 098-2000-M by the Harbour Master of Ilo on 13 June 2000, **Annex 187**; Resolution No. 149-2000-M by the Harbour Master of Ilo on 2 November 2000, **Annex 188**. The fourth paragraph of the recitals of both Resolutions uses the term "Línea de Tratamiento Especial" in the original text.

and the "maritime frontier". No explanation was given for that change. The nomenclature suggests Peru was anxious to devise a term that would allow it to continue to arrest vessels transgressing the all-purpose maritime boundary while attempting to avoid explicitly acknowledging that boundary.

3.92. In fact, the legal basis which Peru invoked for the prosecutions of the cases described immediately above confirms that the offence was not, as Peru now argues, crossing a functional line based on an *ad hoc* agreement. Rather, it was illegally fishing in the Peruvian "maritime dominion". Importantly, this was the case both in 1989 and 2000, although in 2000 Peru started using the "Line of Special Treatment" nomenclature for the boundary line. All the Resolutions in 1989 and 2000 summarized above refer to Articles C-070004 and C-070005 of the Regulation on the Harbour Authorities and Maritime, Fluvial and Lacustrine Activities. According to the description given by the Harbour Master of Ilo in these Resolutions of 1989 and 2000, Article C-070004 prohibits fishing by foreign vessels in the Peruvian "maritime dominion" and Article C-070005 provides that such a breach is to be prosecuted.

2. Chile

3.93. For their part, over the years Chilean naval and maritime authorities have captured many Peruvian vessels and in some cases prosecuted such vessels fishing illegally in Chilean waters. Following the agreement on the Regulation of Permits for the Exploitation of the Resources of the South Pacific under the auspices of the CPPS in 1955[641], Chile regulated the issuance of permits to foreign vessels for fishing in Chilean territorial waters (*aguas territoriales*) and

[641] Signed at Quito on 16 September 1955, **Annex 5**. Under this CPPS Regulation, fishing permits are issued by "the competent authority of the country in whose maritime zone the fishing activities will take place"; see para. 3.130 below.

provided that foreign vessels fishing in those waters without a permit would be prosecuted[642].

3.94. This regime was revised upon enactment of a new General Law on Fisheries and Aquaculture in 1989 (as subsequently modified). Under this regime, extractive fishing activities (defined as fishing activities for the purpose of capturing, hunting, cutting or collecting hydro-biological resources) in the Chilean territorial sea and EEZ require a permit[643]. Illegal fishing, without permit, is an offence under Article 115 of this Law, which reads in material part:

> "It is prohibited to carry out extractive fishing in the interior waters, territorial sea or exclusive economic zone by ships or vessels which hoist foreign flags, unless they are specially authorized to carry out investigative fishing. The offenders shall be sanctioned with a fine"[644].

3.95. Here too, the punishable act is not breaching a traffic rule at sea, but rather unauthorized activities in Chile's territorial sea and EEZ. As an example, the available data on recent captures, in 1984 and from 1994 to 2009, and the proceedings that followed in many of these incidents, are set out in the Appendix to this Counter-Memorial. The data in the Appendix are extracted from the correspondence between the Chilean and Peruvian maritime authorities and the record of proceedings in the Arica courts in respect of Peruvian vessels found fishing in Chilean waters. Where contemporaneous records are no longer available, the available records of the Chilean Navy containing key information

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642 See Decree No. 130 of 11 February 1959: Regulation on Permits for Fishing by Foreign Vessels in Chilean Territorial Waters, **Annex 117**, Arts 5, 24 and 25.

643 Law No. 18,892 (as amended), General Law on Fisheries and Aquaculture, consolidated text published in Decree No. 430 of 21 January 1992, **Annex 137**, Art. 15.

644 *Ibid*., Art. 115.

on some captures have been used to compile the Appendix. The location of each capture of a Peruvian vessel is depicted in **Figure 28**. It is stressed that the records available cover only recent years, as there is no general record-retention or reporting policy for routine matters such as these.

3.96. As illustrated in the Appendix and **Figure 28**, the available documents show that in 1984 and 1994-2009 Chile captured more than 300 Peruvian fishing vessels in the waters south of the boundary parallel, including in Chile's waters to which Peru now lays claim. The red marks within the 10M zone of tolerance in Chile's waters indicate Peruvian vessels which in the circumstances were not considered to have been "accidental[ly] presen[t]" within the meaning of Article 2 of the Lima Agreement. As can be seen in the Appendix, the large majority of these captures were duly notified to the Peruvian authorities (Peru's Consul General in Arica, the Harbour Master in Ilo, or both), identifying the coordinates of the location of each capture. The notification to Peru also included the distance between the location of capture and the "international political boundary" (*límite político internacional* – "*LPI*")[645].

3.97. When informed of arrests of Peruvian vessels, until 2004 Peru's authorities did not object to the term "international political boundary"; nor did they enquire as to the boundary's precise location; nor did they challenge Chile's position that transgressions had been assessed by reference to the international political boundary.

3.98. From 2000, Peru's standard response was simply to acknowledge that Peruvian vessels were found at locations south of the "Special Maritime Frontier

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[645] See, e.g., Fax No. 408/99 of 24 September 1999 from the Harbour Master of Arica to the Harbour Master of Ilo and the Consul General of Peru in Arica, **Annex 89**, first paragraph. Also see para. 3.64 above on the term *límite político internacional*.

Zone" and to state that this zone was "agreed upon between our countries in order to resolve incidents such as the one we are dealing with in this instance"[646]. Peru was referring to the Special Maritime Frontier Zone along the "parallel which constitutes the maritime boundary between the two states" under Article 1 of the Lima Agreement of 1954. Peru was not referring to an "informal" or "*ad hoc*" arrangement, as it now claims[647]. That this was Peru's understanding is confirmed by an incident in 2000, when the Consul General of Peru in Arica complained that a Peruvian vessel was captured six nautical miles south of the "Special Maritime Frontier Zone" while not fishing. In his view, "its presence was accidental and could not be considered a violation of the Chilean jurisdictional waters"[648]. Peru thus acknowledged the applicability of the Lima Agreement and the existence of a maritime boundary.

3.99. Until 2004 Peru continued to receive without reservation Chile's notices which expressly relied on a maritime boundary following the parallel of Hito No. 1. Only in September 2004 did Peru notify Chile that official correspondence in 2003 and 2004 should not be taken as prejudicing or modifying Peru's position regarding the "nature, limits or extent of its zone under national jurisdiction" or the "international instruments on these matters"[649]. The tactical intent of this letter is as transparent as it is incapable of changing what had in fact occurred in previous years. It was purportedly a

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646 See the following letters from the Consul General of Peru in Arica to the Harbour Master of Arica: No. 8-10-B-C/0150-2000 of 3 April 2000, **Annex 90**; No. 8-10-B-C/0353-2000 of 5 September 2000, **Annex 94**; No. 8-10-B-C/0354-2000 of 6 October 2000, **Annex 96**; No. 8-10-B-C/0378-2000 of 19 October 2000, **Annex 97**; No. 8-10-B-C/323-2001 of 10 August 2001, **Annex 99**.

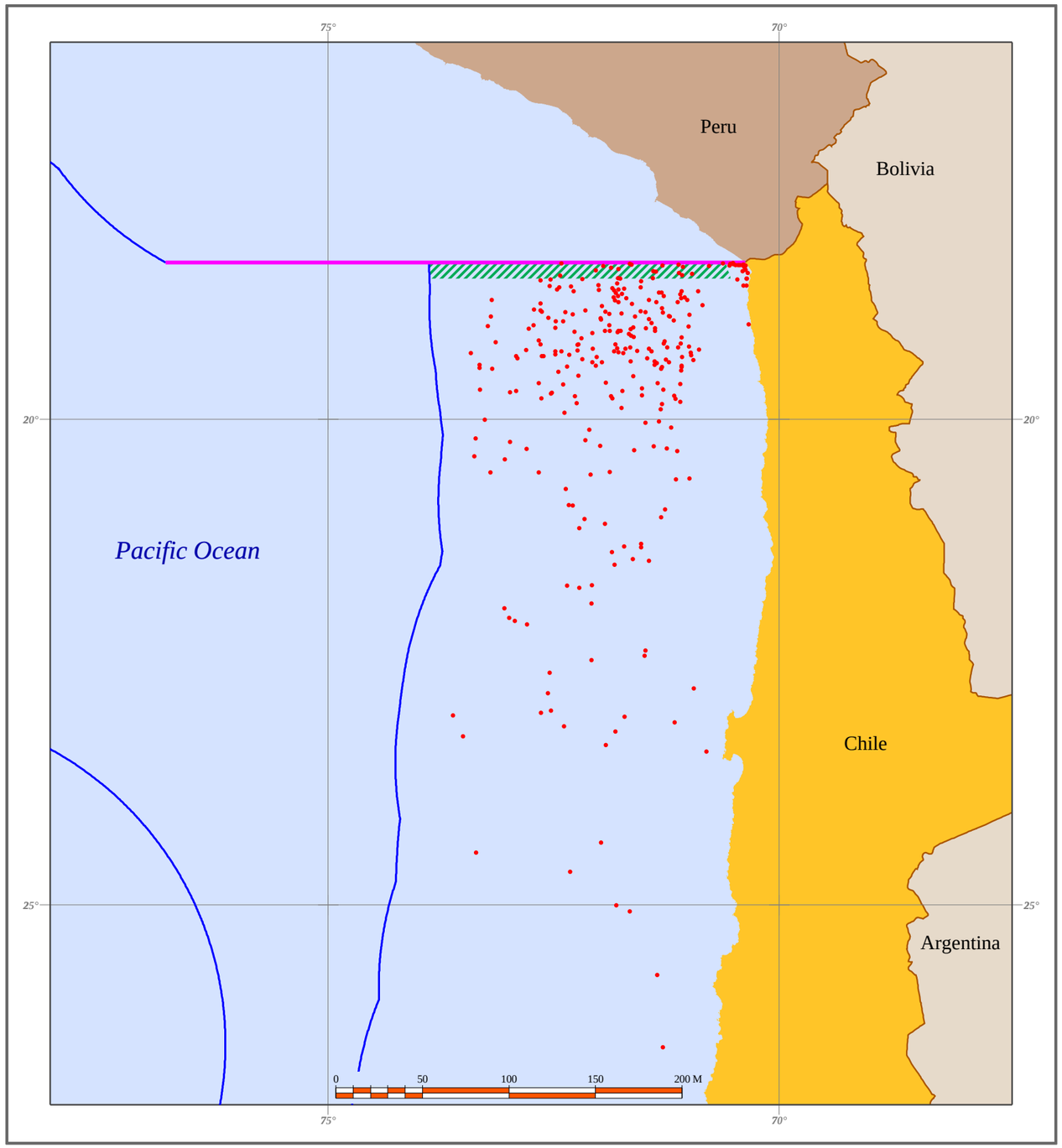
647 Memorial, paras 4.105 and 4.128.

648 Letter No. 8-10-B-C/0169-2000 of 14 April 2000 from the Consul General of Peru in Arica to the Harbour Master of Arica, **Annex 91**.

649 Letter No. 8-10-B-C/389-2004 of 30 September 2004 from the Consul General of Peru in Arica to the Maritime Governor of Arica, **Annex 104**.

Figure 28

Depiction of the locations where Peruvian vessels have been arrested by Chile for violating the maritime boundary, 1984 and 1994 - 2009



The source for the location of arrests is the Appendix to the Counter-Memorial, which is an abstract of the relevant primary records on these arrests.

Prepared for the Ministry of Foreign Affairs, Chile, by UKHO Law of the Sea Consultancy

blanket retrospective reservation covering the volume of official correspondence in 2003 and 2004 between the Parties on captures of Peruvian vessels in Chilean waters[650]. Peru's sudden change of position was not explained. It serves only to underscore that until that time both States' maritime and consular authorities in Arica and Ilo, which are involved in matters relating to the maritime boundary in their daily duties, treated the parallel of latitude 18° 21' 03" S as nothing less than the all-purpose and definitive maritime boundary between the Parties.

3. Co-ordinated procedures for the treatment of captured vessels

3.100. Over the past decades, captured vessels were often escorted by Chile's Navy or Peru's Coastguard (part of Peru's Navy) back to the maritime zone of their home State[651]. This procedure was memorialized in 1995[652]. According to this agreed procedure, small Chilean or Peruvian vessels found further than ten nautical miles on either side of the "international political boundary" (i.e., outside the zone of tolerance under the Lima Agreement) should be escorted by patrol boats until they exit the jurisdictional waters of the other State.

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650 In response, Chile reiterated that there is an agreed maritime boundary pursuant to international agreements in force between the Parties: see Note No. 48 of 24 May 2005 from the Ministry of Foreign Affairs of Chile to the Peruvian Embassy in Chile, **Annex 105**; Note No. 76 of 13 September 2005 from the Ministry of Foreign Affairs of Chile to the Embassy of Peru in Chile, **Annex 84 to the Memorial**.

651 See, e.g., Aerogram No. 14 of 22 May 1967 from the Consul General of Chile in Tacna, Peru to the Ministry of Foreign Affairs of Chile, **Annex 123**, forwarding the message from the Harbour Master of Ilo that the Peruvian patrol ship *Lómas* had escorted a Chilean vessel to the frontier line.

652 See "Procedure for the exchange of Chilean or Peruvian fishing boats, apprehended undertaking fishing activities to the north or to the south of the Special Maritime Frontier Zone, between the Harbour Master of Ilo and the Maritime Governor of Arica", attached as Annex A to the Final Minutes of Understanding of the Fourth Bilateral Meeting between the Commanders of the Frontier Naval Zones of Chile and Peru on 13 July 1995, **Annex 21**.

3.101. Peru attempted in 2003 to set aside some of the "agreements in force" (to use Peru's own terminology)[653] which had been reached in 1995 (as well as agreements reached in 1997) between the Commanders-in-Chief of the Fourth Naval Zone of Chile and the Third Naval Zone of Peru. The attempt included the above-mentioned escorting procedure which was agreed in 1995[654]. This rather highlights Peru's own understanding that the escorting procedure gave effect to the maritime-boundary line of Hito No. 1 and that the procedure was detrimental to a prospective claim by Peru before the Court.

3.102. The escorting procedure was as follows. The Harbour Master of Arica (Chile) would inform his counterpart in Ilo (Peru), and normally also the Consul General of Peru in Arica, that Peruvian vessels, having been captured while fishing in Chilean waters, were to be escorted back to the "international political boundary" by a Chilean Navy patrol ship. The Harbour Master of Arica would provide the estimated time of entry into Peru's territorial waters[655].

3.103. Logbooks of Chilean Navy patrol boats confirm this practice. In March 1995, the patrol boat *Salinas* escorted a Peruvian vessel to a point with latitude 18º 20' 58" S (the latitude of Hito No. 1 under SAD69)[656]. Similarly, on

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653 Final Minutes of Understanding of the Twelfth Bilateral Meeting between Commanders of the Frontier Naval Zones of Chile and Peru between 21 and 25 July 2003, **Annex 29**, Section C, para. 1.

654 *Ibid*., Section C, para. 1(b). The Peruvian Navy argued that the agreement on the escorting procedure fell outside its competence. The Chilean Navy opposed this proposal.

655 See, e.g., the following fax messages from the Harbour Master of Arica to the Harbour Master of Ilo: Fax No. 417 of 4 October 2000, **Annex 95**; Fax No. 211/08 of 9 August 2001, **Annex 98**.

656 See extracts of the Logbook of the Chilean Navy patrol boat *Salinas*, for 30 March 1995, **Annex 139**.

25 March 1996, the patrol boat *Machado* handed over a Peruvian vessel to a Peruvian patrol boat at the international political boundary[657].

3.104. As a more recent example, the logbooks of the Chilean Navy ship *Arica* show that, on 12 November 2002, it escorted a Peruvian vessel to the international political boundary; and that, on 9 December 2002, in two separate incidents, it escorted two Peruvian vessels to the same boundary line[658]. In an analogous case, on 27-29 June 2006, the Chilean Navy patrol ship *Iquique* rescued a Peruvian vessel in the high seas to the west of Chile's EEZ. *Iquique* contacted the authorities in Ilo to arrange a rendezvous with Peruvian Coastguard patrol ship *Río Zaña. Iquique* established communication with *Río Zaña* and handed over the Peruvian vessel at the maritime frontier[659].

3.105. Peru's Navy has also followed the same process of escorting Chilean vessels to the boundary parallel. Recent examples include two occasions in 2000 when the Harbour Master of Ilo in Peru informed his counterpart in Arica that two Chilean fishing vessels were to be escorted by the Peruvian Coastguard to the parallel of latitude 18º 21' 03" S[660]; and one occasion in 2002 when the Harbour Master of Ilo notified his counterpart in Arica that a patrol boat of the Peruvian Coastguard was to escort a Chilean vessel to the "frontier area"[661]. Earlier logbooks of the Chilean Navy patrol boat *Machado* also record one

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657 See extracts of the Logbook of the Chilean Navy patrol boat *Machado*, for 26 February and 25 March 1996, **Annex 141**.

658 Extracts of the Logbook of the Chilean Navy patrol boat *Arica*, for 12 November and 9 December 2002, **Annex 152**.

659 See extracts of the Logbook of the Chilean Navy patrol boat *Iquique*, for 27, 28 and 29 June 2006, **Annex 157**.

660 See Fax No. 226-00 of 28 June 2000 from the Harbour Master of Ilo to the Harbour Master of Arica, **Annex 93**.

661 Fax No. 211-2002 of 9 November 2002 from the Harbour Master of Ilo to the Harbour Master of Arica, **Annex 102**.

occasion on 26 February 1996 when it received the Chilean vessel *Austral* escorted by a Peruvian patrol boat at the international political boundary[662]. The legal significance of the parallel of 18° 21' 03" S in the first two examples of 2000 is obvious in light of the escorting procedure agreed in 1995. The Peruvian Coastguard ensured that the Chilean vessels had crossed that parallel sailing due south, thus exiting Peru's jurisdictional waters.

C. Recognition of an Agreed Maritime Boundary Line by the Parties' Naval Authorities

3.106. The practice of the Navies of Chile and Peru in dealing with transgressions of fishing vessels, summarized above, clearly demonstrates the mutual recognition of a maritime boundary between the Parties. This Subsection shows that this understanding is manifest not only in the control of illegal fishing activities, but also in other functions, in particular the control of maritime traffic of any type of vessel.

3.107. The importance attached to the control of maritime traffic in general was recognized by the Parties at a meeting between their respective Armed Forces in September 2000. It was agreed that the naval authorities of the two States would establish procedures for exchanging necessary information on the control exercised "within the waters under the jurisdiction of each country"[663]. This is a clear recognition of the existence of a permanent and all-purpose maritime boundary.

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662 See extracts of the Logbook of the Chilean Navy patrol boat *Machado*, for 26 February and 25 March 1996, **Annex 141**.

663 Minutes of the Fifteenth Roundtable Discussions between the High Commands of the Armed Forces of Chile and Peru, signed by the Chief of Staff of the National Defence Force of Chile and the Chief of Staff of the Air Force of Peru (as the heads of the Chilean and Peruvian delegations respectively) on 29 September 2000, **Annex 26**; see the paragraph entitled "Sixth Understanding" at the fifth page.

3.108. In considering the ways of dealing with illegal drug-trafficking, the two Navies discussed, in August 2002, a common strategy for coordinated operations. The agreed record of the matters discussed and considered sets out the procedures proposed to be followed by the patrol units. According to the proposed procedures, if an offending vessel trespasses into waters of the other State, the patrol unit which was pursuing that vessel must cease its pursuit and make a signal or radar contact to convey the information to the patrol unit of the latter State. It would then be left to the patrol unit of that other State to continue the pursuit in its own waters and, if it captures the vessel, take appropriate action[664]. Again, this indicates both Parties' understanding that a maritime boundary was in place.

D. PERU'S USE OF ITS MARITIME BOUNDARIES AS THE LIMITS OF THE AIRSPACE ABOVE ITS "MARITIME DOMINION"

3.109. As discussed at paragraphs 2.170-2.172 above, Peru claims to exercise "full and exclusive sovereignty over the airspace that covers its territory and adjacent sea, up to the limit of 200 (two hundred) miles, according to the Political Constitution of Peru"[665]. Peru uses the parallels of latitude 3° 24' S and 18° 21' S, which effectively coincide with its maritime boundaries with Chile and Ecuador, as the lateral limits of its airspace. Peru does so both in its internal law

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664 See Final Minutes of Understanding of the Eleventh Bilateral Meeting between the Commanders of the Frontier Naval Zones of Chile and Peru, Appendix 1 "Considerations for the formulation of a common bilateral strategy to enable future operations against illegal activities carried out at sea", 16 August 2002 **Annex 28**, para. 3.c).

665 Law No. 27261 of 9 May 2000: Law on Civil Aeronautics, **Annex 185**, Art. 3; see also Law No. 15720 of 11 November 1965: Law on Civil Aeronautics, **Annex 12 to the Memorial**, Art. 2 (translation taken from United Nations Legislative Series, *National Legislation and Treaties relating to the Law of the Sea*, 1974, **Annex 164**).

and under the Convention on International Civil Aviation of 1944 (the ***Chicago Convention***)[666].

3.110. Peru claimed "sole sovereignty over the air space above its territory and jurisdictional waters within a distance of 200 miles" in its Law on Civil Aeronautics, first enacted in 1965[667]. Shortly afterwards, in June 1966, a memorandum by the Embassy of Peru in Santiago recorded Peru's objection, not only to incursions by Chilean vessels into its maritime zone, but also to aerial transgressions of the "maritime frontier" by Chilean aircraft[668].

3.111. According to Article 21 of the 2000 version of the Peruvian Law on Civil Aeronautics, authorization is required for "entry into, transit within and exit from" Peru's airspace. That authorization is to specify the point(s) at which an aircraft is to cross the boundary line of Peru's airspace[669]. Chilean aircraft are subject to this requirement of Peruvian law. Chile's authorities are not responsible for obtaining authorization for commercial flights, but Chile's Government has applied for authorization for official flights in Peruvian airspace. The issuance of such authorizations confirms Peru's understanding that its airspace is bounded to the south by the parallel of latitude of Hito No. 1[670].

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666 Convention on International Civil Aviation, concluded at Chicago on 7 December 1944, 15 *UNTS* 295.

667 Law No. 15720 of 11 November 1965: Law on Civil Aeronautics, **Annex 12 to the Memorial**, Art. 2 (translation taken from United Nations Legislative Series, *National Legislation and Treaties relating to the Law of the Sea*, 1974, **Annex 164**); Law No. 27261 of 9 May 2000: Law on Civil Aeronautics, **Annex 185**, Art. 3.

668 Memorandum of 8 June 1966 from the Peruvian Embassy in Chile to the Ministry of Foreign Affairs of Chile, **Annex 76**.

669 See Law No. 27261 of 9 May 2000: Law on Civil Aeronautics, **Annex 185**, Art. 21.

670 See, e.g., Fax No. 555 of 5 September 2007 from the Chilean Air Force Attaché in Peru to the Directorate of International Relations of the Air Force of Chile, reporting Permission PVC No. 257/2007 for overflight granted by the Peruvian Air Force; Fax

3.112. The Chilean Government's requests to Peru for authorization of official flights in the airspace over Peruvian territory, including Peru's "maritime dominion", are submitted through Chile's Air Force attaché in Lima. The request-form to be submitted to Peru includes the itinerary and course of each flight. The points of entry into, and exit from, Peruvian airspace are indicated by the code-names given to the points at which air routes cross the lines dividing Peru's Flight Information Region (***FIR***) with those of Chile and Ecuador under the Chicago Convention[671]. These points on the FIR limits can be seen in the air-route chart of Peru, reproduced as **Figure 29**. So far as relevant here, in the airspace above the South-East Pacific Ocean, the adjacent FIRs of Chile ("Antofagasta"), Peru ("Lima") and Ecuador ("Guayaquil") are divided by two parallels of latitude, to the north (3° 24' S) and to the south (18° 21' S), and the crossing points from one FIR to the next are located on the two parallels[672].

3.113. To cite one recent example, in December 2007 Chile requested Peru's authorization for overflight by an aircraft transporting Chile's peace-keeping contingent to Haiti. The Chilean aircraft was to follow air route L-302. At the crossing point with code-name IREMI (18° 21' 00" S, 75° 23' 00" W), the

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No. 654 of 12 October 2007 from the Chilean Air Force Attaché in Peru to the Directorate of International Relations of the Air Force of Chile, reporting Permission PVC No. 294/2007 for overflight granted by the Peruvian Air Force; Fax No. 697-A of 13 November 2007 from the Chilean Air Force Attaché in Peru to the Directorate of International Relations of the Air Force of Chile, reporting Permission PVC No. 315/2007 for overflight granted by the Peruvian Air Force, **Annex 158**.

671 Under Article 28 and Annex 11 of the Chicago Convention, each State party undertakes to provide flight information and alerting services in an airspace of defined dimensions called a Flight Information Region. Lines dividing FIRs are drawn by ICAO on the basis of air-navigation plans formulated by its Member States.

672 Over Peru's land territory, the lines forming the perimeters of Peru's FIRs coincide with Peru's land boundaries with its neighbouring States.

aircraft would enter the airspace above Peru's "maritime dominion", and later follow air route G-675 until the crossing point with code-name PAGUR (4° 28' 46" S, 80° 21' 34" W). At that last point the aircraft would leave Peruvian airspace, overflying Peru's land boundary with Ecuador. Points IREMI and PAGUR are on the borders of FIR Lima and are depicted on Peru's air-route navigation chart as authorized points of entry and exit. The authorization issued by Peru, reproduced in **Figure 30**, clearly shows that the flight-path between points IREMI and PAGUR, including the flight along air route L-302 over the Peruvian "maritime dominion", is considered by Peru as a flight over "Peruvian territory"[673].

3.114. Peru's choice of the parallel of 18° 21' S as the southern limit of the Peruvian FIR in the airspace above the maritime dominion is significant as part of the totality of the evidence in this case. As Peru mentions in its Memorial, though in a cursory manner[674], the line which originally divided those two adjacent FIRs since 1951 was not a parallel of latitude. In 1962, it was changed to the current line, namely the parallel of 18° 21' S, by the Council of the International Civil Aviation Organization (***ICAO***)[675], following the submission of a working paper by Peru depicting the structure of the air-route network in Peru's airspace[676]. Peru indicated the parallel of 18° 21' S as the southern limit of Peru's airspace. Peru's paper did not indicate that its airspace extended to any

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673 Fax message of 15 January 2008 from the Chief of the Liaison and Protocol Department of the Air Force of Peru to the Directorate of the Air and Space Affairs of the Ministry of Foreign Affairs of Peru and to the Air Force Attaché of the Chilean Embassy in Peru, **Annex 110**.

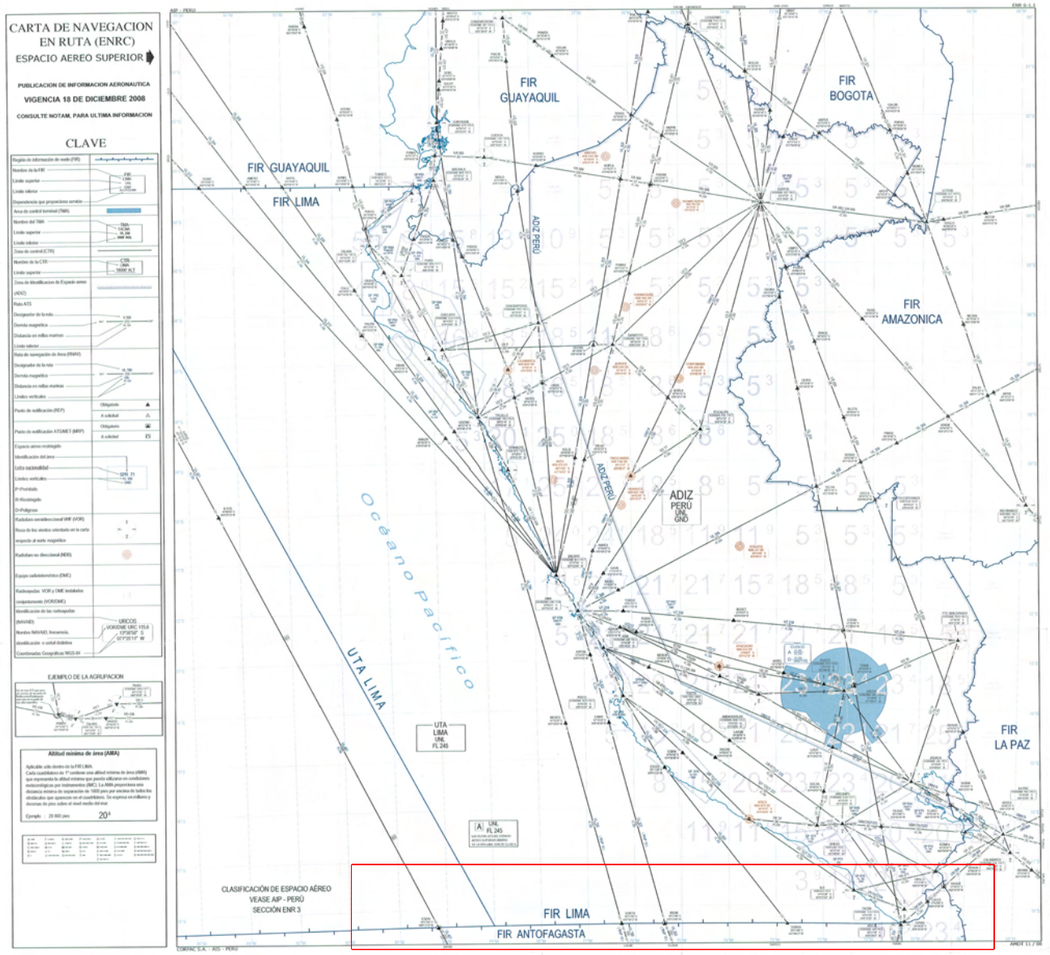
674 See Memorial, footnote 197.

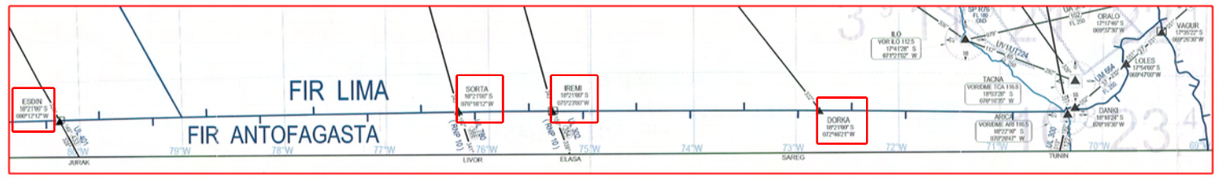
675 ICAO Inter-Office Memorandum of 3 February 2005, **Annex 243**, para. 6 and Enclosure E to the Memorandum ("Summary of Amendments to the Plan").

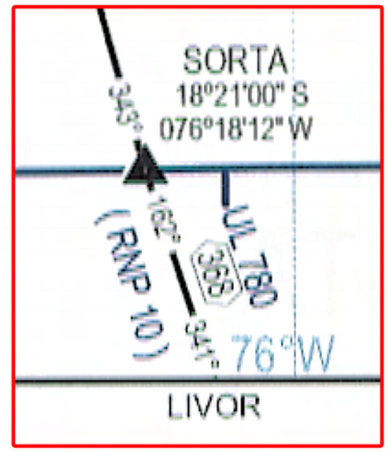
676 Peru's paper was submitted at a South American/South Atlantic regional air navigation meeting in 1961: Establishment of an integrated air route network suitable for the efficient provision of air traffic services, Working paper presented by Peru, LIM SAM/SAT, 1961, WP/31, 13 November 1961, **Annex 238**.

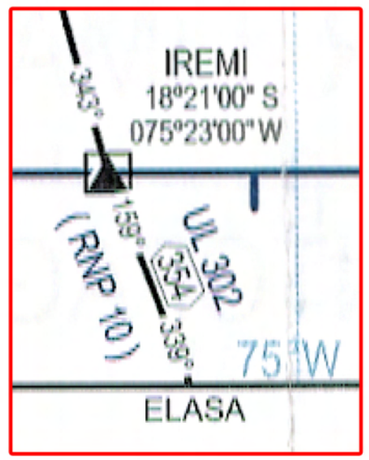
Figure 29

Flight Information Regions (FIRs), Air-Route Navigation Chart - Upper Airspace









Source: Corporación Peruana de Aeropuertos y Aviación Comercial S.A., *Carta de Navegación en Ruta (ENRC), Espacio Aéreo Superior*, 2008

Figure 30

Authorized points of entry into and exit from the Peruvian airspace

DE : OFICINA ENLACE FAP NO. DE FAX : 511 3154368 15 ENE. 2008 03:02PM P1

DPTO. DE ENLACE Y PROTOCOLO
TELEFAX: 315-4368

PARA SER TRANSMITIDO POR FACSÍMIL

FAX Nº 0 25 DIOE FECHA: 15 ENE 2008

PROMOTOR JEFE DEL DPTO. DE ENLACE Y PROTOCOLO FAP

DESTINATARIO DIRECCION DE ASUNTOS AEREOS Y DEL ESPACIO DEL MIN. RR.EE. FAX.311-2675)

INFORMACION AGREGADO AEREO A LA EMBAJADA DE CHILE EN PERU FAX 711-2228)

REFERENCIA SOLICITUD MODIFICACION FAX AAP Nº 25-2008, DEL 14 ENE-08

TEXTO:

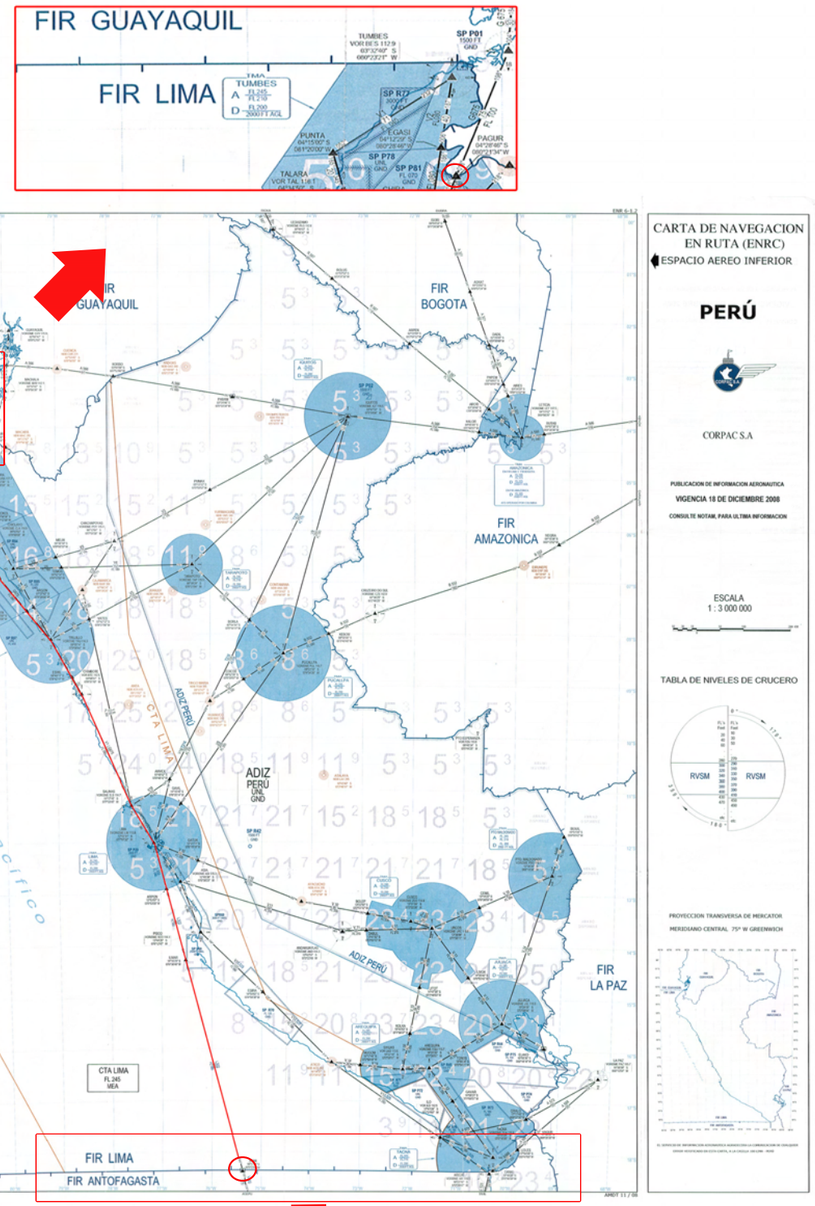
DIOE TENGO EL AGRADO DE DIRIGIRME A ESA DIRECCION EN CONEXIÓN CON EL DOCUMENTO DE LA REFERENCIA, A FIN DE COMUNICARLE QUE LA FUERZA AEREA DEL PERU HA APROBADO LA **MODIFICACION** DEL PERMISO DE VUELO COMOP SEGÚN DETALLE:

PVC-M-007/2008
A) 996 ALTN 998
B) C 130
C) FACH 998 ALTN FACH-998
D) CHILE
E) SOBREVUELO TERRITORIO PERUANO:
SODA-SEGU 17 ENE-08 IREMI L302 LIM G675 PAGUR VIG: 21 ENE-08
SECU SCFA 22 ENE-08 PAGUR G675 LIM L302 IREMI VIG: 26 ENE-08
F) TRASLADO PAX Y CARGA.

Atentamente,
E. Coronel FAP
P/O RICARDO TRELLES NAVARRETE
JEFE DEL DPTO. DE ENLACE Y PROTOCOLO FAP

E) OVERFLIGHT PERUVIAN TERRITORY
SODA—SEGU 17 JAN-08 IREMI L302 LIM G675 PAGUR VALID: 21 JAN-08
SECU SCFA 22 JAN-08 PAGUR G675 LIM L302 IREMI VALID: 26 JAN-08

Fax message of 15 January 2008 from the Chief of Liaison and Protocol Department of the Air Force of Peru



Route Navigation Chart - Lower Airspace, CORPAC S. A., Peru

area south of FIR Lima, or that Chile was exercising air-traffic control to the south of the parallel on the basis of an agreement with Peru delegating such functions to Chile[677]. The position in the north mirrors that in the south. One year earlier, the dividing line between FIR Lima and FIR Guayaquil of Ecuador had been fixed as the parallel of latitude 3° 24' S, effectively corresponding to the Ecuador-Peru maritime boundary[678].

E. Scientific Research in Waters South of the Maritime Boundary

3.115. Under Decree No. 711 of 1975, the Hydrographic and Oceanographic Institute of the Chilean Navy (since renamed the Hydrographic and Oceanographic Service of the Navy; ***SHOA***, in its Spanish-language acronym) authorizes scientific and technological research conducted by foreign nationals in the maritime zones under the national jurisdiction of Chile[679]. SHOA has in fact authorized several research missions in Chile's maritime spaces now claimed by Peru. Recent examples (1996-2004) follow.

(a) An authorization was granted to the Spanish *Instituto de Ciencias del Mar* in March 1996 to conduct scientific research in "waters of

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677 Under the terms of Annex 11 to the Chicago Convention, a State may exercise air-traffic control over airspace which does not form part of its territory in two situations: first, in accordance with an agreement delegating air-traffic services from one State to another; and, second, when a regional agreement provides for the provision of air-traffic services for airspace over the high seas or airspace of undetermined sovereignty. There is no agreement between Peru and Chile delegating to Chile air-traffic services south of parallel 18° 21' S.

678 See Recommendation 3/1 – Flight Information Regions – Amendment to the SAM/SAT Regional Plan (Doc. 7800/3), reproduced as Enclosure D to the ICAO Inter-Office Memorandum of 3 February 2005, **Annex 243**, para. b).

679 Decree No. 711 of 22 August 1975 approving the Regulation on the Control of Marine Scientific and Technological Investigations in the maritime zone of national jurisdiction, **Annex 131**, second recital and Art. 5.

national jurisdiction" of Chile[680]. Both the application for authorization, submitted by the Spanish Foreign Ministry on behalf of the institute, and the authorizing Resolution record that the investigation was to be carried out along five *transectas* (a straight line along which a scientific research ship sails and relevant samples are collected). The route of the Spanish research ship, *Hespérides*, and the five *transectas* are shown in the sketch-map attached to the note verbale from Spain's Foreign Ministry (see **Figure 31**). The northernmost *transecta* started from a point with coordinates 19° S and 71° W, as noted in Annex A to the relevant SHOA Resolution (see **Figure 31**) and is within the maritime area now claimed by Peru.

(b) In December 1997, SHOA authorized the Scripps Institute of the United States of America to carry out marine scientific research in "waters of national jurisdiction"[681]. The area of investigation by the ship *Melville* is shown in Annex A to the authorizing Resolution, reproduced as **Figure 32**. The northernmost part, with a rectangular shape, is limited to the north (line connecting points 1 and 2) by a parallel of latitude 18° 38' South. As illustrated in **Figure 32**, this northernmost part is within the maritime area now claimed by Peru.

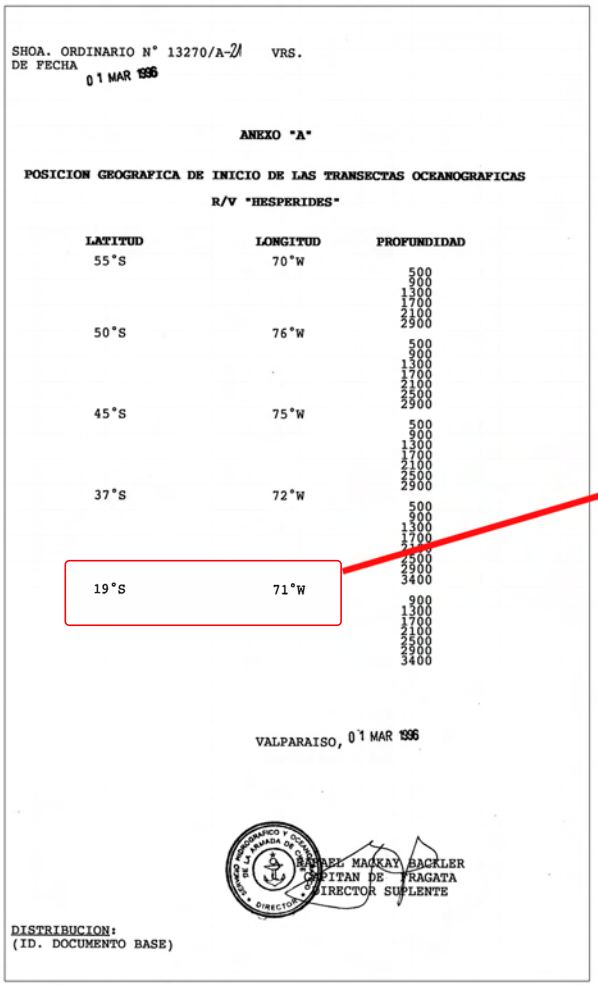
(c) In November 1999, C&C Technologies (a company based in the United States of America) was authorized to conduct scientific research in relation to the proposed installation of a submarine cable system off the coasts of, among other countries, Colombia, Ecuador, Peru and Chile. Authorization was granted by SHOA in respect of research in the Chilean territorial sea and EEZ between Arica and

680 See SHOA Resolution No. 13270/A-21 VRS of 1 March 1996, **Annex 142**.

681 SHOA Resolution No. 13270/64/VRS of 22 December 1997, **Annex 143**.

Figure 31

Scientific voyage authorized by the Chilean Navy: *Hespérides* (1996)



SHOA. ORDINARIO N° 13270/A-21 VRS.
DE FECHA
01 MAR 1996

ANEXO "A"

POSICION GEOGRAFICA DE INICIO DE LAS TRANSECTAS OCEANOGRAFICAS
R/V "HESPERIDES"

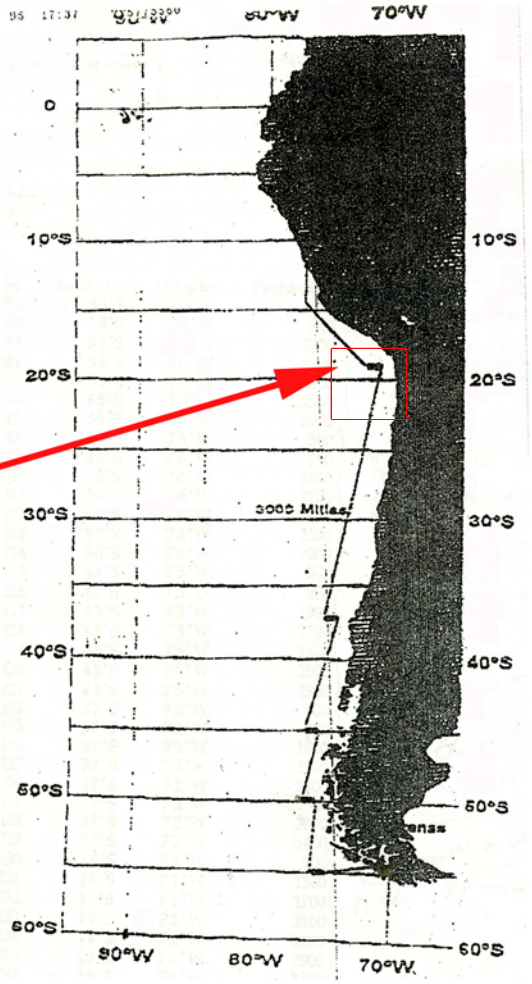
LATITUD	LONGITUD	PROFUNDIDAD
55°S	70°W	500 900 1300 1700 2100 2900
50°S	76°W	500 900 1300 1700 2100 2500 2900
45°S	75°W	500 900 1300 1700 2100 2500 2900
37°S	72°W	500 900 1300 1700 2100 2500 2900 3400
19°S	71°W	900 1300 1700 2100 2500 2900 3400

VALPARAISO, 01 MAR 1996

RAFAEL MACKAY BACKLER
CAPITAN DE FRAGATA
DIRECTOR SUPLENTE

DISTRIBUCION:
(ID. DOCUMENTO BASE)

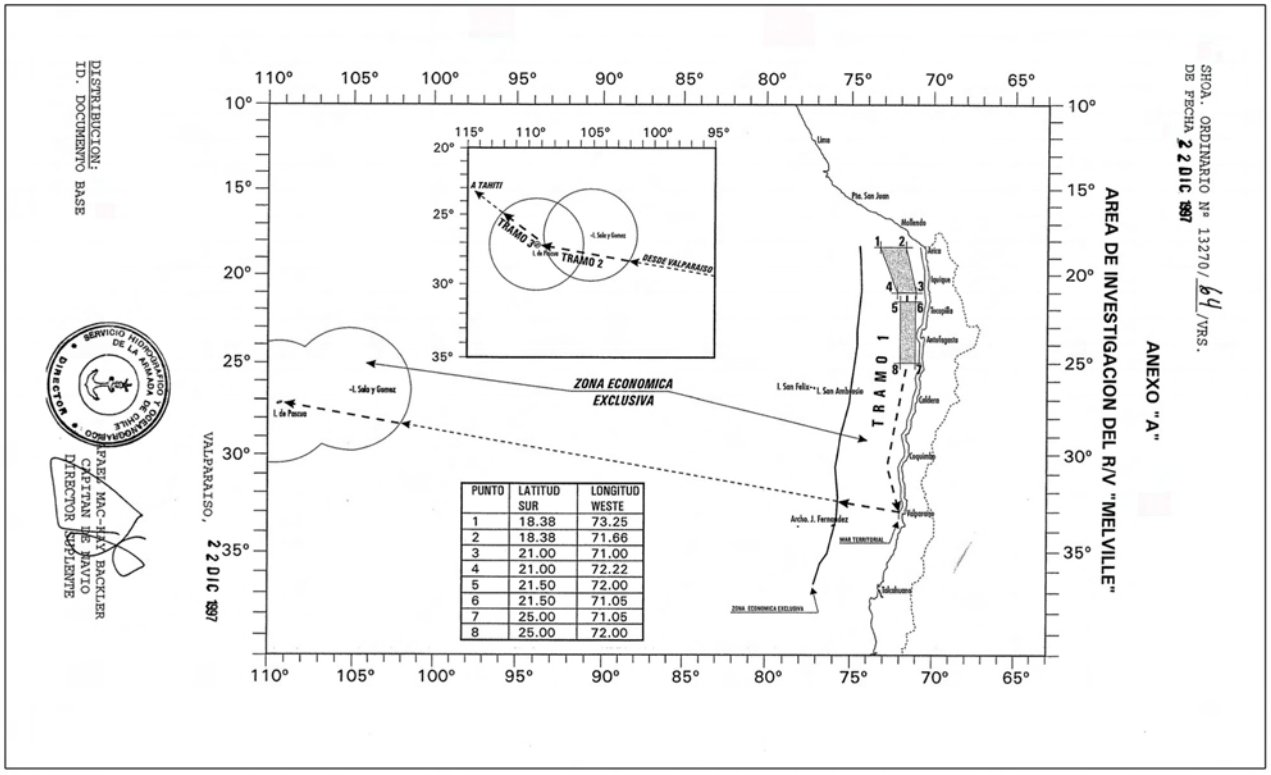
Annex A to Resolution No. 13270/A-21 VRS of 1 March 1996 by SHOA showing the starting points of five *transectas* along which *Hespérides* was authorized to conduct scientific research

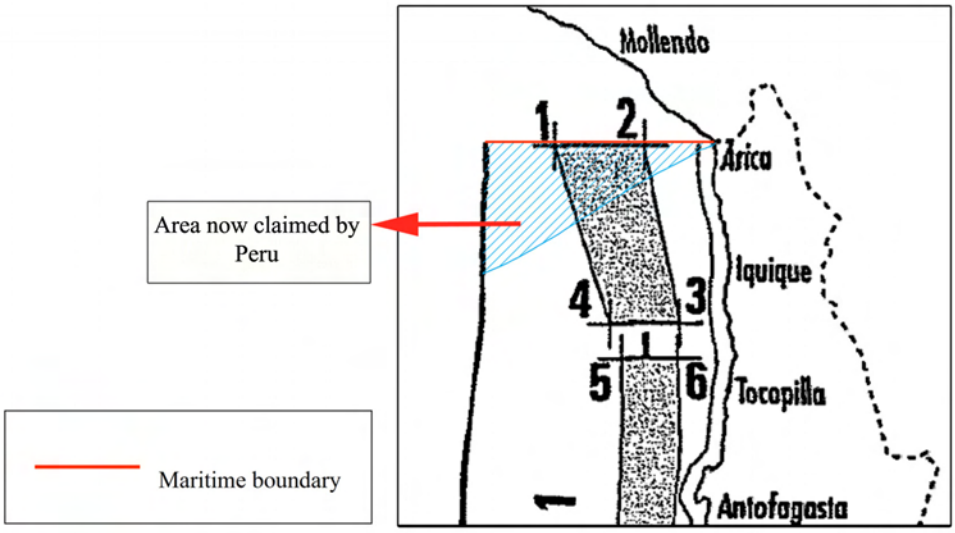


Sketch-map in annex to Note No. 124-18 of 17 October 1995 from Ministry of Foreign Affairs of Spain showing the proposed route of *Hespérides*

Figure 32

Scientific voyage authorized by the Chilean Navy: *Melville* (1997)





Annex A to Resolution No. 13270/64/VRS of 22 December 1997 by SHOA showing the authorized survey area of *Melville*

Valparaíso, along the route of two segments of the proposed system[682]. A sketch-map in the Resolution showing the authorized route is reproduced as **Figure 33**[683]. Another Resolution of the same date shows that two representatives of SHOA, called the "National Observers", were to board the survey ships (*Merlion* and *Beach Surveyor*) after the ships had crossed the International Political Boundary[684]. The report later prepared by the National Observers confirmed that they did in fact board the survey ships at the designated place.

(d) In June 2000, the Scripps Institution of Oceanography and the Woods Hole Oceanographic Institution of the United States of America were authorized to conduct marine scientific research along a route connecting the port of Arica to a point in the Pacific Ocean with coordinates 20° S and 85° W. In the application submitted by the United States Embassy on behalf of Scripps (and later authorized by SHOA), the research was stated to be conducted "in areas subject to the jurisdiction of Chile" and during "transits of the Chilean Exclusive Economic Zone en route to a major research project in international waters"[685]. The authorized route of the research vessel *Melville*, as depicted in **Figure 34**, traversed the maritime area now claimed by Peru to the south of the parallel of Hito No. 1.

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682 See SHOA Resolution No. 13270/71/VRS of 26 November 1999, **Annex 144**, para. 2.

683 *Ibid*., Annex A.

684 See SHOA Resolution No. 13270/72/VRS of 26 November 1999, **Annex 145**, paras 2-3.

685 Note No. 081 of 26 April 2000 from the United States Embassy in Chile to the Ministry of Foreign Affairs of Chile, **Annex 92**; also see SHOA Resolution No. 13270/37/VRS of 9 June 2000, **Annex 146**.

(e) Also in 2000, three companies obtained separate authorizations to conduct surveys in Chile's territorial waters and EEZ. The northern limit of each survey area was defined by specific reference to the "International Political Boundary"[686].

(f) In January 2002, a German institution was authorized to conduct scientific research in the Chilean EEZ up to the International Political Boundary. The research ship, *Sonne*, was to sail northwards from the Chilean port of Valparaíso, cross the International Political Boundary and conclude its voyage at the Peruvian port of Callao. Peru authorized the part of this research mission that was conducted by the *Sonne* in the Peruvian "jurisdictional waters"[687].

(g) Scripps and Woods Hole were authorized once more, in July 2003, to conduct scientific research in the Chilean territorial sea and EEZ. Their project was to cover the waters off the coast of Chile and Ecuador. Part of the research area which was subject to Chile's authorization was along the same route as in 2000 (between the port of Arica and a point in the Pacific Ocean with coordinates 20° S and 85° W). Once again, the authorized route of the research vessel, *Roger Revelle*, traversed the area now claimed by Peru[688], as shown in **Figure 35**.

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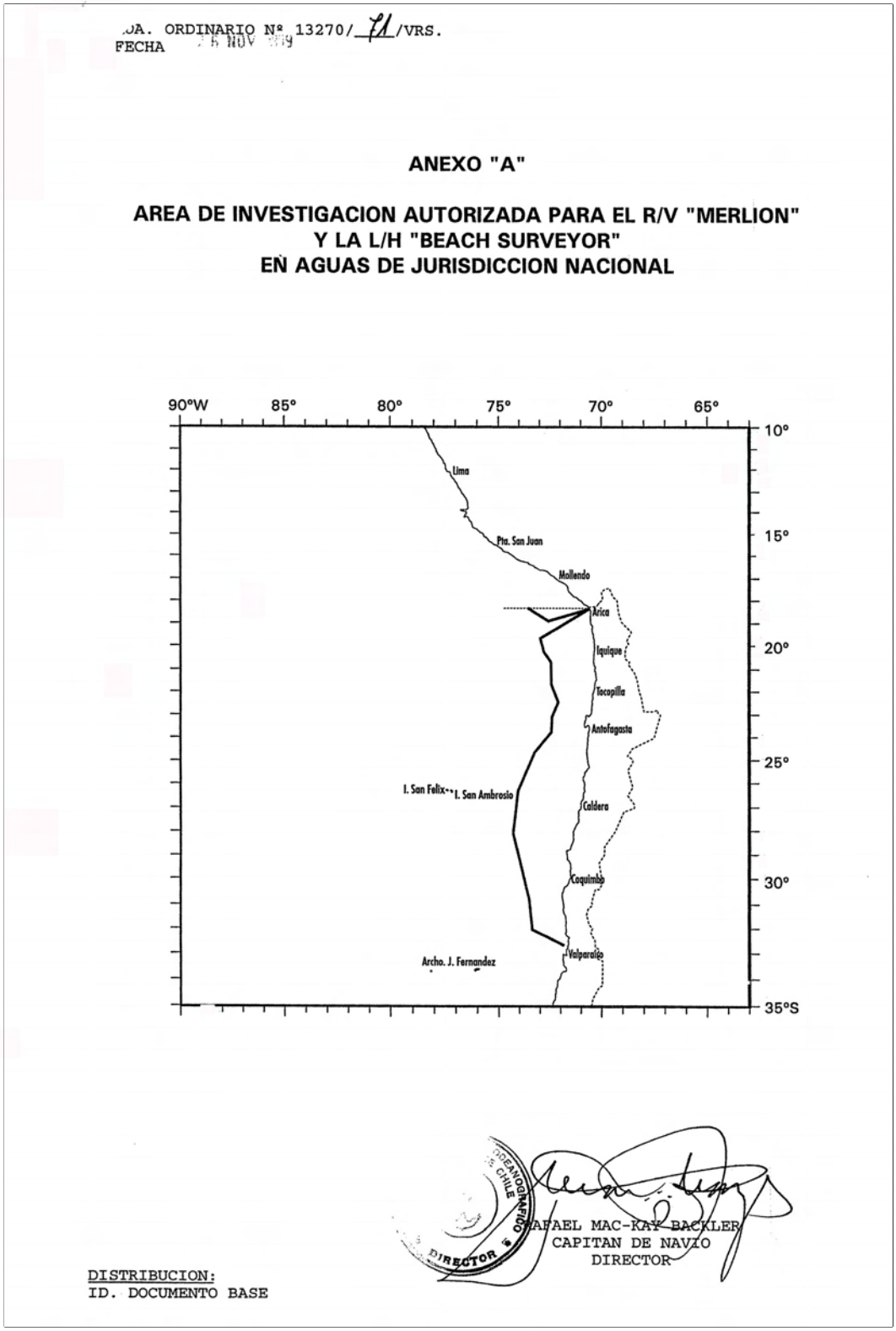
686 SHOA Resolution No. 13270/4/VRS of 12 January 2000, **Annex 151**; SHOA Resolution No. 13270/63/VRS of 3 October 2000, **Annex 147**; SHOA Resolution No. 13270/69/VRS of 18 October 2000, **Annex 148**.

687 SHOA Resolution No. 13270/6/VRS of 11 January 2002, **Annex 150**; Ministerial Resolution No. 068-2002-PE of 15 February 2002 by the Ministry of Production of Peru, **Annex 195**.

688 See Note No. 090 of 3 April 2003 from the United States Embassy in Chile to the Ministry of Foreign Affairs of Chile, **Annex 103**; SHOA Resolution

Figure 33

Scientific voyage authorized by the Chilean Navy:
Merlion and *Beach Surveyor* (1999)



.OA. ORDINARIO Nº 13270/ 71 /VRS.
FECHA 25 NOV 99

ANEXO "A"

**AREA DE INVESTIGACION AUTORIZADA PARA EL R/V "MERLION"
Y LA L/H "BEACH SURVEYOR"
EN AGUAS DE JURISDICCION NACIONAL**

OCEANOGRAFICO DE CHILE
DIRECTOR

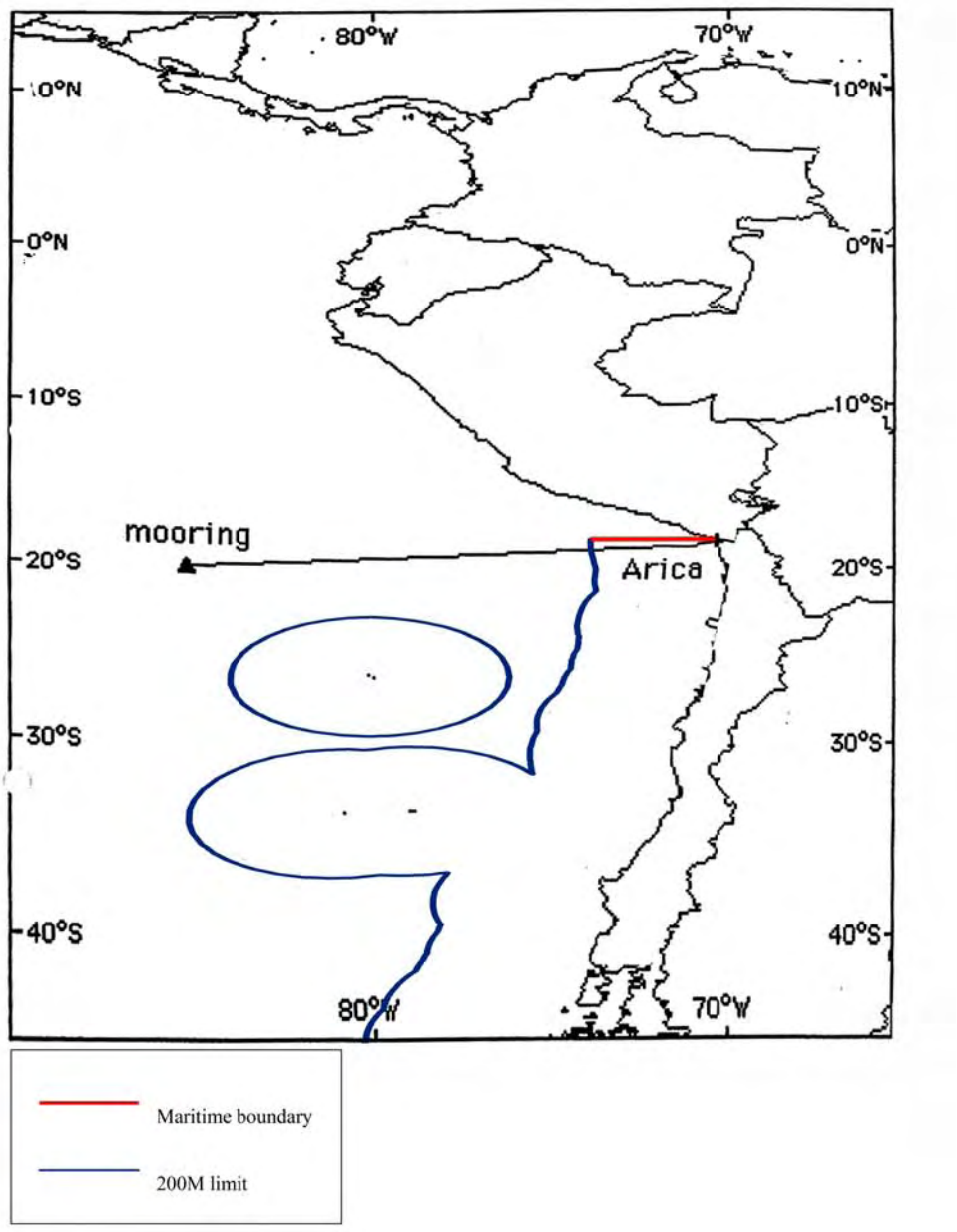
RAFAEL MAC-KAY BACKLER
CAPITAN DE NAVIO
DIRECTOR

DISTRIBUCION:
ID. DOCUMENTO BASE

Annex A to Resolution No. 13270/71/VRS of 26 November 1999 by SHOA showing the authorized route of scientific research by *Merlion* and *Beach Surveyor* in Chilean "waters of national jurisdiction"

Figure 34

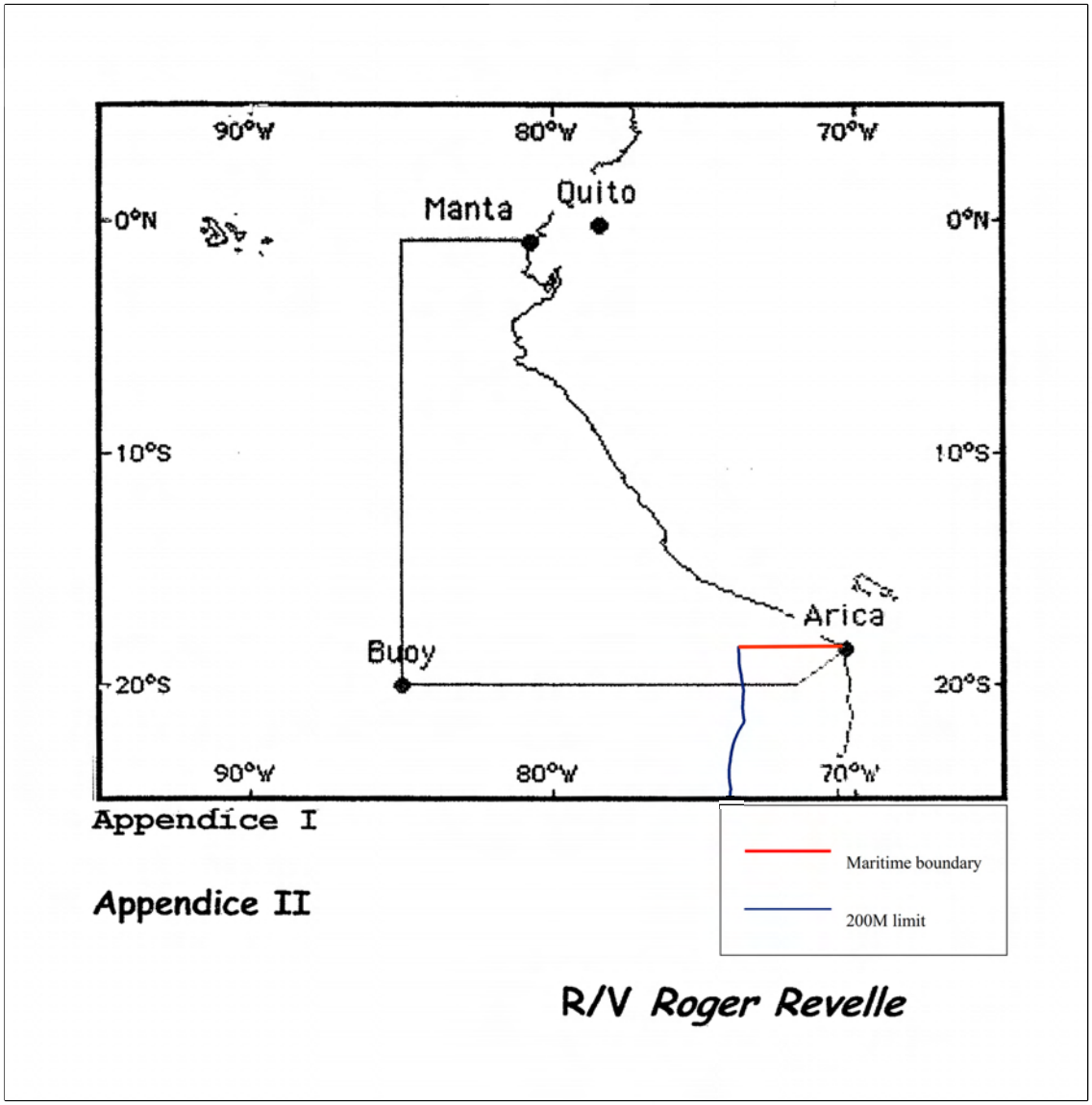
Scientific voyage authorized by the Chilean Navy: *Melville* (2000)



Sketch-map in Note No. 081 of 26 April 2000 from the United States Embassy in Chile to the Chilean Foreign Ministry, showing the proposed route of the research ship *Melville***.** The route within Chilean waters was authorized by SHOA.

Figure 35

Scientific voyage authorized by the Chilean Navy: *Roger Revelle* (2003)



Sketch-map in Note No. 090 of 3 April 2003 from the Embassy of the United States of America with the proposed route for *Roger Revelle.* The route within Chilean waters was authorized by SHOA.

(h) The Cancer Research Institute in Arizona, United States of America, received authorization in 2004 for scientific surveys in the area up to latitude "18° 21' 03" S (boundary of the frontier [*límite de la frontera*] with Peru)"[689]. Similarly, a SHOA authorization in 2005 referred to the "International Political Boundary (18° 21' 00" S when referred to WGS84 DATUM)" as the northern limit of the survey area[690].

3.116. Earlier records of scientific missions by Chile and Peru also indicate the Parties' acknowledgment of an agreed maritime boundary. For a mission carried out in 1972 by SHOA in the waters to the north of the port of Arica, it was envisaged that the Chilean Navy survey ship would cross the maritime boundary and enter into the Peruvian "maritime dominion" to complete the survey. Chile duly requested authorization by diplomatic note, considering that, "during the sound-ranging the said ship of the National Navy will have to navigate in a certain area north of *the maritime boundary between the two countries*" (emphasis added)[691]. The Chilean Navy eventually proceeded to complete its survey as planned without protest from Peru. If Peru believed there was no "maritime boundary" in place (but only an *ad hoc* provisional line of limited import), then clarification of Peru's position was called for. To place this

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No. 13270/04/113/VRS of 23 July 2003, **Annex 154**. The entire project, covering Chilean and Ecuadorean waters, was described by the United States Embassy in Chile, again applying on behalf of the institutions, as being conducted "in areas under the jurisdiction of Chile and Ecuador".

689 SHOA Resolution No. 13270/04/266/VRS of 22 December 2004, **Annex 155**.

690 SHOA Resolution No. 13270/04/263/VRS of 28 September 2005, **Annex 156**.

691 Note DRI-DAE No. 22973 of 26 July 1972 from the Ministry of Foreign Affairs of Chile to the Peruvian Embassy in Chile, **Annex 81**, third paragraph. As can be seen from the second paragraph of the same note, the proposed area of sound-ranging extended up to the parallel of 18º 18' S.

event in chronological context, in July 1972 the two States had just completed the process of constructing two alignment lighthouses to signal the boundary.

3.117. For its part, Peru notified Chile in November 1987 of proposed scientific research in Antarctica by the Peruvian Navy and Peru's Institute of the Sea[692]. In the relevant diplomatic note Peru stated that the ship *Humboldt* "will enter into the Chilean jurisdictional waters approximately on 5 January 1988" en route to Antarctica[693]. Chile agreed to facilitate the *Humboldt*'s transit and calling at two Chilean ports[694]. According to the book on this expedition, written by a Peruvian historian on board as the reporter, the *Humboldt* crossed the "boundary parallel with Chile" early in the evening of 6 January 1988[695].

3.118. Turning, lastly, to plurilateral practice, Chile, Colombia, Ecuador and Peru have long participated in joint marine research projects organized by the CPPS. One such project — only one example of many — has been organized under the Protocol on the Programme for Regional Study of the Phenomenon "El Niño" in the South-East Pacific of 1992[696]. The institutions designated by these Member States conduct research separately (but under the coordination of the CPPS), and the results are collated and published by the Scientific Committee of the CPPS. The CPPS reports contain a chart showing the location of each of the oceanographic stations situated off the coasts of its Member States, where

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692 See Note No. 5-4-M/291 of 20 November 1987 from the Peruvian Embassy in Chile to the Ministry of Foreign Affairs (Special Policy Directorate) of Chile, **Annex 85**.

693 *Ibid*., fourth paragraph.

694 See Note No. 24516 of 10 December 1987 from the Ministry of Foreign Affairs of Chile to the Peruvian Embassy in Chile, **Annex 86**.

695 See J. A. del Busto Duthurburu, *Los Peruanos en la Antártida*, 1989, **Annex 319**, p. 25.

696 Protocol on the Programme for Regional Study of the Phenomenon "El Niño" in the South-East Pacific, signed at Callao on 6 November 1992, **Annex 20**.

meteorological, oceanographic and biological data were collected by the research ships of national institutions.

3.119. One example of such charts, from the project in 1999, is reproduced as **Figure 36**. It shows the oceanographic stations of the national institutions, including those of the Peruvian research ship *Olaya* (shown in star-shaped marks) and the Chilean research ship *Carlos Porter* (shown in red diamond-shaped marks). The northernmost and southernmost sets of oceanographic stations of *Olaya* are located along the parallels of latitude which are close to those constituting the northern and southern limits of Peru's maritime dominion. The northernmost set of the oceanographic stations of Chile's *Carlos Porter* is spread along a parallel extending westwards from Arica for a distance of 200 kilometres, and that parallel traverses the area now claimed by Peru.

Section 5. Acknowledgement of the Delimited Maritime Zones within the context of the Permanent Commission of the South Pacific (CPPS)

3.120. The Santiago Declaration is a foundational text for the entire CPPS system. The views of the CPPS Member States as to how the rules adopted under the auspices of the CPPS are to apply, both between themselves and vis-à-vis third States, are crucial to the interpretation of the Santiago Declaration. This Section demonstrates that all three States have consistently taken the position that they have separate maritime zones, and that those zones are delimited by parallels of latitude. This may be seen from (i) the negotiating history of an additional protocol in 1955 to invite other States in the region to adhere to the regime under the Santiago Declaration, (ii) the text of key agreements between the CPPS Member States and (iii) the views expressed by the CPPS on the maritime zones of its Member States without objection from those States.

A. ACCESSION PROTOCOL TO THE SANTIAGO DECLARATION (1955)

3.121. The regime created under the Santiago Declaration drew attention and interest from other States in the region. In particular, Costa Rica and Colombia began to express interest in acceding to the Declaration. In 1955, Chile, Ecuador and Peru developed an instrument of accession for other American States. The final text of this instrument, the "Protocol of Accession to the Declaration of Santiago on 'Maritime Zone'" (the ***Accession Protocol***)[697], does not explicitly address any maritime-delimitation issues. The reasons for this omission are of special interest in this case.

3.122. The positions taken by Chile and Peru on Article IV of the Santiago Declaration during the preparation and then the negotiation of the text of the Accession Protocol confirm their understanding that Article IV of the Santiago Declaration had fully delimited the maritime zones of the original three States parties.

3.123. Some provisions of the Santiago Declaration were excluded from the Accession Protocol. Most importantly, Article IV of the Declaration was deemed to be inoperative so far as possible new parties were concerned[698]. Instead of Article IV, the Accession Protocol included a paragraph noting that each acceding State had the right to determine both the seaward extension and the

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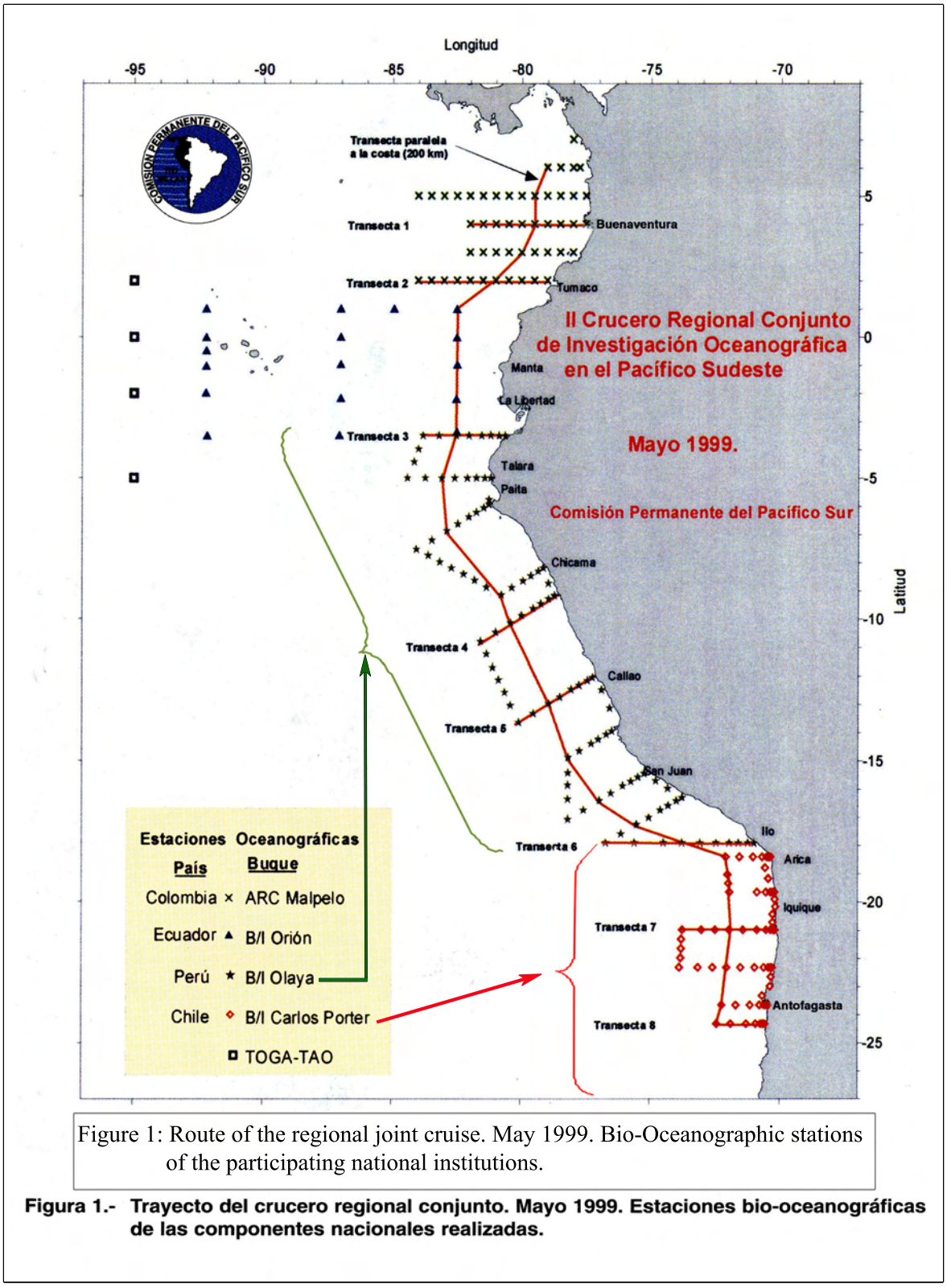
697 Protocol of Accession to the Declaration of Santiago on "Maritime Zone", signed at Quito on 6 October 1955, **Annex 52 to the Memorial**. Costa Rica signed but, in the end, did not join in the Accession Protocol; and the Accession Protocol was not used when Colombia eventually decided to join the CPPS in 1979.

698 *Ibid*., fifth paragraph.

Figure 36

Sketch-map in the CPPS report on the second joint regional oceanographic research (1999) showing the oceanographic stations of the national institutions of its Member States and the routes taken by their research ships



Source: Permanent Commission of the South Pacific, *II Southeast Pacific Joint Regional Oceanographic Research Cruise conducted in May 1999*, January 2000, <http://cpps-int.org/dac/cruceros/II%20CRUCERO.pdf>

manner of delimitation of its own maritime zone in accordance with its particular circumstances[699].

3.124. Chile and Peru were at one on the appropriateness of the exclusion of Article IV and on the reasons for it, as can be seen from separate notes sent by Peru and Chile during the preparation for the diplomatic conference that was to be convened in Quito. In a note to Ecuador (which was taking primary responsibility for drafting the accession instrument for discussion at the same conference), Peru explained that Article IV of the Santiago Declaration, "which establish[es] the frontier between the countries" should be excluded from the scope of the Accession Protocol because it would be "inapplicable in other locations"[700].

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699 Protocol of Accession to the Declaration of Santiago on "Maritime Zone", signed at Quito on 6 October 1955, **Annex 52 to the Memorial**, fourth paragraph. The full text of the provision is as follows:

> "The three Governments declare that the adhesion to the principle stating that the coastal States have the right and duty to protect, conserve and use the resources of the sea along their coasts, shall not be constrained by the assertion of the right of every State to determine the extension and boundaries of its Maritime Zone. Therefore, at the moment of accession, every State shall be able to determine the extension and form of delimitation of its respective zone whether opposite to one part or to the entirety of its coastline, according to the peculiar geographic conditions, the extension of each sea and the geological and biological factors that condition the existence, conservation and development of the maritime fauna and flora in its waters."

700 Memorandum of 23 June 1955 from the Peruvian Embassy in Ecuador to the Government of Ecuador, **Annex 70**, first page. This reads, in material part, as follows:

> ". . .se inclina a suprimir los párrafos IV y VI, que establecen la frontera entre los países -inaplicable en otros lugares- y el propósito de suscribir convenios de aplicación que también están fundamentalmente relacionados con la situación de vecindad de nuestros países."

3.125. In a separate note to Ecuador, Chile also expressed the view that the use of parallels of latitude as maritime boundaries in Article IV of the Santiago Declaration might well be "practically inapplicable" to other countries:

> "The Government of Chile considers it indispensable that the possibility of making reservations to the principles on delimitation of the maritime frontier should be set out in the Protocol, due to the fact that, for example, the principle of the Parallel stipulated in the Declaration of Santiago is practically inapplicable to frontiers of other countries, such as Colombia-Venezuela and the majority of the Central American [States]."[701]

3.126. Thus, both Peru and Chile severally acknowledged that the maritime zones claimed under the Santiago Declaration had already been delimited between all of the original States parties (not just Peru and Ecuador), and that those boundaries followed parallels of latitude. Chile and Peru both considered it appropriate to exclude the delimitation component, Article IV, of the Santiago Declaration from the Accession Protocol, precisely because they understood Article IV to provide for parallels of latitude as the maritime boundaries between each of the original three States parties. What *was* appropriate in the macro-geography of the South-East Pacific was not necessarily appropriate elsewhere.

B. AGREEMENTS AND DECLARATIONS UNDER THE CPPS FRAMEWORK

3.127. The CPPS Member States (Chile, Ecuador, Peru, and since 1979 Colombia) have on many occasions acknowledged the importance of the Santiago Declaration, and reiterated their commitment to co-operate in the protection and conservation of marine resources and the marine environment, as

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[701] Memorandum of 14 August 1955 by the Chilean Embassy in Ecuador, entitled "Observations on the Ecuadorean draft of the Protocol of Accession to the Agreements of Santiago on Maritime Zone", **Annex 71**, second paragraph.

well as in the fields of science and technology[702]. At the same time, the Member States have indicated their understanding that each of them has its own maritime zone within which it is to take measures to implement and enforce the agreed rules on those subject matters[703].

3.128. Furthermore, under the auspices of the CPPS, its Member States have entered into various agreements for the protection and control of marine resources and the environment. The text of the CPPS agreements reflects a shared understanding by the States parties and the CPPS that those States' maritime zones had already been delimited.

3.129. Under Article 2 of the Agreement Relating to Measures of Supervision and Control in the Maritime Zones of the Signatory Countries of 1954, each State is entitled to exercise supervision and control exclusively within the waters under its jurisdiction. Vessels and airplanes of one State may enter into the maritime zone of another State without special authorization when that other State has made express request for co-operation[704].

3.130. Under the Regulation of Permits for the Exploitation of the Resources of the South Pacific, concluded in 1955, no person may exploit resources in the

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[702] See, e.g., Cali Declaration of 24 January 1981, attached to the note verbale of 9 March 1981 from the Heads of Delegation of Chile, Colombia, Ecuador and Peru to the President of the Third United Nations Conference on the Law of the Sea, translated by the United Nations, document A/CONF.62/108, **Annex 49**; Declaration of Viña del Mar of 10 February 1984, **Annex 14**.

[703] See, e.g., Declaration of Viña del Mar of 10 February 1984, **Annex 14**, paras 15 and 18.

[704] Agreement Relating to Measures of Supervision and Control in the Maritime Zones of the Signatory Countries, signed at Lima on 4 December 1954, **Annex 4**, Art. 2. This is one of the agreements signed at the end of the 1954 Inter-State Conference.

maritime zones of Chile, Ecuador or Peru without a permit (Article I)[705]. In Article IV the Regulation provides that the exploitation of mineral resources in a maritime zone requires a permit from "the competent authority of the country in which *the exploitation will take place*" (emphasis added)[706]. Similarly, under Article VI of the Regulation, fishing permits are issued by "the competent authority of the country *in whose maritime zone the fishing activities will take place*" (emphasis added)[707]. These provisions reflect a clear recognition of the CPPS Member States that each of them had a fully delimited maritime zone. The additional importance of Article IV for present purposes lies in the fact that it governs the exploitation of mineral resources, not living resources. The delimitation under the Santiago Declaration was not simply concerned with fisheries; it was an all-purpose delimitation.

3.131. The CPPS Member States have further agreed that each of them is to take appropriate measures to protect the environment of the maritime area under its sovereignty and jurisdiction and address the consequences of pollution within that area. Under Article 3 of the 1981 Agreement on the Protection of the Marine Environment and the Coastal Area of the South-East Pacific, the States parties are required notably to enact laws and regulations for preventing, reducing and controlling contamination in "their respective marine environments and coastal areas"[708]. The States parties have also agreed to designate the authorities

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705 Regulation of Permits for the Exploitation of the Resources of the South Pacific, signed at Quito on 16 September 1955, **Annex 5**, Art. I.

706 *Ibid*., Art. IV.

707 *Ibid*., Art. VI.

708 Agreement on the Protection of the Marine Environment and the Coastal Area of the South-East Pacific, signed at Lima on 12 November 1981, 1648 *UNTS* 3 (entered into force on 19 May 1986), **Annex 12**, Art. 3(3).

responsible for monitoring pollution "within their respective maritime areas of sovereignty and jurisdiction"[709].

3.132. The Protocol for the Protection of the South-East Pacific against Pollution from Land-based Sources of 1983 requires the States parties to endeavour to prevent, reduce, control and eliminate pollution caused by substances listed in Annex I to the Protocol, and gradually to reduce pollution caused by substances listed in its Annex II, in both cases "in their respective zones within the sphere of application of this Protocol"[710]. In their effort to avoid radioactive contamination, the States parties to the Protocol for the Protection of the South-East Pacific against Radioactive Contamination of 1989 have agreed to establish, individually or jointly, a surveillance programme and, for that purpose, to designate the authorities responsible for surveillance "within their respective maritime zones of sovereignty and jurisdiction"[711].

C. CPPS Acknowledgement of Three Distinct National Maritime Zones

3.133. Over the years, the Member States of the CPPS have met regularly to discuss issues related to the protection and conservation of maritime resources, and issued various recommendations. Some of these texts, adopted in the name of the CPPS rather than those of its Member States, again indicate the organization's understanding that each Member State is to exercise exclusive jurisdiction within a defined maritime area. None of the Member States has

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709 Agreement on the Protection of the Marine Environment and the Coastal Area of the South-East Pacific, signed at Lima on 12 November 1981, 1648 *UNTS* 3 (entered into force on 19 May 1986), **Annex 12**, Art. 7.

710 Protocol for the Protection of the South-East Pacific against Pollution from Land-based Sources, signed at Quito on 22 July 1983, 1648 *UNTS* 73 (entered into force on 23 September 1986), **Annex 13**, Arts IV and V.

711 Protocol for the Protection of the South-East Pacific against Radioactive Contamination, signed at Paipa on 21 September 1989, **Annex 19**, Art. VII.

disputed this understanding. Nor has the CPPS ever operated as if there was a maritime area in dispute between two of its founding members.

3.134. In 1957, the CPPS recommended that its Secretary-General suggest to Member States' Governments that they each adopt legislative and economic measures to protect and promote the industries engaged in the exploitation of marine products[712]. In the preamble to the Resolution adopted by the CPPS, it is noted that:

(a) a chief objective of Chile, Ecuador and Peru in setting up the CPPS regime was to ensure that the living resources in their respective maritime waters are utilized to feed the people of each of the three States; and

(b) in order to achieve that objective, in 1952 these three States "determined" the maritime zones over which they had "dominion and exclusive sovereignty"[713].

3.135. Rather than proceeding on the basis that Chile, Ecuador and Peru had claimed in the Santiago Declaration one single or aggregated maritime area of 200 nautical miles vis-à-vis third States (as Peru now claims[714]), this Resolution clearly reflected the position that each Member State possessed a discrete maritime zone of its own and exercised exclusive sovereignty in that zone. The

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712 See Resolution XII adopted during the Fifth Ordinary Meeting of the CPPS in Santiago on 30 September and 1 October 1957, **Annex 237**.

713 *Ibid*., preambular recital. The original Spanish text of this passage reads as follows: "[E]stas naciones determinaron en 1952 las zonas marítimas sobre las cuales tienen dominio y soberanía exclusivos".

714 See Memorial, para. 4.73.

CPPS acknowledged that this position was established in 1952 by the adoption of the Santiago Declaration[715].

3.136. That position of the CPPS is further confirmed by the collection of statistical data on violations of each State's maritime zone, published by the Secretary-General of the CPPS[716]. As already mentioned at paragraphs 2.101 and 2.143 above, this document, published in 1972, separately lists incursions into the maritime zones of Chile, Ecuador and Peru[717]. The CPPS did not consider the Santiago Declaration to have created one shared maritime zone running the length of the coasts of Ecuador, Peru and Chile.

3.137. Finally, in 1967, in his capacity as the Secretary-General of the CPPS, Dr. García Sayán of Peru recognized that, under the Santiago Declaration, each of the States parties possessed a separate maritime zone, rather than sharing a condominium in the maritime area along their coasts:

> "[T]he patrolling exercised by the three countries *in their respective maritime zones* is increasingly preventing foreign intrusions into [those zones] and to subject foreign fishing vessels to the regulation of the respective coastal States. The world resonance of the Onassis affair occurred in 1954 *inside the Peruvian maritime zone*, as well as other minor incidents, have represented serious and repeated warnings that the three member States of the regional system are resolved to ensure the respect for the regime of

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715 The views expressed by the CPPS on the Santiago Declaration can be validly taken into account when interpreting the Santiago Declaration, as the CPPS is closely involved in its application (and of other agreements under the CPPS regime, which regime finds its foundation in the Santiago Declaration); see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, paras 97-99.

716 CPPS Secretary-General, *Infracciones en la Zona Marítima del Pacífico Sur*, January 1972, **Annex 240**.

717 *Ibid*., explanations at p. 5 ("*Presentación*"), para. 2 ("*Plan y Comentario*").

sovereignty and maritime jurisdiction that they have proclaimed."[718] (Emphasis added.)

Section 6. Acknowledgement of Delimited Maritime Zones during Negotiations with the United States (1955)

3.138. Starting in the 1950s, faced with challenges from third States against their newly declared maritime zones, Chile, Ecuador and Peru made it clear that each of them was entitled to a 200M maritime zone and that they would jointly defend their individual zones. Regional solidarity was a key aspect of the Santiago Declaration[719]. As will be seen below, it was obvious in their statements that the three States did not believe that they had claimed a single maritime space along their coasts, but rather that each of them had a separate and fully delimited maritime zone.

3.139. In the mid-1950s the United States of America sought to negotiate bilateral arrangements with Ecuador or Peru to obtain preferential rights for its fishing fleet. These two States refused to engage in any bilateral negotiations, however, because of their commitment under the Complementary Convention of 1954 "not to enter into any covenants, arrangements or agreements that may be detrimental to the Sovereignty over the [Maritime Zone under the Santiago Declaration]"[720]. The United States of America then proposed a four-party negotiation with Chile, Ecuador and Peru, for an agreement on conservation of marine resources in the South-East Pacific Ocean. The negotiation took place in Santiago, Chile in 1955. The negotiation failed to reach a result. The views

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718 Statement made by Dr. García Sayán on 31 January 1967, in CPPS Secretary-General, *Convenios y Otros Documentos* (1952-1966), **Annex 239**, para. 5. Also see para. 6 for his confirmation that there was no condominium shared by the three States.

719 See Complementary Convention, **Annex 51 to the Memorial**, second paragraph.

720 *Ibid*., fourth paragraph.

expressed by the participating States are, however, indicative of their understanding that Chile, Ecuador and Peru possessed defined and delimited maritime zones.

3.140. In their document setting out the bases for a possible agreement with the United States of America, Chile, Ecuador and Peru proposed that there would be three types of maritime areas off their coasts and that different regimes would be applicable in each of them. For the first type of maritime area, "consisting of a twelve-mile strip, measured from the line of the lowest tide on the coasts of each of the C.E.P. countries", the three States proposed that "fishery operations may be carried out by means of special permits issued by each coastal State"[721]. For the other two types of maritime areas, conditions for conservation of the living resources were to be formulated by a technical Joint Commission on which all four States would be represented. Compliance with those conservation conditions was to be "entrusted to *the State in whose zone the fishery is carried out*, in accordance with its domestic legislation"[722] (emphasis added).

3.141. This position was also reflected in the draft agreement proposed by Chile, Ecuador and Peru, which contained the following provision concerning the enforcement of new conservation measures:

> "In the areas specified in Annex __ of this Agreement conservation measures which have been proposed by the Joint Commission and which have entered into force and those of any other origin, shall be put into execution and their enforcement assured by the respective coastal State.

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721 *Bases for an Agreement between the C.E.P. Countries and the United States for Conservation and Fishery in the Waters of the Southeast Pacific*, 23 September 1955, translated and labelled as C.E.P Doc. No. 3 by the United States Department of State in its publication *Santiago Negotiations on Fishery Conservation Problems*, 14 September – 5 October 1955, **Annex 41**, p. 34, para. 4.

722 *Ibid*., p. 35, para. 7.

> Likewise fishing in those areas shall be subject to procurement in advance of the special permits which such country may determine. Policing and control by the coastal state shall be effected through such agencies and means as the said State considers necessary."[723]

A *Memoria* subsequently issued in the name of Peru's Foreign Minister confirms that, under this draft agreement, "[t]he enforcement of these [conservation] measures would be granted to the State in whose zone fishery was being effected"[724].

3.142. Each coastal State would be responsible for enforcement in its own maritime zone. That this was the common position of Chile, Ecuador and Peru becomes even clearer when their approach is compared with that which was proposed by the United States of America. The United States proposed a system of international co-operation in policing the area where the agreement would be applied. More specifically, to ensure compliance, a duly authorized official of *any* State party would be able to board any fishing vessel under the flag of *any* State party in the agreement area[725]. The United States proposal was not accepted by the three States.

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723 Draft submitted by Chile, Ecuador and Peru on the *Agreement between the C.E.P. Countries (Chile, Ecuador, and Peru) and the United States of America, on Conservation and Fishing in the Waters of the Southeast Pacific*, 3 October 1955, translated and labelled as CEP Doc. No. 5 by the United States Department of State in its publication *Santiago Negotiations on Fishery Conservation Problems*, 14 September – 5 October 1955, **Annex 41**, p. 47, Art. XI.

724 *Memoria* of the Minister of Foreign Affairs of Peru (28 July 1955 – 28 July 1956), **Annex 99 to the Memorial**, ninth paragraph. The original Spanish text reads: "El cumplimiento de las medidas estaría encomendado *al Estado en cuya zona* se verificase la pesca" (emphasis added). (The italicized part is translated by Peru as "to the States in whose shores", rather than "zone".)

725 See *Review and Amplification of Certain United States Proposals*, USA Doc. No. 9 of 3 October 1955, reproduced by the United States Department of State in its

3.143. Plainly, Peru's new argument that the Santiago Declaration set forth one single maritime zone is not borne out by the common position of Chile, Ecuador and Peru in the 1955 negotiations with the United States of America. These negotiations are one example of negotiations with third States which confirm the existence of a maritime boundary between the Parties.

Section 7. Cartographic Depiction of Peru's "Maritime Dominion"

3.144. Peru states in its Memorial that no official cartography of Peru has ever depicted a maritime boundary with Chile[726]. To illustrate this point, Peru refers to maps produced by various Government agencies and public institutions, such as the Geographic Service of the Army, the Military Geographic Institute and the Ministry of Defence[727]. However, there are numerous depictions of the southern boundary of Peru's maritime zone published by private entities which have been officially authorized by Peru's Ministry of Foreign Affairs, often with explicit reference to Supreme Decree No. 570 of 1957[728], as accurate representations of Peru's frontiers. Together with other depictions which do not on their face carry official authorization[729], these maps illustrate that the maritime boundary following the parallel of Hito No. 1 was a matter of common knowledge in Peru. As discussed below at paragraph 4.43, the maps authorized by the Ministry of Foreign Affairs constitute official recognition by Peru of the

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Santiago Negotiations on Fishery Conservation Problems, 14 September – 5 October 1955, **Annex 41**, p. 52.

726 See Memorial, para. 5.10.

727 *Ibid*., paras 5.14-5.16. It is noted that, as far as Chile is aware, there is no official Peruvian document depicting the maritime boundary between Ecuador and Peru either.

728 Supreme Decree No. 570 of 5 July 1957, **Annex 11 to the Memorial**; also see paras 3.146-3.151 of this Counter-Memorial.

729 A sample of such depictions is reproduced in **Figures 43-63**.

maritime boundary depicted in those maps, and are evidence of considerable probative value in these proceedings.

3.145. Supreme Decree No. 570 provides that–

> "no geographic or cartographic publication referring to or representing the frontier zones of the Nation shall be entered, printed or circulate in the Republic without previous authorization by the Ministry of Foreign Affairs. In consequence, *all official and private institutions* wishing to issue this sort of publication will be compelled to procure this authorization before proceeding."[730] (Emphasis added.)

Under the terms of this Supreme Decree, prior authorization is required for all publications, whether issued by the State ("official institutions") or by private entities. Article 2 of Supreme Decree No. 570 of 1957 provides that such prior authorization is to be issued in the form of a Ministerial Resolution "following the corresponding technical inquiry"[731].

3.146. The Ministry of Foreign Affairs of Peru has authorized numerous books on the geography of Peru pursuant to the 1957 Supreme Decree. For example, in 1984 the Foreign Ministry formally authorized the publication of the third edition of a book used in secondary schools in Peru called *Geography of Peru and the World*[732]. The relevant Resolution states that "Peru's international

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730 Supreme Decree No. 570 of 5 July 1957, **Annex 11 to the Memorial**, Art. 1.

731 *Ibid*., Art. 2.

732 See J. A. Benavides Estrada, *Geografía del Perú y del Mundo*, 1984, approved by Resolution No. 0185 of 17 April 1984 of the Ministry of Foreign Affairs of Peru, **Annex 173**.

boundaries have been drawn in an acceptable way"[733]. This book includes a "political map of Peru" with the country's maritime zone bounded by parallels of latitude both in the north and the south. In the same map, the parallel of latitude constituting the southernmost limit of Peru's maritime zone is called the "Parallel of Hito No. 1 La Concordia", indicating that this parallel passes through Hito No. 1. In a separate section, the book again confirms that the Peruvian Sea (*Mar Peruano*) is bounded by two parallels, to the north and to the south[734].

3.147. A facsimile of the authorization by the Ministry of Foreign Affairs is included in the book, and both it and the depictions of the maritime boundaries that it authorized are reproduced as **Figure 37**[735].

3.148. An equivalent authorization was granted by the Ministry of Foreign Affairs in 1982 to the publishers of the book *Escuela Nueva*[736], which included maps depicting the southern maritime boundary as the parallel of latitude at the point at which the land boundary of Chile and Peru reaches the sea (**Figure 38**). The map is specifically described as depicting "the boundary of the Peruvian Sea".

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733 Resolution No. 0185 of 17 April 1984 of the Ministry of Foreign Affairs of Peru, reproduced in J. A. Benavides Estrada, *Geografía del Perú y del Mundo*, 1984, **Annex 173**.

734 See, J. A. Benavides Estrada, *Geografía del Perú y del Mundo*, 1984, **Annex 173**, p. 127.

735 *Ibid*., p. 49.

736 J. A. Benavides Estrada, A. Marín del Águila, O. Díaz Alva and A. Soto Sánchez, *Escuela Nueva, Enciclopedia Escolar*, 1982, approved by Resolution No. 0405 of 26 August 1982 of the Ministry of Foreign Affairs of Peru.

3.149. The Foreign Ministry has also authorized another book on geography published in 1983, which again showed the Peruvian sea (*Mar Peruano*) bounded by two parallels; the relevant sketch-map is reproduced as **Figure 39**[737].

3.150. Peru continued to grant official authorization for publications depicting its "maritime dominion" delimited in the north and south by parallels of latitude after the 1986 Bákula Memorandum. For example, a 1992 publication for secondary-school students was authorized by the Foreign Ministry, under Supreme Decree No. 570 of 1957, which explicitly depicts the "Maritime Dominion or the Sea of Peru" as being delimited in the south by the "parallel of Hito No. 1", as shown in **Figure 40** [738].

3.151. A more recent example is the *Atlas of Peru and the World*, published in 1999. It includes a map titled "Map of Peru in accordance with the frontier treaties [*Mapa del Perú, luego de los tratados fronterizos*]", which clearly marks the parallels of latitude of the points where the northern and southern land boundaries reach the sea as the lateral limits of Peru's maritime zone. On the page adjoining this map the book contains the following passage:

> "Maritime frontier
>
> Established with sovereignty and exclusive jurisdiction over the seabed and subsoil of the continental shelf up to 200 nautical miles, according to Supreme Decree No. 781,

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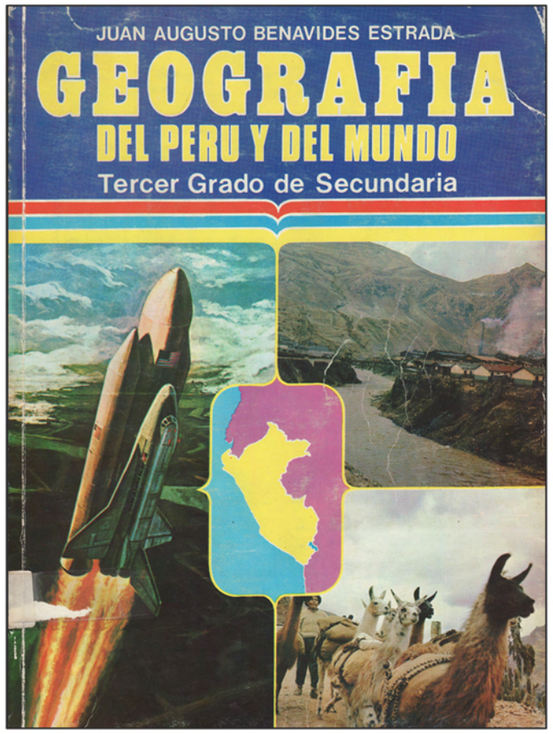
737 J. A. Benavides Estrada, *Geografía: Atlas del Perú y del Mundo*, 1983, approved by Ministerial Resolution No. 0016-82-ED of the Ministry of Education and by Ministerial Resolution No. 404-82-RE of the Ministry of Foreign Affairs of Peru.

738 J. A. Benavides Estrada, *Geografía*, 1992, approved by Resolution No. 0611 of 20 December 1991 of the Ministry of Foreign Affairs of Peru and Decree No. 032 of 10 March 1992 of the Peruvian National Institute of Research and Development of Education.

Figure 37

Sketch-maps of Peru's maritime zone authorized by the Ministry of Foreign Affairs of Peru



"AÑO DEL SESQUICENTENARIO DEL NATALICIO DEL ALMIRANTE MIGUEL GRAU"

MINISTERIO DE RELACIONES EXTERIORES
RE (TER) Of. Nº 0-3-A/125
Ref. Autoriz. con R.M.- Nº 0185, dos textos escolares.

Lima, 30 de Abril de 1984.

Señores
Editorial Escuela Nueva, S.A.
Av. 28 de Julio Nº 1181 - 105 - La Victoria.
Pte.

Tengo el agrado de dirigirme a ustedes para transcribir el texto de la Resolución Ministerial Nº 0185, de fecha 17 de Abril del año en curso, que a la letra dice lo siguiente:

"----Vista la solicitud Nº 607-84, de fecha 6 de Abril del año en curso, de Editorial Escuela Nueva S.A., y el anexo respectivo;----De conformidad a lo establecido en el Decreto Legislativo Nº 112, de 12 de Junio de 1981, en el Decreto Supremo Nº 570, de 5 de Julio de 1957, y en la Resolución Ministerial del Ramo Nº 458, de 28 de Abril de 1961;----Por cuanto según el informe Nº 15-c, de fecha 10 de Abril del año en curso, de la Dirección de Soberanía Territorial y el informe Nº 007-D-84, de fecha 6 de Abril de 1984, del Departamento de Cartografía, los límites internacionales del Perú han sido trazados de manera aceptable;----Estando a lo acordado----SE RESUELVE:----Autorizar la circulación en el país de dos textos escolares titulados "Geografía de América y del Mundo" de 2º Grado de Secundaria y "Geografía del Perú y del Mundo" de 3er Grado de Secundaria, de autoría de Juan A. Benavides Estrada e impresos en primera edición por Editorial Escuela Nueva S.A.----Regístrese y comuníquese.----SANDRO MARIATEGUI CHIAPPE, PRESIDENTE DEL CONSEJO DE MINISTROS Y MINISTRO DE RELACIONES EXTERIORES".

...Peru's international boundaries have been drawn in an acceptable way;...

Lo que comunico a ustedes, para su conocimiento y fines del caso.

Dios guarde a ustedes.

JORGE COLUNGE VILLACORTA
MINISTRO
Director de Soberanía Territorial

CVA/gfAH.

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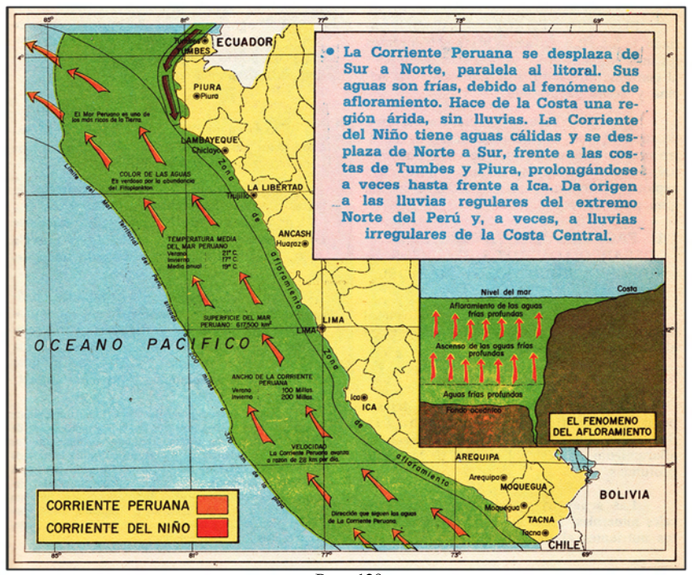
Reproduction of the letter of authorization from the Ministry of Foreign Affairs of Peru

Page 49



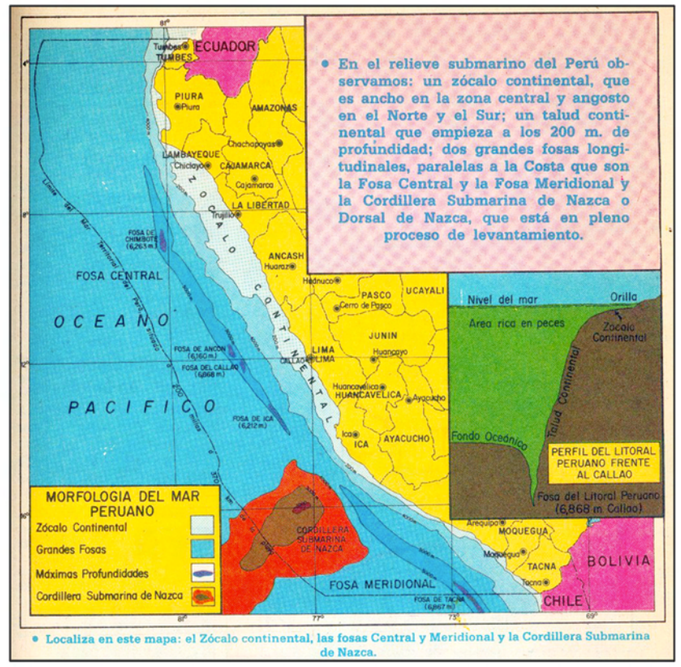
Page 129

The Peruvian sea is part of the Pacific Ocean that washes the coast of Peru. Its boundaries are the parallel of Boca de Capones, to the north and the parallel of Hito No. 1 of La Concordia, to the south and an imaginary line, parallel to the coastline, located at 200M from it (370 Km approximately). Its total area is 617,000 Km^2.

1. LOCALIZACION GEOGRAFICA DEL MAR DEL PERU.

El Mar Peruano es la parte del Océano Pacífico que baña las costas del Perú. Tiene como límites el paralelo de la **Boca de Capones**, por el Norte y el paralelo del **Hito Nº 1 de La Concordia**, por el Sur y una línea imaginaria, paralela al litoral, **situada a 200 millas de éste** (370 Km. aproximadamente). Su área total es de 617 000 Km^2.

Page 127



Page 135

Source: J. A. Benavides Estrada, *Geografía del Perú y del Mundo*, Editorial Universo S. A., 1984

Sketch-maps of Peru's maritime zone authorized by the Ministry of Foreign Affairs of Peru

"... Peru's international boundaries have been drawn in an acceptable way..."

" AÑO DE LOS DERECHOS DEL MINUSVALIDO "

MINISTERIO DE RELACIONES EXTERIORES

RE (TER) Of. Nº 0 4 A /85

Ref. autoriz. con R.M.- Nº 0405, tres textos es colares.

Lima, 31 de Agosto de 1982.

Señor
Carlos A. Benavides Aquije
Gerente-General de Editorial Escuela Nueva, S.A.
Av. Las Artes Nº 1183 - San Borja
Pte.

Tengo el agrado de dirigirme a usted, para transcribirle el texto de la Resolución Ministerial- Nº 0405, de fecha 26 de Agosto del año en curso, que a la letra dice lo siguiente:

"----Vista la solicitud Nº 1098-82, de - fecha 4 de Agosto del año en curso, de Carlos A. Benavides Aquije, y el anexo respectivo;----De conformidad a lo establecido en el Decreto Legislativo Nº 113, de 12 de Junio de 1981, en el Decreto Supremo Nº 570, de 5 de Julio de 1957, y en la Resolución Ministerial del Ramo Nº 458, de 28 de Abril de 1961;----Por cuanto, según el informe Nº 54-c, de fecha 12 de Agosto del año en curso, de la Dirección de Soberanía Territorial y el informe - Nº 23-D-82, de fecha 11 de Agosto de 1982, del Departamento de Cartografía, los límites internacionales del - Perú, han sido trazados de manera aceptable;----Estando a lo acordado----SE RESUELVE:----Autorizar la circulación en el país de tres textos escolares titulados "Escuela Nueva", 6to Grado Educación Primaria. 2da edición; "Escuela Nueva", 5to Grado Educación Primaria, 3ra edición y "Escuela Nueva", 4to Grado Educación Primaria - 4ta edición, impresos en Editorial Universo, S.A. (6to-Grado) Editorial Labrusa, S.A. (5to y 4to Grado), editados por Editorial Escuela Nueva, S.A., autores J. Augusto Benavides E., Angel Marín del Aguila, Oscar Díaz Alva y Alberto Soto Sánchez.----Regístrese y comuníquese. ----JAVIER ARIAS STELLA, MINISTRO DE RELACIONES EXTERIORES".

Lo que comunico a usted, para su conocimiento y fines del caso.

Dios guarde a usted.

JVM.gfAH.

JORGE VEGAS MOHRMANN
Director de Soberanía Territorial

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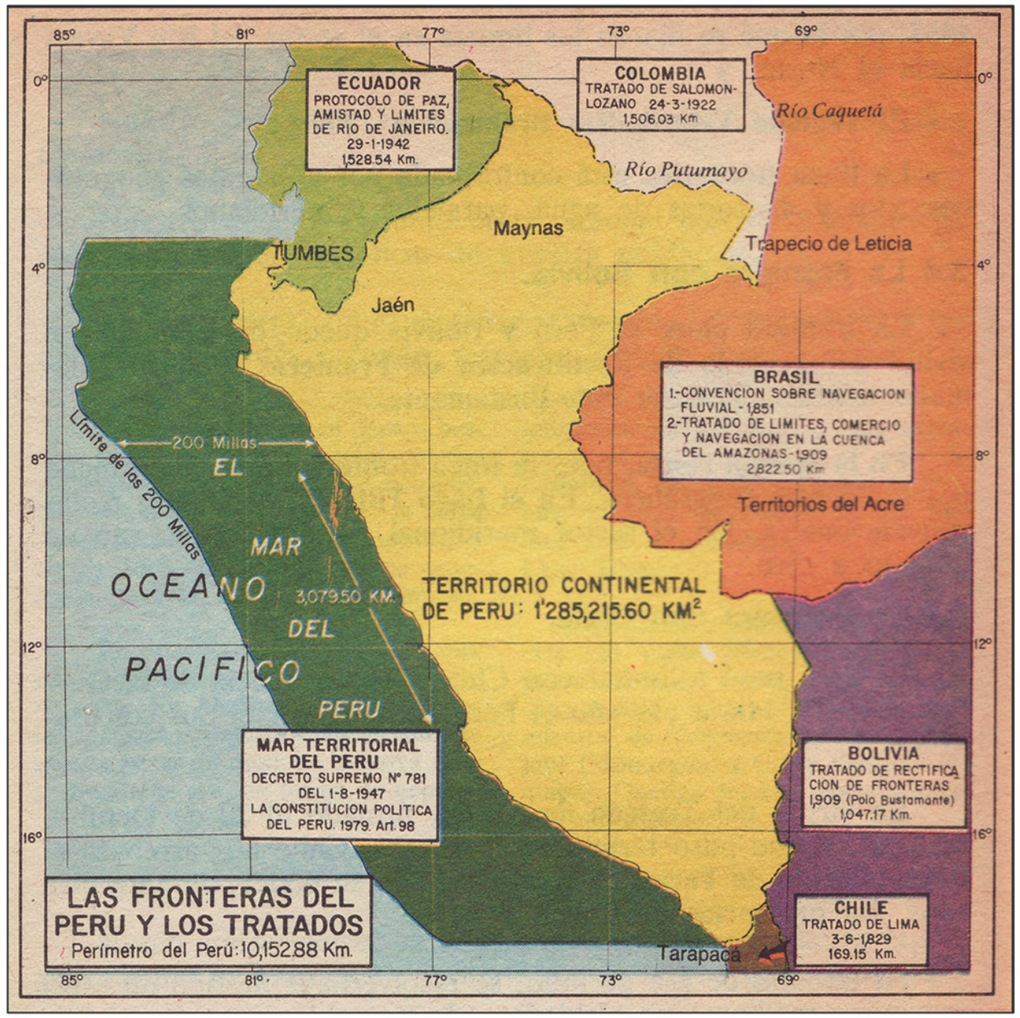
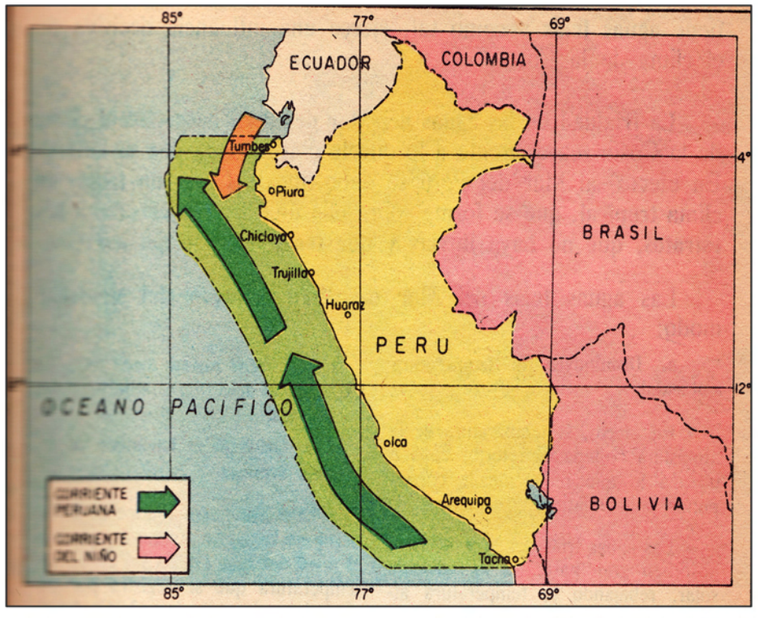


Source: J. A. Benavides Estrada, A. Marín del Águila, O. Díaz Alva and A. Soto Sánchez, *Escuela Nueva, Enciclopedia Escolar*, *5to. Grado*, Editorial Escuela Nueva S. A., 1982

Figure 38 (2 of 2)

Sketch-maps of Peru's maritime zone authorized by the Ministry of Foreign Affairs of Peru

Page 15



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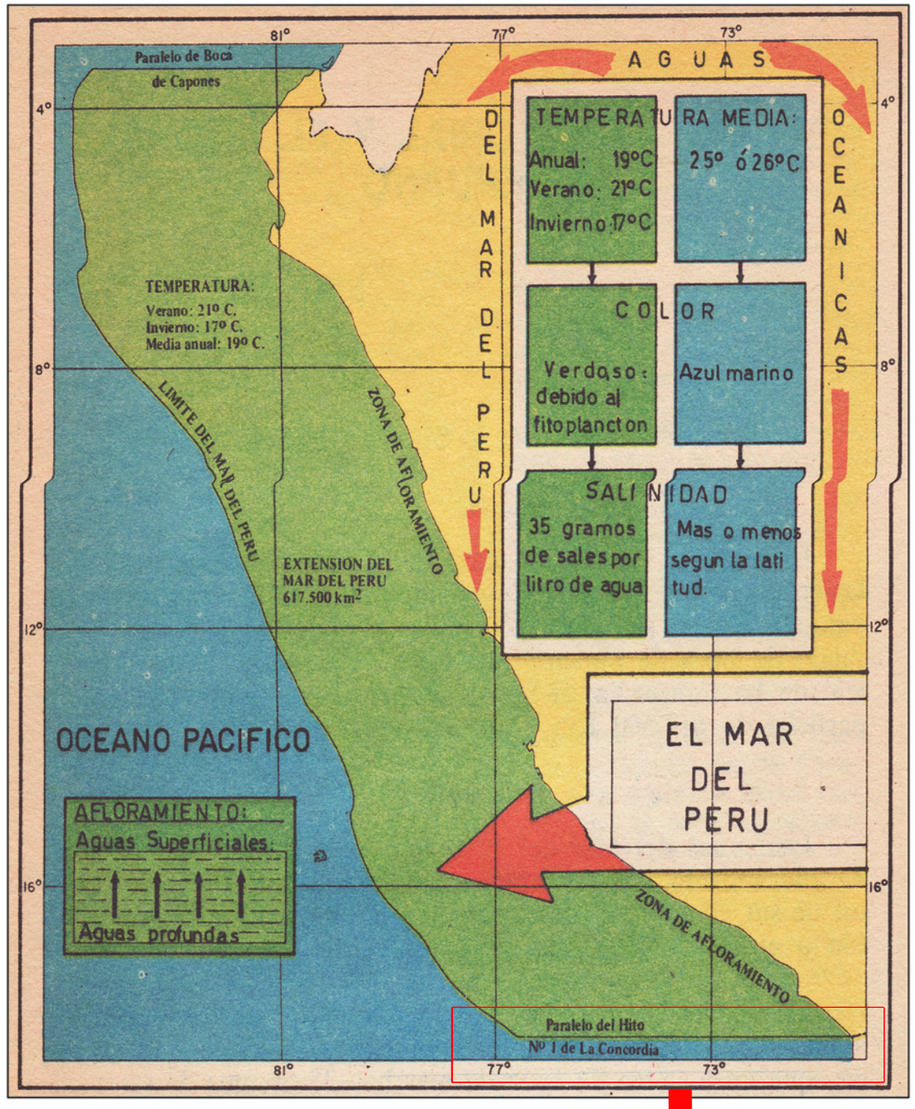

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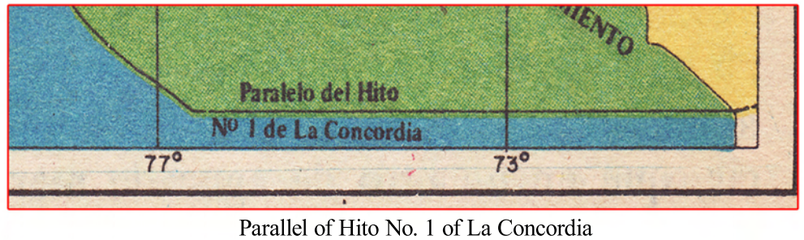
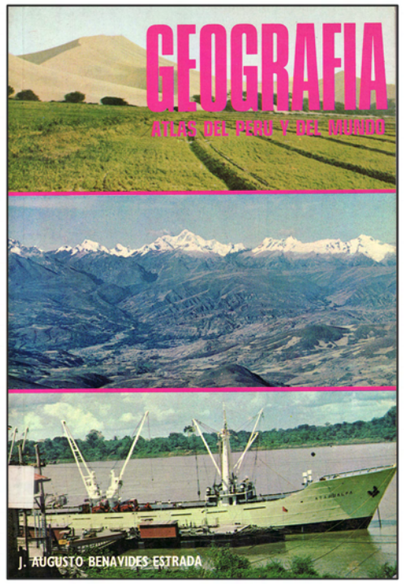


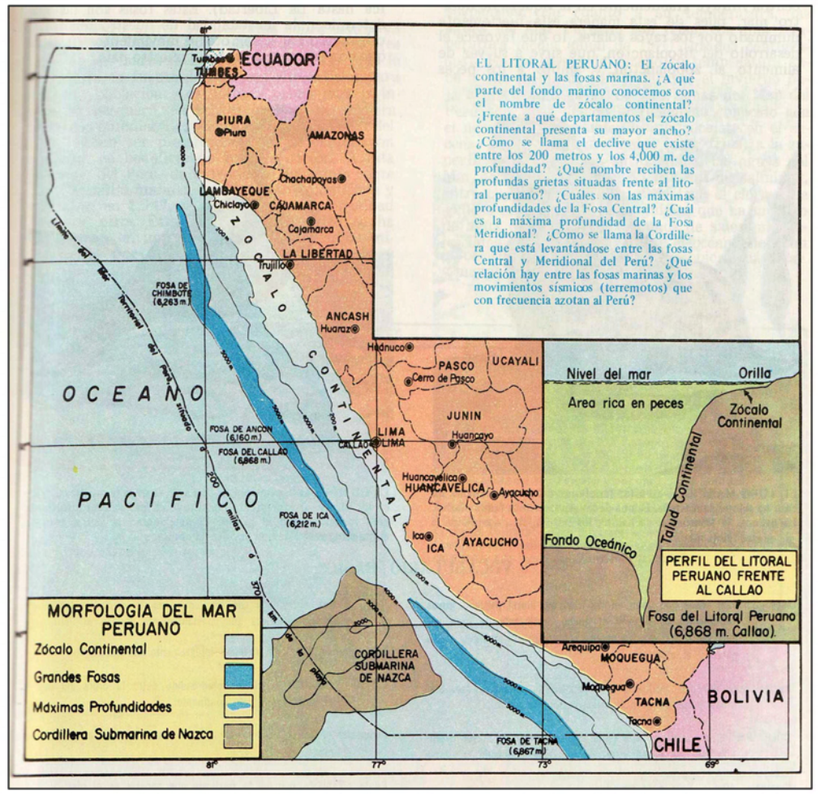
Parallel of Hito No. 1 of La Concordia

Source: J. A. Benavides Estrada, A. Marín del Águila, O. Díaz Alva and A. Soto Sánchez, *Escuela Nueva, Enciclopedia Escolar*, *5to. Grado*, Editorial Escuela Nueva S. A., 1982

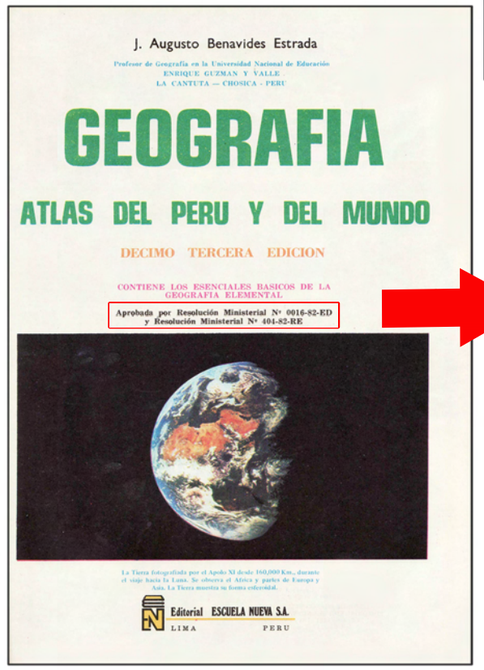
Figure 39

Sketch-maps of Peru's maritime zone authorized by the Ministry of Foreign Affairs of Peru



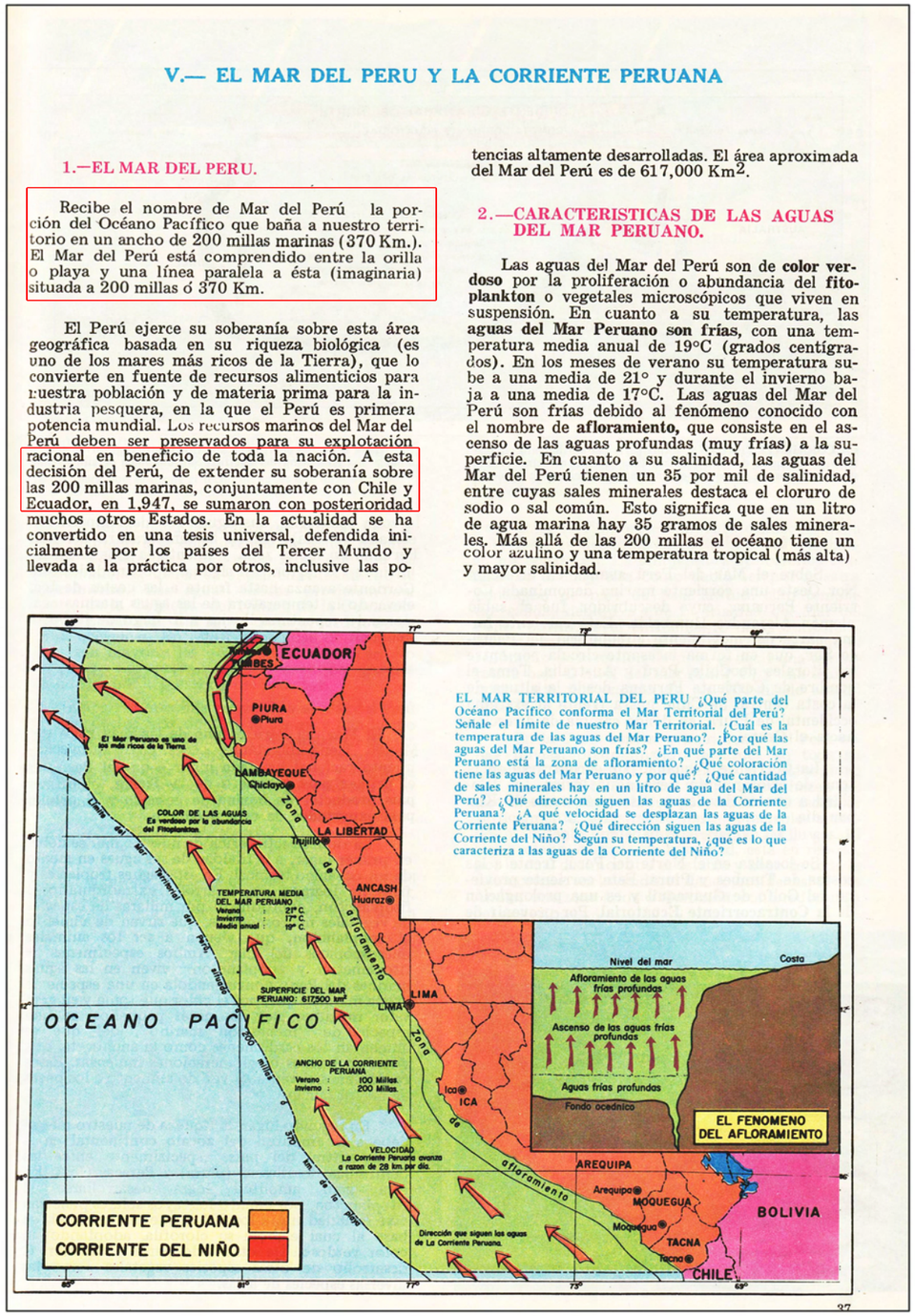


Page 35



Aprobada por Resolución Ministerial Nº 0016-82-ED y Resolución Ministerial Nº 404-82-RE

Approved by Ministerial Resolution No. 0016-82-ED and Ministerial Resolution No. 404-82-RE (Ministry of Foreign Affairs)



V.— EL MAR DEL PERU Y LA CORRIENTE PERUANA

1.—EL MAR DEL PERU.

Recibe el nombre de Mar del Perú la porción del Océano Pacífico que baña a nuestro territorio en un ancho de 200 millas marinas (370 Km.). El Mar del Perú está comprendido entre la orilla o playa y una línea paralela a ésta (imaginaria) situada a 200 millas ó 370 Km.

El Perú ejerce su soberanía sobre esta área geográfica basada en su riqueza biológica (es uno de los mares más ricos de la Tierra), que lo convierte en fuente de recursos alimenticios para nuestra población y de materia prima para la industria pesquera, en la que el Perú es primera potencia mundial. Los recursos marinos del Mar del Perú deben ser preservados para su explotación racional en beneficio de toda la nación. A esta decisión del Perú, de extender su soberanía sobre las 200 millas marinas, conjuntamente con Chile y Ecuador, en 1,947, se sumaron con posterioridad muchos otros Estados. En la actualidad se ha convertido en una tesis universal, defendida inicialmente por los países del Tercer Mundo y llevada a la práctica por otros, inclusive las potencias altamente desarrolladas. El área aproximada del Mar del Perú es de 617,000 Km^2.

2.—CARACTERISTICAS DE LAS AGUAS DEL MAR PERUANO.

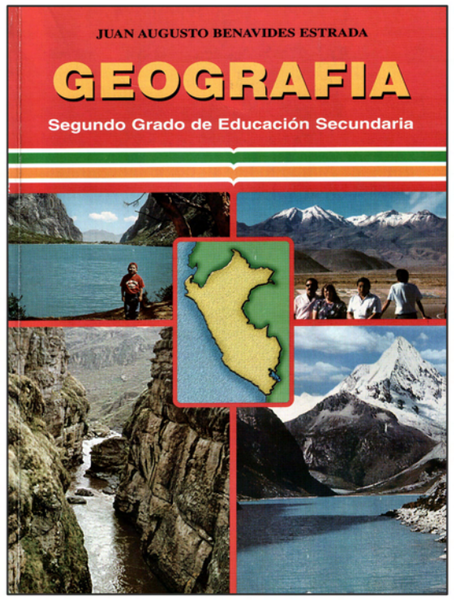
Las aguas del Mar del Perú son de **color verdoso** por la proliferación o abundancia del **fitoplankton** o vegetales microscópicos que viven en suspensión. En cuanto a su temperatura, las **aguas del Mar Peruano son frías**, con una temperatura media anual de 19°C (grados centígrados). En los meses de verano su temperatura sube a una media de 21° y durante el invierno baja a una media de 17°C. Las aguas del Mar del Perú son frías debido al fenómeno conocido con el nombre de **afloramiento,** que consiste en el ascenso de las aguas profundas (muy frías) a la superficie. En cuanto a su salinidad, las aguas del Mar del Perú tienen un 35 por mil de salinidad, entre cuyas sales minerales destaca el cloruro de sodio o sal común. Esto significa que en un litro de agua marina hay 35 gramos de sales minerales. Más allá de las 200 millas el océano tiene un color azulino y una temperatura tropical (más alta) y mayor salinidad.

Page 129

Source: J. A. Benavides Estrada, *Geografía: Atlas del Perú y del Mundo*, Editorial Escuela Nueva S. A., 1983

Figure 40

Sketch-maps of Peru's maritime zone authorized by the Ministry of Foreign Affairs of Peru



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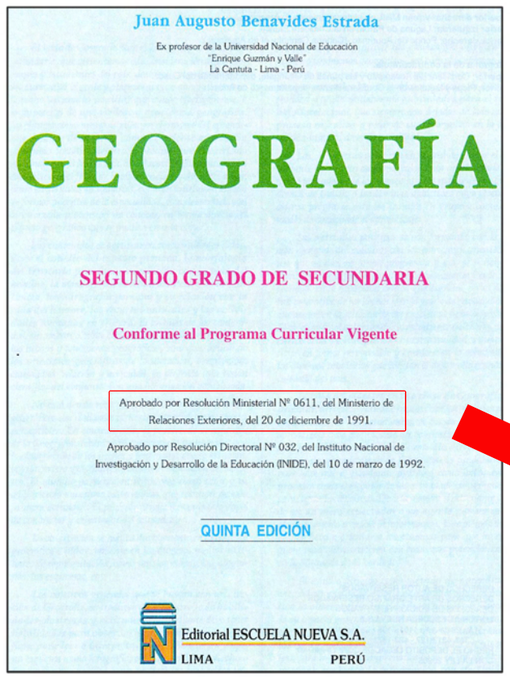
Juan Augusto Benavides Estrada

Ex profesor de la Universidad Nacional de Educación "Enrique Guzmán y Valle" La Cantuta - Lima - Perú

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Aprobado por Resolución Directoral Nº 032, del Instituto Nacional de Investigación y Desarrollo de la Educación (INIDE), del 10 de marzo de 1992.

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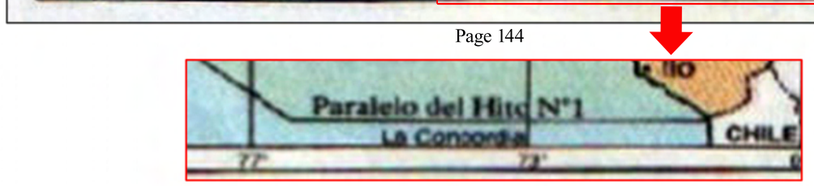
LIMA PERÚ



Page 144

Parallel of Hito No. 1 La Concordia

Aprobado por Resolución Ministerial Nº 0611, del Ministerio de Relaciones Exteriores, del 20 de diciembre de 1991.

Approved by Ministerial Resolution No. 0611 of the Ministry of Foreign Affairs, 20 December 1991

Page 146

Source: J. A. Benavides Estrada, *Geografía*, Editorial Escuela Nueva S. A., 1992

> signed by President José Luis Bustamante y Rivero, reaffirmed in the Declaration of Santiago, in 1952."[739]

This explicit linkage between the Peruvian Supreme Decree of 1947, the Santiago Declaration and the lateral maritime boundary with Chile was, as is recorded in the book itself, authorized by Peru's Foreign Ministry. The sketch-map and reference to the authorization are reproduced as **Figure 41**[740].

Section 8. The Maritime Boundary between Ecuador and Peru under the Santiago Declaration

3.152. As one of the States parties to the Santiago Declaration, Ecuador has also consistently maintained the position that a parallel of latitude constitutes its maritime boundary with Peru, and not just with respect to islands (as Peru now claims) but also as between the mainland territories. Ecuador maintains that position to the present day. As already noted[741], so does in fact Peru: it says that no maritime-boundary issues are extant.

3.153. Ecuador's position is well illustrated in its Supreme Decree No. 959-A of 1971, which prescribed straight baselines for the measurement of Ecuador's territorial sea. Article 1 of that Supreme Decree reads in material part as follows:

> "The straight baselines from which the breadth of the territorial sea of the Republic shall be measured shall be constituted by the following traverses:
>
> I. On the continent

---

739 L. Quintanilla, *Atlas del Perú y del mundo*, 1999, approved by Letter (DFL-CAR) No. 0-3-D/29 of the Ministry of Foreign Affairs of Peru, **Annex 184**, p. 8.

740 *Ibid*., p. 9.

741 See paras 1.48 and 2.89-2.91 above.

. . .

(d) A straight line from Puntilla de Santa Elena in the direction of Cabo Blanco (Peru) to the intersection with *the geographic parallel constituting the maritime frontier with Peru*."[742]

(Emphasis added.)

3.154. So far as Chile is aware, Peru has not protested the description of the maritime boundary between Ecuador and Peru in Article 1, paragraph I(d) of Supreme Decree No. 959-A of 1971. This maritime boundary was depicted in the *Limits in the Seas* series published by the United States Department of State (first in No. 42, 1972; reproduced as **Figure 42**)[743].

3.155. Peru in fact recognizes the parallel of latitude passing through the point in *Boca de Capones* as the maritime boundary with Ecuador. Again, there has been no suggestion by Peru that the general maritime zones of the two States are yet to be delimited (which is inconsistent with Peru's present reading of Article IV of the Santiago Declaration, as discussed at paragraphs 2.89 and 2.208 above). In a diplomatic note to Ecuador in 1969, in response to Ecuador's request that Peru should seek rectification of a privately published map, Peru agreed to do so and also attached a map stated to be correctly showing, as the maritime boundary, the parallel of latitude passing through *Boca de Capones*[744].

---

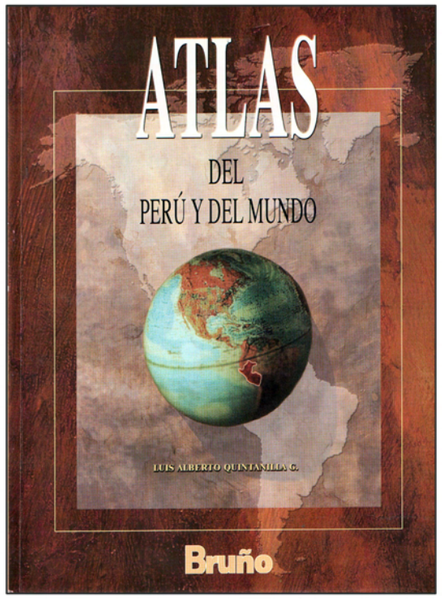
742 Supreme Decree No. 959-A of 28 June 1971, **Annex 212**. Ecuador had already claimed a territorial sea of 200M in 1966, when Ecuador modified Article 633 of its Civil Code through Decree No. 1542 of 10 November 1966, **Annex 211**.

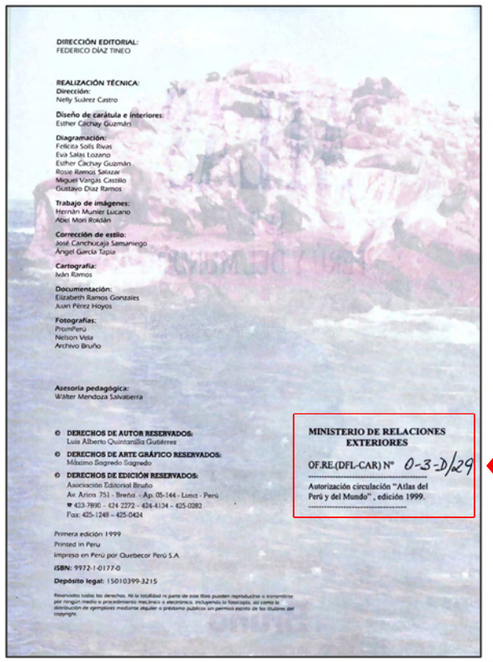
743 Also see the analysis by the United States Department of State of the Santiago Declaration and the Lima Agreement, which form the legal basis of the Ecuador-Peru maritime boundary, at para. 2.228 above.

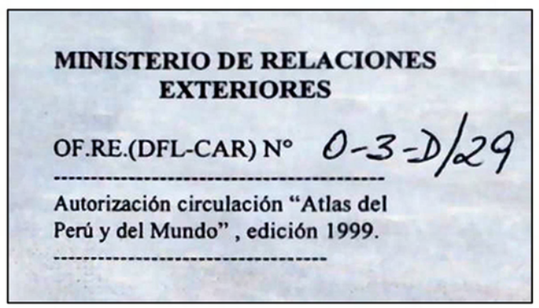
744 See Note of 26 September 1969 from the Peruvian Embassy in Ecuador to the Ministry of Foreign Affairs of Ecuador, **Annex 79** (without the enclosure).

Figure 41

Sketch-map of Peru's maritime zone authorized by the Ministry of Foreign Affairs of Peru







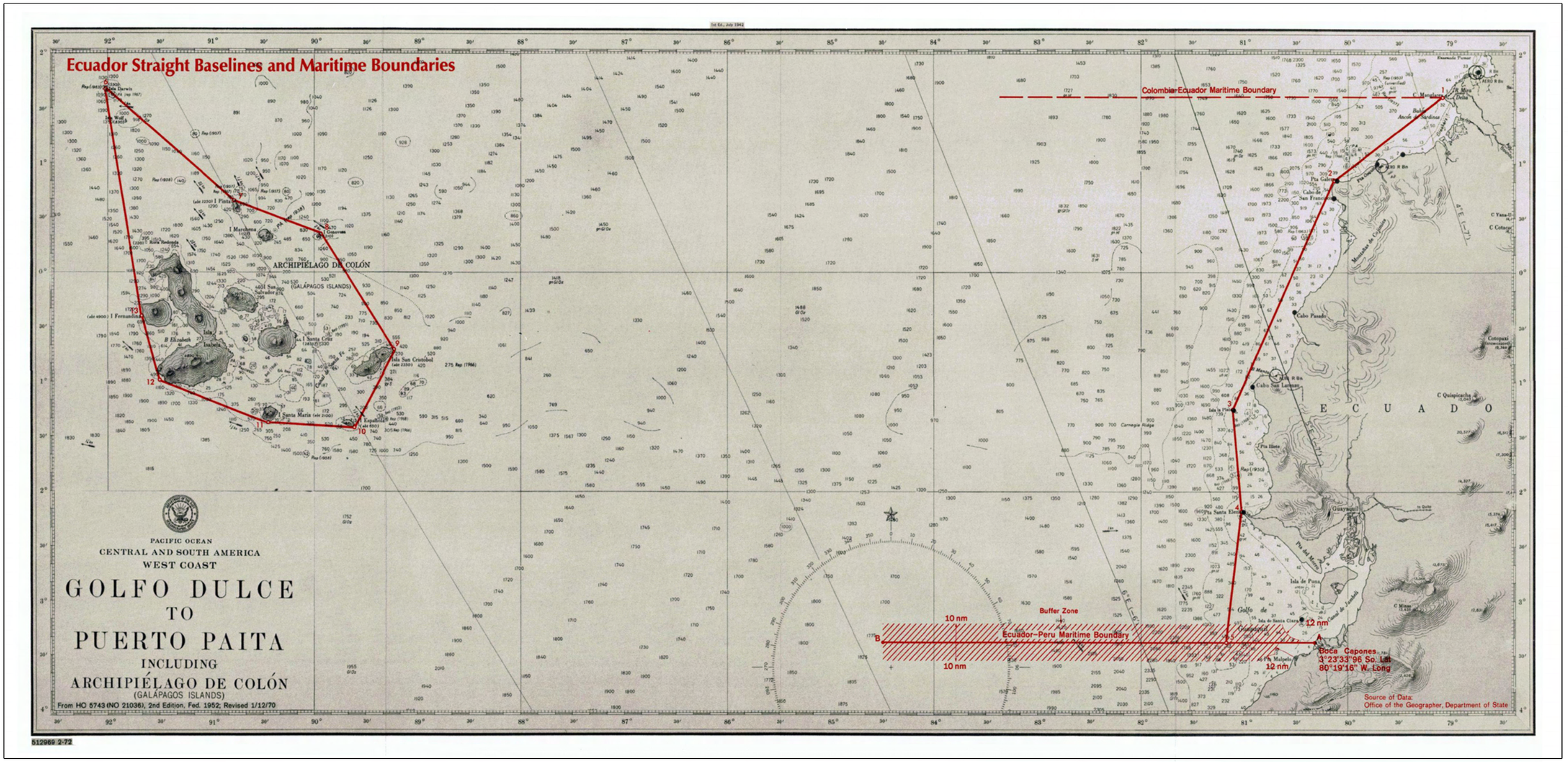
Ministry of Foreign Affairs
OF.RE.(DFL-CAR) No. 0-3-D/29
Authorization for circulation of *Atlas del Perú y del Mundo*, 1999 edition

Page 9

Source: L. A. Quintanilla G., *Atlas del Perú y del Mundo*, Editorial Bruño, 1999

Figure 42

Sketch-map of the Ecuador-Peru maritime boundary and the Ecuadorean baselines by the United States Department of State (1972)



Source: United States Department of State, Office of the Geographer, *Limits in the Seas, No. 42 (Straight Baselines: Ecuador)*, 1972

3.156. Ecuador treats the parallel of latitude 3° 23' 33.96" S as constituting the maritime boundary with Peru. This may be seen, for example, in a statement by the Ministry of Foreign Affairs of Ecuador in 2005[745]. In the same statement, Ecuador confirmed that this maritime boundary is based on the Santiago Declaration and the Lima Agreement[746].

3.157. Furthermore, Ecuador shares in unqualified and unambiguous terms Chile's position that the Santiago Declaration, confirmed by the Lima Agreement, established the delimitation rule that a parallel of latitude constitutes the maritime boundary between all three States parties, not just between Peru and Ecuador, and not only in respect of islands. In a joint declaration of 1 December 2005[747], the Presidents of Ecuador and Chile–

> "reaffirmed the full validity of, and their firm adherence to, the Treaties and other Instruments of the South-East Pacific, in particular, the Declaration on the Maritime Zone of 1952 and the Agreement Relating to a Special Maritime Frontier Zone of 1954, which establish the maritime delimitation between the Parties through a geographic parallel."[748]

3.158. The Congress of Ecuador expressed the same view in November 2005, in stating that the Santiago Declaration and the Lima Agreement are

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745 Press Release No. 660 of 2 December 2005 issued by the Ministry of Foreign Affairs of Ecuador, **Annex 224**, para. 5.

746 *Ibid*., para. 3.

747 Joint Declaration by the Presidents of Ecuador and Chile on the Occasion of the Official Visit to Ecuador of the President of Chile, 1 December 2005, **Annex 30**.

748 *Ibid*., para. 6. The original Spanish text reads: "reafirmaron la plena vigencia y su firme adhesión a los Tratados y otros Instrumentos del Pacífico Sudeste, en particular, a la Declaración sobre Zona Marítima de 1952 y al Convenio sobre Zona Especial Fronteriza Marítima de 1954 que establecen la delimitación marítima entre las Partes a través del paralelo geográfico."

"International Treaties that established as maritime frontier boundaries [*límites marítimos fronterizos*] between Ecuador, Peru and Chile, those which are determined by the parallel at the point at which the land frontier of the signatory States reaches the sea"[749].

3.159. Four years later, in September 2009, the Foreign Ministers of Chile and Ecuador reiterated their common position that their respective maritime boundaries with Peru have been established by the 1952 Santiago Declaration and the 1954 Lima Agreement[750].

Section 9. Conclusion

3.160. This Chapter has described numerous examples of the bilateral and unilateral practice of the Parties which demonstrate that both States have acted on the basis that there was in place an agreed, definitive, all-purpose maritime delimitation constituted by the parallel of latitude passing through the point at which the land frontier reaches the sea. In agreements in 1968 and 1969 the Parties explicitly acknowledged their maritime boundary and took measures in physical implementation of it. They agreed to signal that boundary using alignment lighthouses, i.e., permanent and prominent structures, and agreed that Hito No. 1 was the reference point that they should use to do so.

3.161. In 1955, prior to this signalling exercise, Peru clearly acknowledged its maritime boundary with Chile on two occasions. First, in connection with the Protocol of Accession to the Santiago Declaration, Peru acknowledged that Article IV of the Santiago Declaration gave effect to the general delimitation rule

---

749 Resolution of the National Congress of Ecuador of 15 November 2005, **Annex 223**, first operative paragraph.

750 See Minutes of the Second Meeting of the Chile-Ecuador Bilateral Inter-Ministerial Council of 6-7 September 2009, **Annex 32**, para. 3.

agreed between the Parties: that their maritime zones were delimited by parallels of latitude. Second, in its Supreme Resolution of 1955 Peru relied on Article IV of the Santiago Declaration to specify the lateral limits of Peru's maritime zone for the purpose of cartographic and geodesic works. Peru then monitored the proper depiction of its international boundaries over time, requiring publications depicting these boundaries to be authorized by the Ministry of Foreign Affairs. Over the years, such authorization has in fact been conferred on many maps depicting the maritime boundary with Chile as the parallel of latitude passing through Hito No. 1. Throughout, Peru has enforced the maritime boundary against Chilean vessels, and has also required observance of that boundary by Peruvian vessels.

3.162. The next Chapter applies the rules of international law concerning the interpretation of treaties to the factual and legal circumstances discussed in Chapters II and III.

CHAPTER IV
THE PARTIES' MARITIME BOUNDARY HAS BEEN SETTLED BY TREATY

Section 1. Introduction

4.1. Agreements between States are paramount. That is the fundamental rule applicable to boundary delimitation, both on land and at sea. The rule applies to past agreements as well as to future ones. Thus, UNCLOS specifically provides that it does not affect agreed maritime delimitations that pre-date UNCLOS[751]. Chile's case is that Chile and Peru fully and conclusively delimited their maritime entitlements in the Santiago Declaration of 1952. That treaty is to be read together with the Lima Agreement of 1954, and in the context of the concordant proclamations made by the Parties in 1947. Both States acknowledged that boundary in their subsequent agreements and practice. This historical continuum is crucial to a proper understanding of the Parties' agreed boundary. The Parties' delimitation agreement should be given effect to by the Court, pursuant to Article 38(1) of its Statute[752].

4.2. The purpose of this Chapter is to apply the rules of customary international law on treaty interpretation to the factual and legal circumstances

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751 UNCLOS, Arts 74(4) and 83(4); and see paras 4.74-4.78 below.

752 Article 38(1) reads as follows:

"The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

set forth in the preceding Chapters. The Chapter concludes with a discussion of the principle of the stability of boundaries. That principle applies to both terrestrial[753] and maritime[754] boundaries. The significance of that principle for the present case is that in accordance with it, once a maritime boundary has been agreed, one State cannot unilaterally resile from the agreed boundary. It is Chile's case that Peru seeks impermissibly to resile from the Parties' agreement on the maritime boundary.

4.3. The Court's approach in the *Libya/Chad Territorial Dispute* case indicates that where a boundary is said to have been fixed by treaty it is appropriate to determine *whether* the States concerned have agreed on a boundary between them, before proceeding to the subsequent question of *where* that boundary lies[755]. Thus, the primary question here is whether there is an agreed maritime boundary between Chile and Peru. Once that question has been answered in the affirmative, the second question is the course of that boundary. Once this has been identified, the third question is what maritime zones that boundary delimits. Thereafter, the only possibly remaining question is whether there is any ground for one party to the boundary agreement to avoid or reopen it. The third and fourth questions are not raised in Peru's pleadings in this case.

4.4. In Chapters II and III, the approach has been essentially chronological. This Chapter, by contrast, follows the steps of the interpretive process set forth in Articles 31 and 32 of the Vienna Convention. In outline, this Chapter considers the following matters:

---

753 See *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 37, para. 72.

754 See *Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, I.C.J. Reports 1978*, pp. 35-36, para. 85.

755 See *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, e.g., paras 38, 57 and 66.

(a) the ordinary meaning of the text of the Santiago Declaration and Lima Agreement in their context;

(b) the object and purpose of the Santiago Declaration and the Lima Agreement;

(c) subsequent agreements between the Parties relevant to the interpretation of the Santiago Declaration;

(d) subsequent practice in the application of the Santiago Declaration and Lima Agreement;

(e) the preparatory works of the Santiago Declaration and Lima Agreement; and

(f) the circumstances of the Santiago Declaration's conclusion.

Section 2. The Santiago Declaration and the Lima Agreement are Complementary Texts

4.5. Article 4 of the Lima Agreement provides that:

> "All the provisions of this Agreement shall be deemed to be an integral and supplementary part of, and not in any way to abrogate, the resolutions and decisions adopted at the Conference on the Exploitation and Conservation of the Maritime Resources of the South Pacific, held in Santiago de Chile in August 1952."[756]

---

[756] Lima Agreement, **Annex 50 to the Memorial**, Art. 4

4.6. The Santiago Declaration was the primary instrument adopted at the 1952 Conference. Thus the Lima Agreement is deemed, by the same three States parties, to be "an integral and supplementary part of" the Santiago Declaration[757]. The two agreements were concluded as separate legal instruments, but they form one consolidated arrangement. The Lima Agreement is not merely a subsequent agreement relevant to the interpretation of the Santiago Declaration. As the Parties agreed, the Lima Agreement is so closely related to the Santiago Declaration as to be "deemed to be an integral and supplementary part" of it.

4.7. The Lima Agreement does not address any issue related to islands or insular maritime zones. It refers in unqualified terms to "the maritime frontier between adjacent States"[758] and the "maritime boundary"[759] between those States. These references are deemed to be an integral part of the Santiago Declaration. This confirms that when the three States parties concluded the Lima Agreement in 1954, Chile and Peru had already delimited their maritime boundary in the Santiago Declaration (as had Peru and Ecuador).

Section 3. The Applicable Rules of Treaty Interpretation

4.8. The rules governing treaty interpretation are contained in Articles 31 and 32 of the Vienna Convention. Those rules are as follows:

---

757 Lima Agreement, **Annex 50 to the Memorial**, Art. 4.

758 *Ibid*., first recital.

759 *Ibid*., Art. 1.

"**Article 31**
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(*c*) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (*a*) leaves the meaning ambiguous or obscure; or
>
> (*b*) leads to a result which is manifestly absurd or unreasonable."

4.9. Both Parties signed the Vienna Convention on 23 May 1969. It entered into force for Chile on 9 April 1981 and for Peru on 14 September 2000. Article 4 of the Vienna Convention provides that it "applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States". On a purely conventional basis the Vienna Convention would not apply to any of the agreements relevant to this case. However, the Convention does apply to the Santiago Declaration and Lima Agreement in so far as it reflects customary international law[760]. It is well established that Articles 31[761] and 32[762] of the Vienna Convention reflect

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760 See *Case concerning the Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 62, para. 99.

761 See *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 21-22, para. 41; *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 18, para. 33; *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 812, para. 23; *Kasikili/Sedudu Island* (*Botswana/Namibia*), *Judgment, I.C.J. Reports 1999*, p. 1059, para. 18; *Case concerning Legality of Use of Force* (*Serbia and Montenegro v. United Kingdom*), *Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 1345, para. 98; *Case concerning Legality of Use of*

customary international law. It is also settled that the rules codified in those articles are properly to be applied to the interpretation of treaties considerably pre-dating the Vienna Convention itself[763]. Accordingly, Articles 31 and 32 of the Vienna Convention provide the framework for interpreting the international agreements that are central to the disposition of this case.

Section 4. The Agreed Maritime Boundary between Chile and Peru

A. The Ordinary Meaning of the Terms of the Santiago Declaration and Lima Agreement in their Context

4.10. To answer the question of whether there exists an agreed maritime boundary between the Parties, the starting point is the ordinary meaning of the text of the Santiago Declaration, which is to be read together with the Lima Agreement. The words used must be interpreted in their context. The relevant context in which the ordinary meaning of any individual article, or any specific

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Force (*Serbia and Montenegro v. The Netherlands*), *Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 1049, para. 99; *Legality of Use of Force (Serbia and Montenegro v. Portugal) Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 1199, para. 102; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 174, para. 94.

762 See *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment, I.C.J. Reports 1991,* pp. 69-70, para. 48; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 60, para. 160; *Case concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), I.C.J. Judgment,13 July 2009*, p. 24, para. 47.

763 See *Case concerning Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1059, para. 18; *Case concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), I.C.J. Judgment, 13 July 2009*, p. 24, para. 47.

words within an article, must be determined is the entirety of the Santiago Declaration and the Lima Agreement.

1. The ordinary meaning of the Santiago Declaration in its context

4.11. Peru claims in its Memorial that the Santiago Declaration "did not address lateral boundaries at all"[764], that it showed "no interest in or concern for the delimitation of lateral maritime boundaries between the three States"[765] and that it did "not have the format of a boundary treaty"[766]. These assertions are inconsistent with Peru's own case. On Peru's interpretation, Article IV of the Santiago Declaration was concerned exclusively with lateral maritime boundary delimitation between insular maritime zones and general maritime zones in circumstances where an island was less than 200 nautical miles from the general maritime zone of an adjacent State. Peru explicitly says so in its Memorial[767].

4.12. The question in this case is not whether the Santiago Declaration concerned the delimitation of lateral maritime boundaries. Peru concedes that the Santiago Declaration effected such a delimitation to some extent. As discussed at paragraphs 2.90 and 2.208 above, and illustrated in **Figure 7**, the consequence of Peru's interpretation of Article IV of the Santiago Declaration would be a delimitation — albeit partial — between Peru and Ecuador. The question for the Court is whether, in addition to the partial lateral delimitation conceded by Peru, Article IV of the Santiago Declaration delimited the lateral maritime boundary between the "general" maritime zones of Chile and Peru.

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764 Memorial, para. 4.74.

765 *Ibid*., para. 4.88.

766 *Ibid*., para. 4.81: and cf. para. 2.69 of this Counter-Memorial.

767 See, e.g., Memorial, paras 4.77 and 4.80.

4.13. Article IV of the Santiago Declaration provides in full that:

> "In the case of island territories, the zone of 200 nautical miles shall apply to the entire coast of the island or group of islands. If an island or group of islands belonging to one of the countries making the declaration is situated less than 200 nautical miles from the general maritime zone belonging to another of those countries, the maritime zone of the island or group of islands shall be limited by the parallel at the point at which the land frontier of the States concerned reaches the sea."[768]

4.14. In this Article the maritime zones of islands, otherwise extending to the full 200 nautical miles in every direction[769], are agreed to "be limited by the parallel at the point at which the land frontier of the States concerned reaches the sea." The islands concerned are those "situated less than 200 nautical miles from the general maritime zone belonging to another of those countries"[770]. Affected insular zones end at that parallel of latitude because the limit of each State's general maritime zone was also agreed to be "the parallel at the point at which the land frontier of the States concerned reaches the sea"[771]. That parallel was the line at which "the general maritime zone belonging to another of those countries" began. Peru was the only party to the Santiago Declaration with which the other

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768 Santiago Declaration, **Annex 47 to the Memorial**, Art. IV. The original Spanish text reads as follows:

> "En el caso de territorio insular, la zona de 200 millas marinas se aplicará en todo el contorno de la isla o grupo de islas. Si una isla o grupo de islas pertenecientes a uno de los países declarantes estuviere a menos de 200 millas marinas de la zona marítima general que corresponde a otro de ellos, la zona marítima de esta isla o grupo de islas quedará limitada por el paralelo del punto en que llega al mar la frontera terrestre de los estados respectivos."

769 *Ibid*., Art. IV, first sentence.

770 *Ibid*., Art. IV.

771 *Ibid*.

two States parties, Chile and Ecuador, shared a maritime boundary. And as discussed in detail above at paragraphs 2.32-2.34, Peru had fixed the limits of its maritime zone in 1947 using the same parallels of latitude on which the three States agreed in the Santiago Declaration.

4.15. As Peru's interpretation of Article IV of the Santiago Declaration would result in a partial delimitation, and only between two of the three States parties to it, the onus must be on Peru to establish the proposition that the three States parties to the Santiago Declaration went to the trouble of laterally delimiting the boundary between insular maritime zones and the part of an adjacent general maritime zone with which overlap could have arisen, but agreed absolutely nothing about the lateral delimitation of the general, and most important, maritime zones that they were claiming[772]. This is an unreasonable proposition.

4.16. Peru seeks to avoid this onus by saying that because, as a factual matter, the only islands within 200 nautical miles of the general maritime zone of an adjacent State party are Ecuadorean islands in the Gulf of Guayaquil, Article IV of the Santiago Declaration does not apply at all between Chile and Peru. Yet Article IV says nothing about applying to only two of the three States parties. If a provision of a treaty between three States parties was to apply between only two of them, one would expect the treaty to say so[773]. In a factual

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772 See *Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq), Advisory Opinion 1925, P.C.I.J., Series B, No. 12*, p. 20; and *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 23-24, paras 47-48, discussed at paras 4.79-4.80 below.

773 When Chile, Ecuador and Peru were preparing a protocol for other States to accede to the Santiago Declaration, they expressly excluded Article IV from that protocol because the boundary for which Article IV provided would not necessarily have been appropriate for other States; see paras 3.121-3.126 above. As a matter of treaty technique, when Article IV was to be inapplicable, the States parties to the Santiago

sense the only islands affected by Article IV of the Santiago Declaration are Ecuadorean. But that is a purely factual matter. It is irrelevant to the proper legal interpretation of Article IV of the Santiago Declaration, which in Chile's submission delimits the general maritime zones of adjacent States parties as well as the maritime zones of any islands coming within 200 nautical miles of the maritime boundary.

2. The ordinary meaning of the Lima Agreement in its context

4.17. The States parties to the Lima Agreement are Chile, Peru and Ecuador — the same three States as in the Santiago Declaration. The full title of the Lima Agreement is the "Agreement Relating to a Special *Maritime Frontier* Zone". The recitals refer to "violations of the *maritime frontier* between adjacent States" (emphasis added)[774]. In Article 1 the Agreement refers to "the parallel which constitutes a *maritime boundary* between the two countries" (emphasis added)[775]. A clarificatory agreement concluded on the same day as the Lima Agreement refers to enforcement decisions being taken by "the authorities of the country whose *maritime jurisdictional boundary* would have been transgressed" (emphasis added)[776]. In all of these extracts the emphasis on the reference to the maritime boundary is added. All of these extracts confirm that the Santiago Declaration delimited the maritime boundary between Chile and Peru, because, as in the *Territorial Dispute* case between Libya and Chad, in a subsequent agreement to the one delimiting the boundary, "the existence of a determined

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Declaration expressly made it so. If Article IV had not been applicable to Chile, the States parties would not have included it in the Santiago Declaration.

774 Lima Agreement, **Annex 50 to the Memorial**, first recital.

775 *Ibid*., Art. 1.

776 See **Annex 40** and para. 2.210 above.

frontier was accepted and acted upon"[777] and the subsequent agreement "mention[s] 'the frontier'. . .with no suggestion of there being any uncertainty about it"[778].

4.18. In full, Article 1 of the Lima Agreement reads as follows: "A special zone is hereby established, at a distance of twelve nautical miles from the coast, extending to a breadth of 10 nautical miles on either side of the parallel which constitutes a maritime boundary between the two countries."[779] As explained at paragraphs 2.202-2.205 above, the ordinary meaning of "the two countries" in Article 1 of the Lima Agreement is *the two States on either side of the parallel of latitude constituting a maritime boundary between these two States*.

4.19. The "parallel which constitutes a maritime boundary" in Article 1 of the Lima Agreement serves as the reference line on either side of which a 10M zone of tolerance was established. If the "parallel which constitutes a maritime boundary" in the Lima Agreement did not apply at all as between Chile and Peru, as Peru now suggests[780], then it would follow that there was no zone of tolerance between Chile and Peru. This would mean that in so far as Chile was concerned the entire Lima Agreement would have no *effet utile*; in fact, it would have no *effet* at all. An interpretation that deprives a treaty provision, let alone an entire treaty, of its effectiveness, is obviously to be avoided[781].

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777 *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 35, para. 66.

778 *Ibid*., p. 35, para. 66.

779 Lima Agreement, **Annex 50 to the Memorial**, Art. 1.

780 See Memorial, paras 4.103-4.104.

781 See *Lighthouses Case between France and Greece, Judgment, 1934, P.C.I.J., Series A/B, No. 62*, p. 27; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 35, para. 66;

4.20. As discussed in Section 10 of Chapter II, third States, the United Nations and publicists from many legal traditions have consistently understood the ordinary meaning of the Santiago Declaration and Lima Agreement as being that there is an agreed maritime boundary between Chile and Peru.

B. The Object and Purpose of the Santiago Declaration and the Lima Agreement

4.21. The object and purpose of a treaty can be expressed at varying levels of specificity[782]. At the most general level, the States parties to the Santiago Declaration were "determined to conserve and safeguard for their respective peoples the natural resources of the maritime zones adjacent to their coasts"[783]. More specifically, the object and purpose of the Santiago Declaration was to set forth extended maritime zones subject to the "exclusive sovereignty and jurisdiction"[784] of each State party. More specifically still, a necessary part of that object and purpose was the identification of the physical perimeter[785] of the maritime space appertaining to each State, within which such sovereignty and jurisdiction would be exercised.

4.22. The seaward limit of each State's maritime zone was doubtless of primary importance. This seaward limit was expressed in Article II as being "a

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Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, I.C.J. Reports 1978, p. 22, para. 52; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 25, para. 51.

782 See *Fisheries Jurisdiction Case (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 17, para. 32.

783 Santiago Declaration, **Annex 47 to the Memorial**, fourth recital.

784 *Ibid*., Art. II.

785 Also see 1947 Chilean Declaration, **Annex 27 to the Memorial**, Art. 3; and 1947 Peruvian Supreme Decree, **Annex 6 to the Memorial**, final recital and Art. 3.

minimum distance of 200 nautical miles". The lateral delimitation of those zones between the States parties was also within the object and purpose of the Santiago Declaration. It was part of the broader goal of identifying the spatial limits of each State's claim to "exclusive sovereignty and jurisdiction". Peru itself acknowledges that lateral delimitation was within the scope of the Santiago Declaration, although it claims it was only in respect of delimitation between the general maritime zone of Peru and the maritime zones of Ecuadorean islands within 200 nautical miles of the parallel passing through the point at which the Ecuador-Peru land boundary reaches the sea.

4.23. As for the Lima Agreement, its *only* purpose was to create zones of tolerance on either side of the maritime boundaries between the States parties, in response to accidental boundary violations by small fishing vessels. That the Lima Agreement was concluded to deal with boundary violations, and used the maritime boundaries as reference lines for the creation of zones of tolerance, confirms the existence of those maritime boundaries.

4.24. The purpose of the Lima Agreement totally undermines Peru's contention that the Santiago Declaration established one unified maritime zone shared between the three States parties. As discussed at paragraphs 2.93-2.99 above, this contention fails on the language of the Santiago Declaration alone. The very existence of the Lima Agreement also demonstrates that by the time of its conclusion each of the States parties had its own maritime zone. This is clear even from the language of Peru's Memorial, where Peru refers to "encroachments on another State's maritime zone"[786] occurring prior to the Lima Agreement, which encroachments the Lima Agreement was designed to address. There could not have been encroachments on a maritime zone that remained to be delimited. A good-faith interpretation of the ordinary meaning of the terms of

[786] Memorial, para. 4.98.

the Santiago Declaration, read together with the Lima Agreement, in their proper context and in light of the object and purpose of these treaties, leads ineluctably to the conclusion that there was by 1954 and there continues now to exist an agreed maritime boundary between Chile and Peru.

C. SUBSEQUENT AGREEMENTS BETWEEN CHILE AND PERU IN 1968 AND 1969

4.25. As mandated by Article 31(3)(a) of the Vienna Convention, "any subsequent agreement between the parties regarding the interpretation of [the Santiago Declaration] or the application of its provisions" is to be taken into account in interpreting the Santiago Declaration. Chile and Peru reached such agreements as part of a lengthy process of co-operation in 1968 and 1969, which culminated in the building of two lighthouses to signal their maritime boundary. That process, together with the relevant agreements, is described in detail at paragraphs 3.22-3.38 above.

4.26. When the delegates of the two States first met at the site of Hito No. 1 in April 1968, they prepared joint minutes in which they memorialized their mandate. That was "physically to give effect to the parallel of the maritime frontier originating at Boundary Marker number one (No. 1)"[787]. The 1968 Minutes refer a second time to "the parallel of the maritime frontier"[788] as the parallel on which both lighthouses would be built. The 1968 Minutes were followed by an exchange of diplomatic notes between the Parties. Peru recorded that it "approve[d] in their entirety" the 1968 Minutes, which Peru acknowledged were signed in connection with the process of installing lighthouses physically to

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787 1968 Minutes, **Annex 59 to the Memorial**, first paragraph. The original Spanish text reads as follows: "materialicen el paralelo de la frontera marítima que se origina en el Hito número uno (No. 1)".

788 *Ibid*.

give effect to "the parallel of the maritime frontier"[789]. Chile's response also accepted the proposals made in the 1968 Minutes, and reproduced Peru's language in referring to the purpose of the exercise as being "physically to give effect to the parallel of the maritime frontier"[790]. At the end of the signalling process, the head of the Peruvian delegation and the head of the Chilean delegation agreed on a joint report, the 1969 Act, regarding the condition of the *hitos* that they had inspected "on the occasion of the works which they had been instructed to conduct in order to verify the location of Boundary Marker number one and to signal the maritime boundary"[791].

4.27. Ecuador was not involved in the 1968-1969 signalling agreements, which implemented the boundary between the Parties. The argument on which Peru relies in connection with the Santiago Declaration and the Lima Agreement, i.e. that any reference to a parallel of latitude relates only to Peru and Ecuador, cannot apply to the 1968-1969 process. That process expressly and exclusively concerned signalling the maritime boundary between Chile and Peru, which was stated to be the parallel of Hito No. 1.

4.28. The 1968 Minutes, the exchange of formal diplomatic notes that accompanied them, and the 1969 Act constitute binding agreements between the Parties. They confirm that the Parties had already agreed their maritime boundary and were by then engaged in the task of signalling the precise physical location of that pre-existing boundary. Signalling the precise physical location of

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789 Note No. (J) 6-4/43 of 5 August 1968 from the Secretary-General of the Ministry of Foreign Affairs of Peru (signed for the Foreign Minister) to the Chilean chargé d'affaires in Peru, **Annex 74 to the Memorial**.

790 Note No. 242 of 29 August 1968 from the Embassy of Chile to the Ministry of Foreign Affairs of Peru, **Annex 75 to the Memorial**.

791 1969 Act, **Annex 6**, first paragraph.

a boundary presupposes that it has already been delimited[792]. That delimitation between Chile and Peru was agreed in the Santiago Declaration and acted upon in the Lima Agreement.

D. Subsequent Practice in the Application of the Santiago Declaration and the Lima Agreement

4.29. Article 31(3)(b) of the Vienna Convention requires that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be taken into account. There are numerous examples of State practice that confirm that the correct interpretation of the Santiago Declaration and Lima Agreement is that the Parties have an agreed maritime boundary. Details are provided in Chapters II and III. Here highlights are collated for the purpose of the interpretive exercise at hand. These examples demonstrate that until very recently Peru adopted the same position as Chile has consistently adopted from the time of the Santiago Declaration until the present.

1. Peru's legislation recognizes the maritime boundary with Chile

4.30. The object of Peru's Supreme Resolution No. 23 of 1955[793], quoted in full and discussed at paragraphs 3.50-3.56 above, was to specify as a matter of internal law the seaward and lateral limits of Peru's maritime zone "referred to" in the Santiago Declaration. Peru resolved, for the purpose of depicting the zone in cartographic and geodesic work, that "[i]n accordance with Clause IV of the Declaration of Santiago" that zone "may not extend beyond [the line] of the

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792 See *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 28, para. 56.

793 1955 Supreme Resolution, **Annex 9 to the Memorial**.

corresponding parallel at the point where the frontier of Peru reaches the sea."[794] The text speaks for itself.

4.31. Peru now says that since, on its current argument, Article IV of the Santiago Declaration only applied to the insular zones of islands near the seaward terminus of the Ecuador-Peru land boundary, it follows that the 1955 Supreme Resolution was similarly limited[795]. Such an interpretation is certainly not borne out by the plain terms of the Resolution, and Peru made no mention of this narrow interpretation when it transmitted the Resolution to the United Nations in 1972, or following its publication in the United Nations *Legislative Series* in 1974[796]. A good-faith reading of the Resolution is that Peru considered Article IV of the Santiago Declaration to have delimited both of Peru's lateral maritime boundaries. Peru's suggestion is that a Supreme Resolution designed to set forth the limits of Peru's "maritime dominion" for the purpose of cartographic and geodesic work left the entire southern boundary totally undelimited and the northern boundary only partially delimited, without mentioning either of these two limitations. That is hardly credible.

4.32. Other examples of Peruvian legislation are collated in Chapter III, Section 3(B)(2). One such example, more recent than the 1955 Supreme Resolution, is Peru's 1987 Regulation of Captaincies and Maritime, Fluvial and Lacustrine Activities[797]. That Regulation divides Peru's "maritime dominion" into internal "maritime districts". The southernmost district is Maritime

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794 1955 Supreme Resolution, **Annex 9 to the Memorial**, second operative paragraph.

795 See Memorial, para. 4.113.

796 United Nations Legislative Series, *National Legislation and Treaties Relating to the Law of the Sea*, 1974, **Annex 164**, pp. 27-28.

797 Regulation of the Captaincies and Maritime, Fluvial and Lacustrine Activities, approved by Supreme Decree No. 002-87-MA of 11 June 1987, **Annex 174**. See further paras 3.72-3.76 above.

District 31. It is limited in the south by "the frontier boundary between Peru and Chile [*el límite fronterizo entre Perú y Chile*]"[798]. The same Regulation defines the geographic jurisdiction of the Captaincies of Peru's major ports. The Captaincy of Peru's southernmost major port, Ilo, has jurisdiction "up to the frontier with Chile to the South [*hasta la frontera con Chile por el Sur*]"[799]. The Regulation of the Law on the Control and Surveillance of Maritime, Fluvial and Lacustrine Activities of 2001 also recognizes Peru's maritime frontier with Chile[800]. The terms used in Peru's legislation are self-explanatory and unqualified.

2. Peru's complaints of violations of the boundary by Chilean vessels

4.33. In late 1962 Peru complained that a number of private Chilean fishing vessels had been fishing on the Peruvian side of the agreed maritime boundary. On 20 December 1962 the Embassy of Peru in Chile submitted a memorandum to the Ministry of Foreign Affairs of Chile. Its text was as follows:

> "[T]he Government of Peru, taking strongly into account the sense and provisions of the 'Agreement Relating to a Special Maritime Frontier Zone'. . .wishes the Government of Chile, particularly through the competent authorities of the port of Arica, to adopt measures to put an end to these illegitimate incursions, and that the owners of fishing

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798 Regulation of the Captaincies and Maritime, Fluvial and Lacustrine Activities, approved by Supreme Decree No. 002-87-MA of 11 June 1987, **Annex 174**, Chapter II Section III, Clause A-020301.

799 *Ibid*., Chapter II Section IV, Clause A-020401.

800 Regulation of the Law on the Control and Surveillance of Maritime, Fluvial and Lacustrine Activities, approved by Supreme Decree No. 028 DE/MGP of 25 May 2001, **Annex 192**, Part A, Chapter I, Section III (Jurisdiction of Captaincy Districts), Section IV (Jurisdiction of the Captaincies); and see para. 3.75 above.

> vessels be notified that they must refrain from continuing to fish north of the Peru-Chile frontier."[801]

Peru expressly acknowledged the existence of a maritime "frontier", complained about incursions of it, and took "strongly into account" the Lima Agreement in doing so. This leaves no doubt on two points: first, the Lima Agreement applied between Chile and Peru; second, there was a "Peru-Chile frontier" acknowledged in that Agreement.

3. Peru enforces its maritime boundary with Chile

(a) Peru obliges ships to inform Peru when they cross the maritime boundary

4.34. The Directorate of Hydrography and Navigation of the Peruvian Navy issued the second edition of its *Sailing Directions* (*Derrotero de la Costa*) in 1988. The *Directions* oblige all ships to give advance notice to the Peruvian authorities of their intention to enter Peru's "maritime dominion". For this purpose a ship "crosses into Peruvian waters" from the south at "the southern parallel 18° 21' S"[802]. The *Sailing Directions* apply to all vessels, not just fishing boats. All ships entering the Peruvian "maritime dominion" for any purpose must submit a "Sailing Plan Report". When a ship enters Peru's "maritime dominion" from the south, the required Report must provide the estimated time at which the vessel will cross the "jurisdictional parallel" of Hito No. 1[803].

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801 Memorandum No. 5-4-M/64 of 20 December 1962 from the Peruvian Embassy in Chile to the Ministry of Foreign Affairs of Chile, **Annex 73**.

802 Directorate of Hydrography and Navigation of the Navy of Peru, *Derrotero de la Costa del Perú*, *Vol. II*, 2nd edn, 1988, **Annex 175**, p. 12, section 1.34.

803 See further para. 3.83 above.

(b) Resolutions of the Harbour Master of Ilo

4.35. On 5 June 1989 the Harbour Master of the Peruvian port of Ilo issued two Resolutions, each of which imposed a fine on a Chilean vessel for finding herself north of the "frontier line of the Republic of Chile, in the jurisdictional waters of Peru"[804]. The Harbour Master further referred to the "dividing line of the maritime frontier"[805]. Each vessel was laden with 80 tons of anchovy and was fined US$20,000. Having enforced the "maritime frontier" against Chilean vessels, and extracted fines from those responsible for transgressing that frontier, Peru cannot now claim that such a frontier does not exist.

(c) The Diez Canseco *incident of 22 March 1966*

4.36. On 22 March 1966 a Peruvian Navy patrol boat, the *Diez Canseco*, fired warning shots at a Chilean fishing boat. Chile sought an explanation of the incident from Peru. As set forth in more detail at paragraphs 3.16-3.18 above, Peru provided an explanation in the form of a memorandum from the Embassy in Santiago to the Ministry of Foreign Affairs of Chile. Peru explained that when the *Diez Canseco* was "7 miles north of the frontier line" it caught sight of three Chilean vessels that were also north of that line[806]. The *Diez Canseco* pursued one of the Chilean vessels, a fishing boat, and fired 16 warning shots when the *Diez Canseco* was "3 miles north of the frontier line". Peru further explained that

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804 Resolution No. 006-89-M, **Annex 176**, first paragraph; and Resolution No. 007-89-M, **Annex 177**, first paragraph.

805 Resolution No. 006-89-M, **Annex 176**, third recital; and Resolution No. 007-89-M, **Annex 177**, third recital.

806 Memorandum of 8 June 1966 from the Peruvian Embassy in Chile to the Ministry of Foreign Affairs of Chile, **Annex 75**, para. 2.

the *Diez Canseco* ceased pursuit "2 miles north of the frontier line", because the Chilean fishing boat had crossed to the south of that line[807].

4.37. This incident very plainly indicates that Peru considered that a maritime boundary was in place. As explained at paragraphs 3.16-3.18, above, and illustrated in **Figure 21**, the coordinates and measurements given in Peru's memorandum indicate that Peru considered the boundary to be the parallel of latitude of 18° 21' S. Peru explicitly referred to its maritime boundary with Chile numerous times in the memorandum, and Peru defended that boundary by firing warning shots at a fishing vessel. That vigorous defence of the boundary line cannot be reconciled with Peru's present description of the Lima Agreement as merely a "practical device"[808] designed "to reduce friction between fishermen on small boats"[809].

4. Peru uses the maritime boundary as the limit of the airspace above its "maritime dominion"

4.38. On the day on which Peru responded to Chile's request for an explanation about the *Diez Canseco* incident, 8 June 1966, there was a meeting in Santiago between the Peruvian Ambassador to Chile and the Director-General of the Chilean Ministry of Foreign Affairs. Later that day, Peru's Embassy prepared a note memorializing that in the meeting the Peruvian Ambassador had formally communicated to the Chilean Ministry of Foreign Affairs Peru's objection to numerous incidents in which Chilean vessels and aircraft had allegedly crossed illegally the maritime/airspace boundary between Chile and Peru.

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807 Memorandum of 8 June 1966 from the Peruvian Embassy in Chile to the Ministry of Foreign Affairs of Chile, **Annex 75**, para. 2.

808 Memorial, para. 4.100.

809 *Ibid*., para. 8.5.

4.39. The note recorded that the Peruvian Ambassador had "denounced new acts violating the Peruvian maritime frontier"[810], referring to boundary crossings by 44 Chilean vessels and two Chilean aircraft. The number of vessels was obviously significant. More significant for immediate purposes, however, is that Peru complained about "illegal incursions"[811] by Chilean aircraft flying over Peru's maritime zone.

4.40. If the parallel of latitude passing through the point at which the Chile-Peru land frontier reaches the sea were merely a jurisdictional limit for a restricted purpose — "to avoid conflicts between fishing vessels"[812] — Peru would not have considered itself entitled to object to aerial transgressions of that limit. Peru proceeded on the basis that in the airspace of its "maritime dominion" it enjoyed the same plenitude of jurisdiction and sovereignty as over waters, that it was entitled to object to aerial incursions of the southern boundary of its maritime zone, and Peru did in fact so object. Just seven months before this official communication, in Law No. 15720 of 11 November 1965, Peru had explicitly claimed "sole sovereignty over the air space above its territory and jurisdictional waters within a distance of 200 miles"[813]. This is consistent with the account of Peru's "maritime dominion" given at paragraphs 2.166-2.176 above, according to which, in its Constitution[814] and in legislation as recent as

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810 Memorandum of 8 June 1966 by the Peruvian Embassy in Chile to the Ministry of Foreign Affairs of Chile, **Annex 76**, first paragraph.

811 *Ibid*., first paragraph.

812 Memorial, para. 4.106.

813 Law No. 15720 of 11 November 1965: Law on Civil Aeronautics, **Annex 12 to the Memorial**, Art. 2 (translation taken from United Nations Legislative Series, *National Legislation and Treaties Relating to the Law of the Sea*, 1974, **Annex 164**.)

814 See Political Constitution of Peru of 1993, **Annex 179**, Art. 54.

2000[815], Peru claims sovereignty in the airspace above the entire 200M breadth of its "maritime dominion".

4.41. Under its 2000 legislation Peru requires that all aircraft give notice of "entry into, transit within and exit from"[816] Peruvian airspace, including over the "maritime dominion". As explained at paragraphs 3.111-3.114, Peru uses its maritime boundary with Chile as the southern limit of its airspace for the purpose of such notification. Peru also uses the maritime boundary as the southern limit of FIR Lima under the Chicago Convention[817]. The point of primary significance is that Peru claims sovereignty in the airspace above its "maritime dominion", and considers that airspace to be laterally delimited by the all-purpose maritime boundary with Chile.

5. Peru has authorized maps depicting its maritime boundary with Chile

4.42. Peruvian Supreme Decree No. 570 of 1957[818] requires any publication of a map referring to or representing Peru's frontiers to be authorized by the Ministry of Foreign Affairs. As discussed in detail above at paragraphs 3.144-3.151 and illustrated in **Figures 37-41**, Peru has authorized the publication of a number of maps depicting the maritime boundary between Chile and Peru as the parallel of latitude passing through Hito No. 1, even as recently as 1999. This reinforces the obvious conclusion that Peru's 1955 Supreme Resolution, discussed above at paragraph 4.30 and earlier at paragraphs 3.50-3.56, indeed identified the parallel of latitude expressed in Article IV of the Santiago

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815 See Law No. 27261 of 9 May 2000: Law on Civil Aeronautics, **Annex 185**, Art. 3.

816 *Ibid*., Art. 21.

817 See para. 3.114 and footnote 677 of this Counter-Memorial.

818 At **Annex 11 to the Memorial**.

Declaration as the maritime boundary between Chile and Peru, which was to be used in "geodesic and cartographic works".

4.43. A map is a memorandum. In the present case, cartographic evidence can provide a good indication of the relevant Party's position regarding the existence and course of the maritime boundary[819]. It can do so, in particular, when it is the practice of that Party either to produce or to authorize the production of maps depicting its maritime boundaries. When a Government officially authorizes a map, that approval can constitute recognition of the situation depicted in that map[820]. In such cases, the legal value of the map lies, not so much in its intrinsic cartographic merits, but rather in the official *imprimatur* which the map carries: the map can then be said to be "a physical expression of the will of the State"[821]. The probative value of such a map is greater if it constitutes an admission against interest — i.e., "when the State adversely affected has itself produced and disseminated it, even against its own interest"[822]. At the very least, such a map will have evidential value in complementing other evidence of official recognition of the situation which the map depicts[823], and in confirming the conclusions to be drawn from an analysis of the relevant agreements and State practice[824]. In the present case, the maps

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819 See *Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), I.C.J. Judgment, 23 May 2008*, p. 74, para. 271.

820 See *Honduras Borders (Guatemala/Honduras)*, Award, 23 January 1933, *RIAA,* Vol. II, pp. 1330-1331 and 1360-1361.

821 *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J Reports 1986*, pp. 582-583, paras 53 and 56.

822 *Decision regarding delimitation of the border between Eritrea and Ethiopia*, Award, 13 April 2002, *RIAA*, Vol. XXV, p. 116, para. 3.28.

823 See *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 23, para. 45.

824 See *Question of Jaworzina (Polish-Czechoslovakian Frontier), Advisory Opinion, 1923, P.C.I.J., Series B, No. 8*, p. 33.

officially authorized by Peru constitute recognition on Peru's part of the existence of a maritime boundary with Chile, and of the fact that the course of this boundary follows the parallel of latitude of Hito No. 1. These maps confirm Chile's case and squarely contradict the argument that Peru now makes before the Court.

E. The Preparatory Works of the Santiago Declaration and Lima Agreement

4.44. Pursuant to Article 32 of the Vienna Convention, it is appropriate to refer to the preparatory works of the Santiago Declaration and the Lima Agreement to confirm the meaning resulting from the interpretive methods listed in Article 31 of the Vienna Convention, which have been applied above. The preparatory works of a treaty may be called in aid in so far as they "serve the purpose of illuminating a common understanding" of the treaty in question[825]. The brief account here of the salient aspects of the preparatory works of the Santiago Declaration and Lima Agreement, which are discussed comprehensively in Chapter II, Section 4.G. and Section 9.C. above, indicates that the Parties shared a common understanding that in the Santiago Declaration they did indeed agree on the delimitation of their maritime boundary.

1. The preparatory works of the 1952 Santiago Declaration

4.45. On 11 August 1952 a draft of the Santiago Declaration was considered at the First Session of the Legal Affairs Commission of the 1952 Conference. The minutes of that meeting record that the Ecuadorean delegate–

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[825] *The Iron Rhine (Ijzeren Rijn) Arbitration*, Award, 24 May 2005, *RIAA*, Vol. XXVII, p. 63, para. 48.

> "observed that it would be convenient to clarify [the provision which became Article IV of the Santiago Declaration] further in order to avoid errors when construing the zone of interference in the case of islands. He suggested that the declaration be drafted on the basis that the boundary line of each country's jurisdictional zone be the respective parallel of the point at which the frontier of the countries reaches the sea."[826]

The minutes record that: "All the delegates agreed to this proposal."[827]

4.46. This extract from the records of the Santiago Declaration shows the intention of all three States parties that the boundary line of each State's jurisdictional zone be the parallel of the point at which the land frontier with another State party reaches the sea. The negotiating draft was revised by the Chilean and Peruvian delegates to that effect. Article IV provides that insular maritime zones are to be cut off if they reach the parallel of latitude passing through the point at which the land boundary of the States concerned reaches the sea. That is so precisely because the States parties had a common understanding that the parallel of latitude was "the boundary line of each country's jurisdictional zone".

2. The preparatory works of the 1954 Lima Agreement

4.47. At the 1954 Inter-State Conference, Ecuador proposed that the Complementary Convention include–

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826 Minutes of the First Session of the Legal Affairs Commission of the 1952 Conference, 11 August 1952 at 4.00 p.m., **Annex 56 to the Memorial**, p. 2. Chile's translation.

827 *Ibid*., p. 2. Chile's translation.

> "a complementary article clarifying the concept of the dividing line of the jurisdictional sea, which has already been explained at the Conference of Santiago, but which would not be redundant to include herein."[828]

4.48. As recounted in more detail at paragraphs 2.191-2.193 above, the Peruvian and Chilean delegates expressed the view "that article 4 of the Declaration of Santiago is clear enough and, therefore, does not require further explanation"[829]. The Ecuadorean delegate insisted that the general maritime boundaries be acknowledged. He thought that Article IV of the Santiago Declaration "was aimed at establishing the principle of delimitation of waters regarding the islands"[830]. At the initiative of the Chilean Chairman of the 1954 Inter-State Conference, the three States agreed to provide this clarification by formally recording in the minutes of the conference–

> "that the three countries deemed the matter on the dividing line of the jurisdictional waters settled and that said line was the parallel starting at the point at which the land frontier between both countries reaches the sea."[831]

The Peruvian delegate specified that "this agreement was already established in the Conference of Santiago as recorded in the respective Minutes by the request of the Delegate of Ecuador"[832].

4.49. It was on the basis of this minuted agreement that the Ecuadorean delegate ceased to pursue the addition of a provision confirming the existing

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828 Minutes of the First Session of Commission I of the 1954 Inter-State Conference, 2 December 1954 at 10.00 a.m., **Annex 38**, p. 3.

829 *Ibid*.

830 *Ibid*.

831 *Ibid*.

832 *Ibid*., p. 4.

agreement on maritime boundaries in the main convention concluded at the 1954 Inter-State Conference. When the minutes were read the next morning, they were modified so that they recorded, not simply that the Ecuadorean delegate had made the suggestion that an agreement be recorded in the minutes, but rather "that the three countries had agreed on the concept of a dividing line of the jurisdictional sea"[833]. With that modification, the minutes of the First Session were approved.

4.50. This preparatory work, and the express agreement of the three States which it records, are precisely on-point in the present dispute. The Ecuadorean delegate expressed the concern that the text of Article IV of the Santiago Declaration might be read in exactly the way in which Peru now proposes that it be read — i.e., that it was aimed at delimiting the maritime zones of islands vis-à-vis the maritime zones of continental territories. The three States formally and explicitly recorded their agreement that the scope of Article IV of the Santiago Declaration was not limited in that way. They agreed that Article IV delimited all maritime zones — both "general" (continental) and insular — of all three States. And it was Peru which insisted that the minutes expressly record that agreement on this point had been reached in Santiago in 1952.

4.51. Neither Peru nor Chile nor Ecuador can unilaterally renege on that common understanding half a century after the event[834]. The formally minuted agreement on the correct interpretation of Article IV of the Santiago Declaration

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833 Minutes of the Second Session of Commission I of the 1954 Inter-State Conference, 3 December 1954 at 10.00 a.m., **Annex 39**, p. 1.

834 See *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, pp. 135-136; *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962*, pp. 32-33; Separate opinion of Judge Ajibola, *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 73-74, 76; H. Lauterpacht, *The Development of International Law by the International Court*, 1958, **Annex 288**, pp. 171-172.

estops Peru from now asserting a contrary interpretation. In fact Chile and Peru have both acted — including in subsequent agreements and through acts of enforcement — on the basis that a maritime boundary was in place. They have enjoyed the benefits of the stability that comes with an agreed boundary[835], as well as regional solidarity in the face of challenges to their national maritime zones by third States. In these circumstances Peru cannot now advance an interpretation of Article IV of the Santiago Declaration that is the exact opposite of the interpretation to which it agreed in 1954.

4.52. Later on 3 December 1954 the delegates to the 1954 Inter-State Conference returned again to the agreed interpretation of Article IV of the Santiago Declaration. As set forth elsewhere in this Counter-Memorial[836], Article 1 of the Lima Agreement refers to "the parallel which constitutes a maritime boundary between the two countries". The minutes of the Second Session of the 1954 Inter-State Conference indicate the circumstances in which that phrase was agreed. Those minutes record that "the concept already declared in Santiago that the parallel starting at the boundary point on the coast constitutes the maritime boundary between the neighbouring signatory countries, was incorporated into this article"[837]. Against this background, the final text of Article 1 of the Lima Agreement was agreed by all three States.

4.53. The foregoing review of the preparatory works clearly and explicitly confirms that Chile and Peru had the same understanding on the fundamental point: that their maritime boundary was delimited by agreement in the Santiago Declaration of 1952.

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835 Cf. *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 32.

836 See paras 2.200-2.201 and 4.17 above.

837 Minutes of the Second Session of Commission I of the 1954 Inter-State Conference, 3 December 1954 at 10.00 a.m., **Annex 39**, p. 7.

F. THE CIRCUMSTANCES OF THE SANTIAGO DECLARATION'S CONCLUSION

4.54. Pursuant to Article 32 of the Vienna Convention, account may be taken of the circumstances in which a treaty was concluded, to confirm the interpretation indicated by the interpretive means mandated by Article 31 of the Vienna Convention. The "circumstances" which may be considered include legal instruments that constitute part of a series of legal acts of which the primary treaty being interpreted forms part. These legal acts may include unilateral legal instruments of one of the States parties to that treaty[838].

4.55. The Santiago Declaration was not an isolated instrument. As well as being followed by the Lima Agreement and the implementation agreements regarding the signalling exercise concluded in 1968-1969, it was also preceded by the 1947 unilateral and concordant proclamations of Chile and Peru. When Chile, Ecuador and Peru met to conclude the Santiago Declaration in 1952, both Chile and Peru had already, in 1947, unilaterally proclaimed concordant maritime zones of 200 nautical miles[839].

4.56. Peru had specifically indicated in its Supreme Decree of 1947 the method by which its maritime zone was to be measured. It was to be measured "following the line of the geographical parallels [*medida siguiendo la línea de los paralelos geográficos*]"[840]. This is acknowledged in Peru's Memorial, where the measurement of Peru's maritime zone as proclaimed in 1947 is described as follows: "at each point on the coast a line 200-mile long would be drawn seaward along the geographical line of latitude, so that there would be a 'mirror'

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838 See *Anglo-Iranian Oil Co. case, Jurisdiction, Judgment, I.C.J. Reports 1952*, pp. 105-107.

839 See Chapter II, Section 3, above.

840 1947 Peruvian Supreme Decree, **Annex 6 to the Memorial**, Art. 3.

coastline parallel to the real coastline"[841]. As discussed at paragraphs 2.31-2.37 above, since Peru measured its maritime zone in this fashion, Peru's maritime zone could not extend northwards of the parallel of latitude passing through the point where Peru's land boundary with Ecuador reaches the sea, and it could not extend southwards of the parallel of latitude passing through the point where Peru's land boundary with Chile reaches the sea.

4.57. Chile and Peru exchanged formal notifications of their 1947 proclamations[842]. Neither State protested the other's zone. (Nor did Ecuador protest Peru's zone.) As a result, five years later at the Santiago Conference of 1952, the Parties were acting on the concordant basis that their respective maritime zones were bounded by a parallel of latitude. The question of lateral boundaries of the States parties' maritime zones under the Santiago Declaration was therefore not controversial. Peru was the only State party with which both Chile and Ecuador shared a maritime boundary. The question of lateral maritime boundaries could be, and was in fact, dealt with in summary terms in the Santiago Declaration.

Section 5. Location and Course of the Maritime Boundary

4.58. Having established that there is an agreed maritime boundary between Chile and Peru, the next matter is to identify the course of that boundary. The text of the Santiago Declaration provides the answer. The boundary is "the parallel at the point at which the land frontier of the States concerned reaches the sea"[843].

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841 Memorial, para. 4.58.

842 See paras 2.41-2.42 above.

843 Santiago Declaration, **Annex 47 to the Memorial**, Art. IV.

4.59. The Santiago Declaration did not specify coordinates for the precise point at which the land boundary reaches the sea; nor did it need to do so as a matter of legal efficacy. As between the Parties, that point was in fact determined without controversy or difficulty. The Parties found it desirable to use a stable reference point to mark the parallel of latitude constituting their maritime boundary. They used Hito No. 1 as that reference point.

4.60. The reasons for which Hito No. 1 is used as the reference point for the maritime-boundary parallel are straightforward and have already been noted. As discussed more fully above, at paragraphs 2.9-2.16, the Parties agreed in 1930 that the "demarcated boundary line starts from the Pacific Ocean at a point on the seashore [*línea frontera demarcada parte del océano Pacífico en un punto en la orilla del mar*]"[844]. The *hitos* used to demarcate the boundary were listed in an agreed table which described the coordinates and physical characteristics of all the *hitos*. The *hitos* were listed "starting in order from the Pacific Ocean [*partiendo ordenamente del océano Pacífico*]"[845]. Hito No. 1 was listed as being placed on the "seashore [*orilla del mar*]"[846]. Hito No. 1 was accordingly the natural reference point for the Parties to use in implementing the legal expression "the point at which the land frontier of the States concerned reaches the sea" in Article IV of the Santiago Declaration.

4.61. The 1968-1969 signalling agreements and the actual erection of alignment towers in 1972 were a specific response by the Parties to difficulties which had been experienced by mariners in identifying at sea the precise parallel of latitude constituting the maritime boundary. In that process Chile and Peru

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844 1930 Final Act, **Annex 54 to the Memorial**, second paragraph.

845 1930 Final Act, **Annex 54 to the Memorial**, the list of *hitos*; repeated in Act of Plenipotentiaries, **Annex 55 to the Memorial**.

846 Act of Plenipotentiaries, **Annex 55 to the Memorial**; see the description of the first *hito*.

jointly verified the exact physical location of Hito No. 1 and constructed two lighthouses to signal the parallel of latitude of Hito No. 1[847].

4.62. In the 1968 Minutes, signed by representatives of both States, Chile and Peru agreed that "the parallel of the maritime frontier" that was to be marked by the lighthouses was "that which corresponds to the geographical location. . .for Boundary Marker No. 1"[848]. In the 1969 Act the Parties were just as explicit. They agreed that lighthouses would be installed "in order to signal the maritime boundary and physically to give effect to the parallel that passes through. . .Boundary Marker number one"[849]. The 1930 Final Act specifies that Hito No. 1 had an astronomical latitude of 18° 21' 03" S. When referred to the WGS84 datum, Hito No. 1 is at latitude 18° 21' 00" S.

4.63. As a matter of law, where two States act jointly to resolve any difficulties with identifying the actual physical location of an agreed boundary line, and in this process the States confirm the precise location of the boundary, such confirmation constitutes an authentic interpretation of the original boundary agreement[850]. The 1968-1969 agreements and the signalling process as a whole confirmed Hito No. 1 as the reference point for the parallel of latitude constituting the maritime boundary between the Parties. The Parties have used the parallel of latitude of Hito No. 1 to control entry into their respective maritime zones and as the maritime boundary for the capture and prosecution of foreign vessels, as described in Chapter III, Section 4(A) and (B), above.

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847 See Chapter III, Section 2, above.

848 1968 Minutes, **Annex 59 to the Memorial**, penultimate paragraph.

849 1969 Act, **Annex 6**, first paragraph.

850 See *Case concerning the location of boundary markers in Taba between Egypt and Israel*, Award, 29 September 1988, *RIAA*, Vol. XX, pp. 56-57, para. 210; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 23, para. 45. Also see *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 34.

Section 6. Maritime Zones Delimited by the Boundary between Chile and Peru

4.64. The States parties claimed, in Article II of the Santiago Declaration, "exclusive sovereignty and jurisdiction over the sea along the coasts of their respective countries to a minimum distance of 200 nautical miles from these coasts."[851] The States parties added, in Article III of the Santiago Declaration, that this claim encompassed "exclusive sovereignty and jurisdiction over the seabed and the subsoil thereof." The "sea", "the seabed and the subsoil thereof", "along the coasts of their respective countries to a minimum distance of 200 nautical miles from these coasts" were the object of the delimitation between Chile, Ecuador and Peru in 1952.

4.65. The Parties' current maritime zones are discussed in detail at paragraphs 2.164-2.177 above. It is simply recalled here that Chile has a 12M territorial sea, a 24M contiguous zone, a 200M EEZ and a continental shelf[852]. These zones are all consistent with UNCLOS, to which Chile is a party. Peru is not a party to UNCLOS, and claims a unitary maritime zone of 200 nautical miles, which it calls a "maritime dominion". In this unitary 200M zone Peru claims to exercise full sovereignty and jurisdiction from the subsoil of the seabed to the airspace above.

4.66. Since the States parties to the Santiago Declaration claimed plenitude of sovereignty and jurisdiction, and delimited that claim *inter se*, they established an all-purpose maritime boundary. That boundary applies to any and all more specific zones that are from time to time claimed by the States parties in exercise of their sovereignty and jurisdiction. Their delimitation under the Santiago

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851 Santiago Declaration, **Annex 47 to the Memorial**, Art. II.

852 Also see para. 2.177 above with respect to Chile's continental shelf.

Declaration therefore remains effective, and it covers all the maritime zones now actually claimed by each of the Parties.

4.67. In its Memorial Peru asserts that the dividing line between the maritime spaces of Chile and Peru is only a "policing limit" between the "limited functional jurisdiction in respect of fisheries" claimed by the States parties to the Lima Agreement[853]. Yet the States parties to the Lima Agreement were not concerned with claiming jurisdiction. That had already been done two years earlier in the Santiago Declaration, in which Chile, Ecuador and Peru had each claimed exclusive jurisdiction and sovereignty to a seaward distance of at least 200 nautical miles. The Lima Agreement was solely concerned with creating a zone of tolerance to deal with "innocent and inadvertent violations of the maritime frontier"[854]. The Lima Agreement recounted that small fishing vessels were mainly responsible for these violations, and the 10M zone of tolerance on either side of each relevant maritime boundary was designed for their benefit[855].

4.68. The Lima Agreement did not establish a "policing limit" between Chile and Peru. It did not establish any limit at all. Rather, the Lima Agreement established a zone of tolerance on either side of a boundary — "maritime frontier" — that was acknowledged already to exist in unqualified terms. The Lima Agreement might be said to be "functional" in the sense that it was concerned with a zone of tolerance for fishing vessels, but what matters here is that creating that zone was an exercise of the sovereignty and jurisdiction already claimed in the Santiago Declaration two years earlier. The provisions of the Lima Agreement were specifically stated "not in any way to abrogate"[856] the

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853 See Memorial, para. 4.4.

854 Lima Agreement, **Annex 50 to the Memorial**, first recital and Art. 2.

855 *Ibid*.

856 Lima Agreement, **Annex 50 to the Memorial**, Art. 4.

Santiago Declaration. The Lima Agreement did not affect, but rather confirmed, the States parties' claims to exclusive jurisdiction and sovereignty, as it confirmed the existing delimitation of those all-encompassing claims under the Santiago Declaration.

4.69. It follows from the foregoing that there is an agreed all-purpose single maritime boundary between the Parties[857].

Section 7. Stability of Agreed Boundaries

4.70. The final question to address is whether there is any basis on which the agreed maritime boundary can be set aside. That question is not raised in Peru's Memorial, and is briefly addressed here for the sake of completeness.

4.71. The fundamental principle is that once two States have agreed their maritime boundary, later unilateral opposition to that agreement by one of its parties does not undermine the boundary's ongoing validity. A boundary treaty is subject to the normal rule of *pacta sunt servanda*: it "is binding upon the parties to it and must be performed by them in good faith"[858].

4.72. Stability of boundaries is in itself a cardinal rule of international law[859]. As the Court said in the *Case concerning the Temple of Preah Vihear*: "In general, when two countries establish a frontier between them, one of the

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857 This is noted in, for example, E. Jiménez de Aréchaga, "South American Maritime Boundaries" in J. I. Charney and L. M. Alexander (eds), *International Maritime Boundaries, Vol. I*, 1993, **Annex 279**, p. 287; and in *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Memorial submitted by the Kingdom of Denmark on 31 July 1989, *I.C.J. Pleadings, Vol. I*, para. 364.

858 Vienna Convention, Art. 26.

859 See *Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, I.C.J. Reports 1978*, pp. 35-36, para. 85; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 37, para. 72.

primary objects is to achieve stability and finality"[860]. The Court also made clear in *Aegean Sea Continental Shelf* that "the same element of stability and permanence" applies to maritime boundaries as to land boundaries[861]. Further, no rule of international law permits a State unilaterally to resile from an agreement establishing a land or maritime boundary because of subsequent legal developments which, had they occurred by the time of the boundary agreement, might have helped that State obtain a more favourable boundary in the agreement. Much less does one State's view that a previously agreed land[862] or maritime[863] boundary is "inequitable" create a valid basis for that boundary to be set aside. Once a boundary is validly agreed, the boundary may be altered only by consent of the parties to the boundary agreement. In sum, the validity of a boundary agreement falls to be assessed against the circumstances at the time of its conclusion. If it were otherwise, the stability of boundaries, which are an elemental component of international relations, would be constantly at risk.

4.73. In a number of places in its Memorial, Peru asserts that the Santiago Declaration and the Lima Agreement were "provisional"[864] or "temporary"[865]. Nowhere are these adjectival assertions supported. They are present-day unilateral characterizations without foundation in the Santiago Declaration, the Lima Agreement or the relevant subsequent State practice. Like the Santiago Declaration, many treaties delimiting boundaries contain no mention of their

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860 *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 34.

861 See *Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, I.C.J. Reports 1978*, pp. 35-36, para. 85.

862 See *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J Reports 1986*, p. 633, para. 149.

863 See *Case concerning the Delimitation of the Maritime Boundary between Guinea-Bissau and Senegal,* Award, 31 July 1989, *RIAA*, Vol. XX, p. 149, para. 79.

864 See Memorial, paras 2.31, 4.4, 4.9(b), 4.71 and 4.106.

865 Memorial, para. 4.95.

duration. Consistent with the principle of stability of boundaries, boundary agreements that contain no express provision as to their duration are to be interpreted as creating boundaries of indefinite duration[866]. Even if an agreement creating an international boundary lapses — which the Santiago Declaration has not, even on Peru's view — the boundary itself remains. This is because the boundary as a juridical fact takes on a legal existence separate from the agreement that created it[867].

4.74. The foregoing rules on stability of existing boundaries were uncontroversial at the Third Conference on the Law of the Sea[868].

4.75. A major issue at that Conference was the delimitation of the continental shelf and EEZ. The issue of "equitable" delimitation was considered over many sessions of the Conference. The primary rule was agreed in UNCLOS to be that such delimitations were to be "effected by agreement"[869] between the States concerned. This treaty provision reflected the fundamental principle, which had been previously acknowledged by the Court[870], that delimitation in accordance with equitable principles is to be effected by agreement. This is not a hortatory directive. UNCLOS provides that delimitation "*shall* be effected by agreement"[871] (emphasis added). Similarly, Article 6 of the 1958 Geneva

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866 See *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 37, para. 72.

867 See *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 37, paras 72-73; *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, I.C.J. Judgment, 13 December 2007*, p. 29, para. 89.

868 See S. Nandan and S. Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, *Vol. II*, 2002-2003, **Annex 295**, pp. 984-985, para. 83.19(e).

869 See UNCLOS, Arts 74(1) and 83(1).

870 *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 53, para. 101(C)(1); and see paras 2.161-2.162 above.

871 UNCLOS, Arts 74(1) and 83(1).

Convention on the Continental Shelf required that boundaries between States with opposite or adjacent continental shelves "shall be determined by agreement between them"[872].

4.76. In the Third Conference on the Law of the Sea, there were significant differences between, on the one hand, those States which advocated equidistance, as modified by special circumstances, as the approach to be taken to the delimitation of the continental shelf and EEZ, and on the other hand, States which placed primary importance on equitable principles. However great that disagreement, "[c]ommon to both approaches was recognition that delimitation by agreement [was] the most satisfactory way of resolving issues arising from overlapping claims"[873].

4.77. UNCLOS expressly confirms that boundaries agreed prior to its coming into force are to be respected, in the following terms:

> "Where there is an agreement in force between the States concerned, questions relating to the delimitation [of the exclusive economic zone or the continental shelf] shall be determined in accordance with the provisions of that agreement."[874]

4.78. Again, the preservation of existing agreements was not a controversial question. If UNCLOS had not preserved pre-existing maritime boundary agreements, a number of States that are now party to UNCLOS would have refused to adhere to it.

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872 Convention on the Continental Shelf, signed at Geneva on 29 April 1958, 499 *UNTS* 311 (entered into force on 10 June 1954), Art. 6.

873 S. Nandan and S. Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A commentary, Vol. II*, 2002-2003, **Annex 295**, p. 954.

874 UNCLOS, Arts 74(4) and 83(4).

4.79. Respect for the stability of boundaries gives rise to the interpretive presumption enunciated by the Permanent Court in its *Treaty of Lausanne* Advisory Opinion:

> "[A]ny article designed to fix a frontier should, if possible, be so interpreted that the result of the application of its provisions in their entirety should be the establishment of a precise, complete and definitive frontier."[875]

4.80. In the *Libya/Chad Territorial Dispute* case the Court relied on the authority of the *Treaty of Lausanne* Opinion[876] and held that the boundary treaty before the Court "was aimed at settling all the frontier questions, and not just some of them"[877]. When Article IV of the Santiago Declaration, read with the Lima Agreement, is interpreted in good faith following the interpretive process set forth in this Chapter, there is an abundance of material for the Court to preserve the stability of boundaries by finding that the maritime boundary between Chile and Peru has been fully and definitively delimited by agreement, that the agreement delimits all the maritime zones claimed by the Parties; that the agreed boundary is the parallel of latitude of Hito No. 1; and that, having made an agreement on these matters, Peru cannot now unilaterally challenge a long-settled boundary.

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875 See *Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq), Advisory Opinion, 1925, P.C.I.J., Series B, No. 12*, p. 20.

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

877 *Ibid*., p. 24, para. 48.

CHAPTER V
SUMMARY

5.1. This Chapter contains a concise summary of the principal aspects of Chile's position and reasoning, in compliance with Practice Direction II of the Court.

5.2. In 1947 both Chile and Peru issued proclamations claiming sovereignty over a maritime zone having a seaward breadth of 200 nautical miles. Both texts envisaged possible future extensions of the maritime zones proclaimed further seaward. Both texts addressed the perimeter of the maritime zones proclaimed and, in the result, the zones were spatially concordant. In particular, the 1947 Peruvian Supreme Decree explicitly set forth that Peru's maritime zone was to be measured "following the line of the geographic parallels", thus establishing its perimeter. Using this method, Peru's zone was to be bounded in the south by a line following the parallel of latitude corresponding to the point where Peru's land boundary with Chile reaches the sea. Peru sent its proclamation to Chile. Chile acknowledged it without objection.

5.3. The Santiago Declaration of 1952 is a multilateral treaty which recognized an entitlement of each State party (Chile, Ecuador and Peru) to a maritime zone of "exclusive sovereignty and jurisdiction" to a seaward distance of at least 200 nautical miles. In Article IV of the Santiago Declaration the States parties agreed that the "general maritime zone belonging to another of those countries" commenced at the "parallel at the point at which the land frontier of the States concerned reaches the sea". Thus the Santiago Declaration established that Peru had the same lateral maritime boundaries with its neighbours as Peru itself had claimed five years earlier.

5.4. In 1954 Chile, Ecuador and Peru again gathered to defend jointly their extended maritime claims. They recorded in the agreed minutes of their conference that they "deemed the matter on the dividing line of the jurisdictional

waters settled and that said line was the parallel starting at the point at which the land frontier between both countries reaches the sea". At that same conference the three States concluded the Agreement Relating to a Special Maritime Frontier Zone. That agreement, referred to throughout this Counter-Memorial as the Lima Agreement, refers to the "maritime frontier" in its title and in its recitals. In Article 1 it refers to "the parallel which constitutes the maritime boundary between the two countries". These acknowledgements of the existing maritime boundary in the Lima Agreement were "deemed to be an integral and supplementary part of" the Santiago Declaration. In concluding the Lima Agreement, Chile, Peru and Ecuador were giving effect to the Santiago Declaration, and confirming that the boundaries between all three States parties followed a parallel of latitude "at the point at which the land frontier of the States concerned reaches the sea" in accordance with Article IV of the Santiago Declaration.

5.5. As a matter of fact, both Chile and Peru have acknowledged and enforced their agreed maritime boundary. They have done so by unilateral action and also on a bilateral basis, over the course of half a century. The relevant practice of Chile and Peru is collated in Chapter III of this Counter-Memorial. Two prominent examples of recognition of the boundary are the following:

(a) In its 1955 Supreme Resolution Peru stated that its maritime zone "referred to in the Supreme Decree of 1 August 1947 and the Joint Declaration signed in Santiago on 18 August 1952"–

> "1 – shall be limited at sea by a line parallel to the Peruvian coast and at a constant distance of 200 nautical miles from it;
>
> 2 – In accordance with clause IV of the Declaration of Santiago, the said line may not extend beyond that of the corresponding parallel at the point where the frontier of Peru reaches the sea."

(b) In 1968 and 1969 Chile and Peru agreed to take practical measures to signal for mariners the precise physical location of their maritime boundary. A Chile-Peru Mixed Commission of 1968-1969 recorded that its task had been to "physically mark the parallel that passes through. . .Hito No. 1". This parallel was to be physically marked "in order to signal the maritime boundary". The parallel constituting the maritime boundary was agreed to have an astronomical latitude of 18° 21' 03" S. In the WGS84 datum this is latitude 18° 21' 00" S.

5.6. Not only have Chile and Peru recognized and enforced their agreed maritime boundary over time; the existence of that agreed boundary has also been consistently recognized by the United Nations, through its Division for Ocean Affairs and the Law of the Sea, by third States and by a plethora of respected publicists from a diversity of legal traditions.

5.7. In addition to its claim to a maritime area within Chile's 200M limit, Peru also claims an area of high seas, referred to throughout this Counter-Memorial as the *alta mar* area. Peru asks the Court to extend Peru's "maritime dominion" into this high-seas area, which is seaward of Chile's EEZ and continental shelf. Yet under the Santiago Declaration the parallel of latitude which constitutes the maritime boundary also constitutes an agreed lateral limit beyond which neither State can claim any maritime zone, even where the other State has no abutting maritime zone. Peru's claim to the *alta mar* area is therefore precluded by the Santiago Declaration.

5.8. Peru seeks to resile from an agreement of 1952, which has conferred a stable maritime boundary upon the Parties over a long period, and whose roots are in concordant unilateral proclamations made by the Parties in 1947. The rules of *pacta sunt servanda* and stability of boundaries prevent Peru from doing so. Article 38(1) of the Court's Statute provides that the Court shall apply international conventions applicable between the contesting States. The governing agreement in this case sets forth the maritime boundary which was

agreed between Chile and Peru in 1952 and then confirmed on numerous subsequent occasions over the course of more than 50 years.

CHAPTER VI
SUBMISSIONS

Chile respectfully requests the Court to:

(a) DISMISS Peru's claims in their entirety;

(b) ADJUDGE AND DECLARE that:

(i) the respective maritime zone entitlements of Chile and Peru have been fully delimited by agreement;

(ii) those maritime zone entitlements are delimited by a boundary following the parallel of latitude passing through the most seaward boundary marker of the land boundary between Chile and Peru, known as Hito No. 1, having a latitude of 18° 21' 00" S under WGS84 Datum; and

(iii) Peru has no entitlement to any maritime zone extending to the south of that parallel.

Alberto van Klaveren Stork
Agent of the Republic of Chile
9 March 2010

LIST OF ANNEXES
(VOLUMES II - V)

VOLUME II

TREATIES AND INTER-STATE ACTS

Annex 9.	Agreement Concerning Delimitation of Marine and Submarine Areas and Maritime Co-operation between the Republics of Colombia and Ecuador, signed at Quito on 23 August 1975
Annex 10.	Reciprocal Fisheries Agreement between the Government of the United States of America and the Government of Canada, signed at Washington D.C. on 24 February 1977
Annex 11.	Memorandum of Understanding between the Government of the Republic of Indonesia and the Government of Australia Concerning the Implementation of a Provisional Fisheries Surveillance and Enforcement Arrangement, signed at Jakarta on 29 October 1981
Annex 12.	Agreement on the Protection of the Marine Environment and the Coastal Area of the South-East Pacific, signed at Lima on 12 November 1981
Annex 13.	The Protocol for the Protection of the South-East Pacific against Pollution from Land-based Sources, signed at Quito on 22 July 1983
Annex 14.	Declaration of Viña del Mar of 10 February 1984
Annex 15.	Treaty of Peace and Friendship between Chile and Argentina, signed at Vatican City on 29 November 1984
Annex 16.	Agreement between the Government of Japan and the Government of the Union of Soviet Socialist Republics on Co-operation in the Field of Fisheries, signed at Moscow on 12 May 1985
Annex 17.	Agreement between the Libyan Arab Socialist People's Jamahariya and the Republic of Tunisia to Implement the Judgment of the International Court of Justice in the Tunisia/Libya Continental Shelf Case, signed at Benghazi on 8 August 1988
Annex 18.	Protocol for the Conservation and Administration of the Protected Marine and Coastal Areas of the South-East Pacific, signed at Paipa on 21 September 1989
Annex 19.	Protocol for the Protection of the South-East Pacific against Radioactive Contamination, signed at Paipa on 21 September 1989

Annex 20.	Protocol on the Programme for Regional Study of the Phenomenon "El Niño" in the South-East Pacific, signed at Callao on 6 November 1992
Annex 21.	Final Minutes of Understanding of the Fourth Bilateral Meeting between the Commanders of the Frontier Naval Zones of Chile and Peru, 13 July 1995
Annex 22.	Interim Accord between Greece and the Former Yugoslav Republic of Macedonia, signed at New York on 13 September 1995
Annex 23.	Act of Brasilia, signed by the Presidents of Peru and Ecuador at Brasilia on 26 October 1998
Annex 24.	Agreement between the Government of the Republic of Peru and the Government of the Republic of Chile for the Reciprocal Promotion and Protection of Investments, signed at Lima on 2 February 2000
Annex 25.	Framework Agreement for the Conservation of the Living Marine Resources on the High Seas of the South-East Pacific, signed at Santiago on 14 August 2000 (not in force) (also known as the "Galápagos Agreement")
Annex 26.	Minutes of the Fifteenth Roundtable Discussions between the High Commands of the Armed Forces of Chile and Peru, signed by the Chief of Staff of the National Defence Force of Chile and the Chief of Staff of the Air Force of Peru on 29 September 2000
Annex 27.	Agreement on Provisional Arrangements for the Delimitation of the Maritime Boundary between the Republic of Tunisia and the People's Democratic Republic of Algeria, signed at Algiers on 11 February 2002
Annex 28.	Final Minutes of Understanding of the Eleventh Bilateral Meeting between the Commanders of the Frontier Naval Zones of Chile and Peru, 16 August 2002
Annex 29.	Final Minutes of Understanding of the Twelfth Bilateral Meeting between Commanders of the Frontier Naval Zones of Chile and Peru between 21 and 25 July 2003

Annex 42.	Intervention by Dr. García Sayán of Peru in the general debate in the Second Committee of the First United Nations Conference on the Law of the Sea, 13 March 1958
Annex 43.	Intervention by Mr. Arias-Schreiber of Peru during the 30th Meeting of the Second Session of the Second Committee of the Third United Nations Conference on the Law of the Sea, 7 August 1974 at 11.10 a.m.
Annex 44.	Intervention by Mr. Arias-Schreiber of Peru during the 45th Meeting of the Second Session of the Second Committee of the Third United Nations Conference on the Law of the Sea, 28 August 1974 at 11.00 a.m.
Annex 45.	Intervention by Mr. Bákula of Peru during the 48th Meeting of the Second Session of the Second Committee of the Third United Nations Conference on the Law of the Sea, 2 May 1975 at 3.30 p.m.
Annex 46.	Letter No. 804/124 of 20 August 1979 from the Heads of Delegation of Chile, Colombia, Ecuador and Peru to the President of the Third United Nations Conference on the Law of the Sea
Annex 47.	Intervention by Mr. Arias-Schreiber of Peru during the 118th Meeting of the Resumed Eighth Session of the Plenary Meetings of the Third United Nations Conference on the Law of the Sea, 23 August 1979 at 4.35 p.m.
Annex 48.	Statement by the Delegation of Peru at the Third United Nations Conference on the Law of the Sea, 4 April 1980
Annex 49.	Note verbale of 9 March 1981 from the Heads of Delegation of Chile, Colombia, Ecuador and Peru to the President of the Third United Nations Conference on the Law of the Sea, transmitting the Cali Declaration of 24 January 1981
Annex 50.	Intervention by Mr. Arias-Schreiber of Peru during the 182nd Plenary Meeting of the Third United Nations Conference on the Law of the Sea, 30 April 1982 at 3.20 p.m.
Annex 51.	Statement by the CPPS to the Third United Nations Conference on the Law of the Sea

VOLUME III

CORRESPONDENCE BETWEEN STATES AND BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS

Annex 63.	Note of 29 September 1954 from the Legation of Norway in Chile to the Ministry of Foreign Affairs of Peru
Annex 64.	Note No. 57/1954 of 4 October 1954 from the Legation of Sweden in Peru to the Minister of Foreign Affairs of Peru
Annex 65.	Note No. 197 of 4 October 1954 from the Danish chargé d'affaires in Peru to the Minister of Foreign Affairs of Peru
Annex 66.	Memorandum No. 3883 of 28 October 1954 from the Legation of the Netherlands in Peru to the Ministry of Foreign Affairs of Peru
Annex 67.	Note No. 276 of 4 March 1955 from the United States Ambassador to Peru to the Minister of Foreign Affairs of Peru, enclosing an aide-mémoire
Annex 68.	Note No. 34 (1271/11/54) of 31 August 1954 from the British Ambassador to Peru to the Minister of Foreign Affairs of Peru
Annex 69.	Note No. 5-4-M/29 of 20 April 1955 from the Peruvian Embassy in Chile to the Ministry of Foreign Affairs of Chile
Annex 70.	Memorandum of 23 June 1955 from the Peruvian Embassy in Ecuador to the Government of Ecuador
Annex 71.	Memorandum of 14 August 1955 by the Chilean Embassy in Ecuador: "Observations on the Ecuadorean draft of the Protocol of Accession to the Agreements of Santiago on Maritime Zone"
Annex 72.	Note No. 142 of 20 June 1961 from the Chilean Ambassador to Peru to the Minister of Foreign Affairs of Peru
Annex 73.	Memorandum No. 5-4-M/64 of 20 December 1962 from the Peruvian Embassy in Chile to the Ministry of Foreign Affairs of Chile
Annex 74.	Note No. V.1000-491 of 20 November 1964 from the Harbour Master of Mollendo-Matarani to the Maritime Governor of Arica
Annex 75.	Memorandum of 8 June 1966 from the Peruvian Embassy in Chile to the Ministry of Foreign Affairs of Chile

Annex 88.	Fax No. 024 of 25 February 1999 from the Deputy Harbour Master of Arica to the Consul of Peru in Arica
Annex 89.	Fax No. 408/99 of 24 September 1999 from the Harbour Master of Arica to the Harbour Master of Ilo and the Consul General of Peru in Arica
Annex 90.	Letter No. 8-10-B-C/0150-2000 of 3 April 2000 from the Consul General of Peru in Arica to the Harbour Master of Arica
Annex 91.	Letter No. 8-10-B-C/0169-2000 of 14 April 2000 from the Consul General of Peru in Arica to the Harbour Master of Arica
Annex 92.	Note No. 081 of 26 April 2000 from the United States Embassy in Chile to the Ministry of Foreign Affairs of Chile
Annex 93.	Fax No. 226-00 of 28 June 2000 from the Harbour Master of Ilo to the Harbour Master of Arica
Annex 94.	Letter No. 8-10-B-C/0353-2000 of 5 September 2000 from the Consul General of Peru in Arica to the Harbour Master of Arica
Annex 95.	Fax No. 417 of 4 October 2000 from the Harbour Master of Arica to the Harbour Master of Ilo
Annex 96.	Letter No. 8-10-B-C/0354-2000 of 6 October 2000 from the Consul General of Peru in Arica to the Harbour Master of Arica
Annex 97.	Letter No. 8-10-B-C/0378-2000 of 19 October 2000 from the Consul General of Peru in Arica to the Harbour Master of Arica
Annex 98.	Fax No. 211/08 of 9 August 2001 from the Harbour Master of Arica to the Harbour Master of Ilo
Annex 99.	Letter No. 8-10-B-C/323-2001 of 10 August 2001 from the Consul General of Peru in Arica to the Harbour Master of Arica
Annex 100.	Aide-mémoire of 25 January 2002 from the Ministry of Foreign Affairs of Chile to the Peruvian chargé d'affaires in Chile, transcribed in a message of the same date from the Ministry of Foreign Affairs of Chile to the Chilean Embassy in Peru

Annex 113.	Confidential Note No. 6 of 31 January 1955 from the Minister of Foreign Affairs to the Chilean Ambassador to Peru
Annex 114.	Confidential Note No. 94/15 of 3 February 1955 from the Chilean Ambassador to Peru to the Minister of Foreign Affairs
Annex 115.	Note No. 2890 of 25 March 1955 from the Minister of Foreign Affairs to the Director of the Official Gazette
Annex 116.	Cable No. 33 of 31 March 1955 from the Chilean Ambassador to Peru to the Minister of Foreign Affairs
Annex 117.	Decree No. 130 of 11 February 1959: Regulation on Permits for Fishing by Foreign Vessels in Chilean Territorial Waters
Annex 118.	Letter No. 12115/1 of 10 February 1961 from the Maritime Governor of Arica sent to, *inter alios*, fishing companies INDO and EPERVA
Annex 119.	Letter No. 12115/2 of 11 February 1961 from the Maritime Governor of Arica to the President of the Union of Fishermen in Arica
Annex 120.	Confidential Letter No. 1043/72 of 27 September 1961 from the Chilean chargé d'affaires in Peru to the Minister of Foreign Affairs
Annex 121.	Note No. 12115/5 of 30 January 1963 from the Maritime Governor of Arica to the Director of the Coast and Merchant Navy
Annex 122.	Cable No. 48 of 23 March 1966 from the Ministry of Foreign Affairs to the Chilean Embassy in Peru
Annex 123.	Aerogram No. 14 of 22 May 1967 from the Consul General of Chile in Tacna to the Ministry of Foreign Affairs
Annex 124.	Instrument of ratification of the Agreement Relating to a Special Maritime Frontier Zone signed by the President of Chile on 21 September 1967
Annex 125.	Note No. 397 of 26 September 1967 from the Minister of National Defence to the Minister of Foreign Affairs

Annex 126.	Note No. 21 of 2 November 1967 from the Governor of Arica to the Minister of the Interior
Annex 127.	Statement by Mr. Palza on 3 December 1969 in the Chamber of Deputies on the "Installation in Arica (Tarapaca) of the alignment lighthouse for demarcating the maritime boundary zone with Peru"
Annex 128.	Note No. 12115/6 of 12 May 1971 from the Maritime Governor of Arica to the Director of International Relations of the Ministry of Foreign Affairs
Annex 129.	Notice to Mariners No. 57 of 1972 issued by SHOA
Annex 130.	Notice to Mariners No. 152 of 1972 issued by SHOA
Annex 131.	Decree No. 711 of 22 August 1975 approving the Regulation on the Control of Marine Scientific and Technological Investigations in the maritime zone of national jurisdiction
Annex 132.	Decree No. 1,190 of 29 December 1976 on the Organization of the Maritime Search and Rescue Service of the Chilean Navy
Annex 133.	SHOA, *Derrotero de la Costa de Chile, Vol. 1*: *From Arica to Chacao Canal*, 6th edn, 1980
Annex 134.	Decree No. 408 of 17 December 1986 on the Prohibition of Use of Fishing Equipment for Dragging and Fencing in the Indicated Area and Repealing the Specified Decree
Annex 135.	SHOA, *Derrotero de la Costa de Chile*, *Vol. 1*: *From Arica to Chacao Canal*, 7th edn, 1988
Annex 136.	Supreme Decree No. 453 of 3 May 1989 Creating the Fourth Naval Zone
Annex 137.	Law No. 18,892 (as amended), General Law on Fisheries and Aquaculture, consolidated text published in Decree No. 430 of 21 January 1992
Annex 138.	Decree No. 704 of 29 October 1990 modifying Decree No. 1190 of 29 December 1976 on the Organization of the Maritime Search and Rescue Service of the Navy of Chile

Annex 139.	Extracts of the Logbook of the Chilean Navy patrol boat *Salinas*, for 30 March 1995
Annex 140.	SHOA, *Derrotero de la Costa de Chile*, *Vol. 1*: *From Arica to Chacao Canal*, 8th edn, 1995
Annex 141.	Extracts of the Logbook of the Chilean Navy patrol boat *Machado*, for 26 February and 25 March 1996
Annex 142.	SHOA Resolution No. 13270/A-21 VRS of 1 March 1996
Annex 143.	SHOA Resolution No. 13270/64/VRS of 22 December 1997
Annex 144.	SHOA Resolution No. 13270/71/VRS of 26 November 1999
Annex 145.	SHOA Resolution No. 13270/72/VRS of 26 November 1999
Annex 146.	SHOA Resolution No. 13270/37/VRS of 9 June 2000
Annex 147.	SHOA Resolution No. 13270/63/VRS of 3 October 2000
Annex 148.	SHOA Resolution No. 13270/69/VRS of 18 October 2000
Annex 149.	SHOA, *Derrotero de la Costa de Chile*, *Vol. 1: From Arica to Chacao Canal*, 9th edn, 2001
Annex 150.	SHOA Resolution No. 13270/6/VRS of 11 January 2002
Annex 151.	SHOA Resolution No. 13270/4/VRS of 12 January 2000
Annex 152.	Extracts of the Logbook of the Chilean Navy patrol boat *Arica*, for 12 November and 9 December 2002
Annex 153.	*Libro de la Defensa Nacional de Chile* [*Defence White Book of Chile*], 2002
Annex 154.	SHOA Resolution No. 13270/04/113/VRS of 23 July 2003
Annex 155.	SHOA Resolution No. 13270/04/266/VRS of 22 December 2004
Annex 156.	SHOA Resolution No. 13270/04/263/VRS of 28 September 2005

Annex 157.	Extracts of the Logbook of the Chilean Navy patrol boat *Iquique*, for 27, 28 and 29 June 2006
Annex 158.	Fax No. 555 of 5 September 2007 from the Chilean Air Force Attaché in Peru to the Directorate of International Relations of the Air Force of Chile; Fax No. 654 of 12 October 2007 from the Chilean Air Force Attaché in Peru to the Directorate of International Relations of the Air Force of Chile; Fax No. 697-A of 13 November 2007 from the Chilean Air Force Attaché in Peru to the Directorate of International Relations of the Air Force of Chile
Annex 159.	SHOA, *List of Lights,* 17th edn, 2008

VOLUME IV

OFFICIAL TEXTS, OFFICIAL STATEMENTS, OFFICIALLY AUTHORIZED TEXTS AND INTERNAL DOCUMENTS: PERU

Annex 170.	Supreme Resolution No. 23 of 12 January 1955 as published by the Ministry of Foreign Affairs, *Instrumentos Nacionales e Internacionales sobre Derecho del Mar*, 1971
Annex 171.	Regulation on the Visit and Stay of Foreign Warships at National Ports and Transit through the Waters under the Sovereignty and Jurisdiction of Peru, originally approved by Supreme Decree No. 004-77-MA of 22 March 1977 and modified by Supreme Decree No. 080-93-MGP of 26 October 1993
Annex 172.	Directorate of Hydrography and Navigation of the Navy, *Derrotero de la Costa del Perú, Vol. II*, 1982
Annex 173.	J.A. Benavides Estrada, *Geografía del Perú y del Mundo*, 1984, approved by Resolution No. 0185 of 17 April 1984 of the Ministry of Foreign Affairs
Annex 174.	Supreme Decree No. 002-87-MA of 11 June 1987 approving the Regulation of Captaincies and Maritime, Fluvial and Lacustrine Activities
Annex 175.	Directorate of Hydrography and Navigation of the Navy, *Derrotero de la Costa del Perú, Vol. II*, 2nd edn, 1988
Annex 176.	Resolution No. 006-89-M of 5 June 1989 by the Harbour Master of Ilo
Annex 177.	Resolution No. 007-89-M of 5 June 1989 by the Harbour Master of Ilo
Annex 178.	Directorial Resolution No. 347-91-DC/MGP of 20 December 1991 of the Directorate-General of Captaincies and Coastguard
Annex 179.	Political Constitution of Peru, 29 December 1993
Annex 180.	Directorial Resolution No. 0313-94/DCG of 23 September 1994 of the Directorate-General of Captaincies and Coastguard
Annex 181.	Directorate of Hydrography and Navigation of the Navy, *List of Lights*, 9th edn, 1998
Annex 182.	Statement by the Minister of Foreign Affairs, 13 November 1999

Annex 183.	Peruvian Congress, Foreign Affairs Committee, *Congreso y Gestión Externa*, Part I, Chapter IX "Congress and external issues of the 1990s", 1999
Annex 184.	L. Quintanilla, *Atlas del Perú y del Mundo*, 1999, authorized for circulation by Letter (DFL-CAR) No. 0-3-D/29 of the Ministry of Foreign Affairs
Annex 185.	Law No. 27261 of 9 May 2000: Law on Civil Aeronautics
Annex 186.	National Institute of Statistics and Information, *Perú: Estadísticas del Medio Ambiente 2000*, 2000
Annex 187.	Resolution No. 098-2000-M of 13 June 2000 by the Harbour Master of Ilo
Annex 188.	Resolution No. 149-2000-M of 2 November 2000 by the Harbour Master of Ilo
Annex 189.	Letter No. 4626 SGMD-D of 21 November 2000 from the Minister of Defence to the Minister of Foreign Affairs
Annex 190.	Ministry of Energy and Mines, *Anuario Estadístico de Hidrocarburos – Hydrocarbons Statistical Yearbook 2000*
Annex 191.	Law No. 27415 of 25 January 2001: Territorial Demarcation of the Province of Tacna
Annex 192.	Supreme Decree No. 028 DE/MGP of 25 May 2001 approving the Regulation of the Law on the Control and Surveillance of Maritime, Fluvial and Lacustrine Activities
Annex 193.	Directorate of Hydrography and Navigation of the Navy, *Derrotero de la Costa del Perú*, *Vol. II*, 3rd edn, 2001
Annex 194.	Ministry of Agriculture, *Perú: Estadística Agraria 2000*, 2002
Annex 195.	Ministerial Resolution No. 068-2002-PE of 15 February 2002 by the Ministry of Production
Annex 196.	IMARPE, Coastal Laboratory of Ilo, *Identificación y Delimitación de Bancos Naturales de Recursos Bentónicos en el Litoral de la Región Tacna,* 2003

Annex 209.	Internal note of 17 January 1958 of the United Kingdom Foreign Office authored by the Legal Advisor Sir Gerald Fitzmaurice
Annex 210.	Ecuadorean Decree No. 2556 of 9 November 1964
Annex 211.	Ecuadorean Decree No. 1542 of 10 November 1966 modifying Article 633 of the Civil Code
Annex 212.	Ecuadorean Supreme Decree No. 959-A of 28 June 1971 prescribing straight baselines for the measurement of the Territorial Sea
Annex 213.	United States Department of State, Office of the Geographer, *Limits in the Seas*, *No. 42: Straight Baselines: Ecuador*, May 1972
Annex 214.	Statement of Reasons of September 1975 by the Minister of Foreign Affairs of Colombia before the Colombian Congress in respect of the bill to approve the Agreement between Colombia and Ecuador concerning Delimitation of Marine and Submarine Areas and Maritime Cooperation
Annex 215.	Presentation of 15 October 1975 by Senator Fernández before Colombia's Congressional Commission on International Relations and National Defence of the bill approving the Colombia-Ecuador delimitation agreement before the Congressional Commission on International Relations and National Defence
Annex 216.	United States Department of State, Office of the Geographer, *Limits in the Seas*, *No. 86: Maritime Boundary: Chile-Peru*, July 1979
Annex 217.	*Grisbådarna: primary boundary lines proposed by Sweden and Norway to the Tribunal and the boundary established by the Tribunal*, Figure submitted by the United States in *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), I.C.J. Pleadings, Vol. VIII,* Map No. 30, (with annotations added by Chile)
Annex 218.	People's Republic of China State Oceanic Administration Policy Research Office, *Collection of International Maritime Delimitation Treaties*, 1989

Annex 219.	United States Department of State, Office of Ocean Affairs, *Limits in the Seas*, *No. 108: Maritime Boundaries of the World*, 1st Revision, 1990
Annex 220.	United States Department of State, Office of Ocean Affairs, *Limits in the Sea*, *No. 36: National Claims to Maritime Jurisdiction*, 7th Revision, 1995
Annex 221.	Intervention by United States Senator Pell on freedom of overflight in the Peruvian airspace beyond twelve nautical miles, United States Congressional Record, 1995, Vol. 141, p. S9196.
Annex 222.	United States Department of State, Office of Ocean Affairs, *Limits in the Seas*, *No. 36: National Claims to Maritime Jurisdictions*, 8th Revision, 2000
Annex 223.	Resolution of the National Congress of Ecuador, 15 November 2005
Annex 224.	Press Release No. 660 of 2 December 2005 issued by the Ministry of Foreign Affairs of Ecuador

DOCUMENTS OF INTERNATIONAL ORGANIZATIONS

Annex 225.	Communication from the Republic of Chile on the Conclusion of an Agreement between Chile and Peru regarding Tacna and Arica during the Third Meeting of the Fifty-fifth Session of the Council of League of Nations, 13 June 1929, at 10.30 a.m.
Annex 226.	United Nations, *Report of the Special Rapporteur to the ILC, Second Session of the ILC*, 1950
Annex 227.	United Nations, *Memorandum on the Regime of the High Seas submitted by the Secretariat of the ILC, Second Session of the ILC*, 1950
Annex 228.	United Nations, *Report of the ILC on its Second Session*, 1950
Annex 229.	United Nations, *Summary Record of the 69th meeting of the ILC*, 17 July 1950

Annex 230.	United Nations, "Draft Articles on the Continental Shelf and Related Subjects", annexed to the *Report of the ILC on its Third Session,* 1951
Annex 231.	United Nations, *Report on the Regime of the Territorial Sea by Mr. J.P.A. François, Special Rapporteur*, 1952
Annex 232.	United Nations, *Summary Record of the 171st meeting of the ILC*, 24 July 1952
Annex 233.	United Nations, *Annex to the Second Report on the Regime of the Territorial Sea by Mr. J.P.A. François, Special Rapporteur*, 1953
Annex 234.	United Nations, *Regime of the Territorial Sea*: *Information and Observations Submitted by Governments Regarding the Question of the Delimitation of the Territorial Sea of Two Adjacent States*, 1953
Annex 235.	United Nations, "Chapter III on the Regime of the High Seas", annexed to *Report of the ILC covering the Work of its Fifth Session,* 1953
Annex 236.	United Nations, *Report of the ILC on the Work of its Eighth Session,* 1956
Annex 237.	Resolution XII adopted during the Fifth Ordinary Meeting of the CPPS in Santiago on 30 September and 1 October 1957
Annex 238.	*Establishment of an integrated air route network suitable for the efficient provision of air traffic services*, Working paper presented by Peru, LIM SAM/SAT, WP/31, 1961
Annex 239.	Statement by Dr. García Sayán, "Al Cabo de 15 Años" in CPPS Secretary-General, *Convenios y Otros Documentos (1952-1966*), p. 1
Annex 240.	CPPS Secretary-General, *Infracciones en la Zona Marítima del Pacífico Sur*, January 1972
Annex 241.	United Nations Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea – Maritime Boundary Agreements (1942-1969)*, 1991

Annex 242.	United Nations, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, *Handbook on the Delimitation of Maritime Boundaries*, 2000
Annex 243.	ICAO Inter-Office Memorandum of 3 February 2005 "Boundaries of the Antofagasta and Lima FIRs" with Enclosures
Annex 244.	United Nations Division for Ocean Affairs and the Law of the Sea, *Table of Claims to Maritime Jurisdiction* as at 28 May 2008

PRESS ARTICLES

Annex 245.	"El Tratado de Tacna y Arica ante el Congreso Pleno Peruano", *El Diario Ilustrado*, 27 June 1929
Annex 246.	J. M. Peña Prado, Address to the Congress of Peru, reproduced in *La Crónica*, 7 May 1955
Annex 247.	"Señalan errores en medición del mar territorial peruano", *El Comercio*, 23 May 1956
Annex 248.	J. Velando Ugarteche, "La Salida al Mar de Bolivia", *Expreso*, 19 May 1967, reproduced in a collection of his written work, 1988

VOLUME V

WRITINGS OF PUBLICISTS (IN ALPHABETICAL ORDER)

Annex 260.	W. C. Extavour, *The Exclusive Economic Zone*, 1979
Annex 261.	E. Ferrero Costa, "Fundamento de la Soberanía Marítima del Perú Hasta las 200 Millas", in Pontificia Universidad Católica del Perú, *Derecho*, No. 32, 1974, p. 38
Annex 262.	G. Francalanci and T. Scovazzi (eds), *Lines in the Sea*, 1994
Annex 263.	J. P. A. François, *Handboek van het Volkenrecht*, 1949
Annex 264.	Kuen-Chen Fu, *Equitable Ocean Boundary Delimitation – On Equitable Principles and Ocean Boundary Delimitation*, 1989
Annex 265.	R. Galindo Pohl, "The Exclusive Economic Zone in the Light of Negotiations of the Third United Nations Conference on the Law of the Sea", in F. Orrego Vicuña (ed.), *The Exclusive Economic Zone – A Latin American Perspective*, 1984, p. 31
Annex 266.	E. García Sayán, *Notas sobre la Soberanía Marítima del Perú – Defensa de las 200 millas de mar peruano ante las recientes transgresiones*, 1955
Annex 267.	F. V. García-Amador, "The Origins of the Concept of an Exclusive Economic Zone: Latin American Practice and Legislation", in F. Orrego Vicuña (ed.), *The Exclusive Economic Zone – A Latin American Perspective*, 1984, p. 7
Annex 268.	G. González Videla, *Memorias*, *Vol. 2*, 1975
Annex 269.	Foreword by J. Salvador Lara in P. Goyes Arroyo, *Límite Marítimo: Ecuador-Perú*, 2007, p. xi.
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Annex 313.	L. Valencia Rodríguez, *Análisis de la Posición Jurídica Ecuatoriana en las Doscientas Millas*, 1980
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Annex 318.	Perupetro, *Estadística Petrolera 2008*
Annex 319.	J. A. del Busto Duthurburu, *Los Peruanos en la Antártida*, 1989
Annex 320.	FAO Fisheries Statistics Query Results

LIST OF FIGURES
(VOLUME VI)

Figure 40.	Sketch-maps of Peru's maritime zone in J. A. Benavides Estrada, *Geografía*, 1992, approved by Resolution No. 0611 of 20 December 1991 of the Ministry of Foreign Affairs of Peru and Decree No. 032 of 10 March 1992 of the National Institute of Research and Development of Education of Peru
Figure 41.	Sketch-maps of Peru's maritime zone in L. Quintanilla, *Atlas del Perú y del mundo*, 1999, approved by Letter (DFL-CAR) No. 0-3-D/29 of the Ministry of Foreign Affairs of Peru
Figure 42.	Sketch-map of the Ecuador-Peru maritime boundary and the Ecuadorean baselines by the United States Department of State (1972)
Figure 43.	Sketch-map of Peru's maritime zone in G. Pons, *Historia del Perú. El Perú Contemporáneo*, undated, authorized by Ministerial Resolution No. 4284 of 21 March 1961 of the Ministry of Public Education of Peru
Figure 44.	Sketch-map of Peru's maritime zone in J. A. Benavides Estrada, *Geografía del Perú y del Mundo: Política y Económica*, *Segundo Año de Educación Secundaria*, 12th edn., undated, authorized by Ministerial Resolution No. 612 of 26 February 1966 and ratified by Ministerial Resolution No. 0344 of 7 March 1969, both issued by the Ministry of Public Education of Peru
Figure 45.	Sketch-maps of Peru's maritime zone in J. Villanueva Sotomayor, *Geografía*, *Primer Grado de Educación Secundaria*, undated, authorized by Ministerial Resolution No. 587-86-ED of 10 September 1986 of the Ministry of Education of Peru
Figure 46.	Sketch-map of Peru's maritime zone in J. Villanueva Sotomayor, *Geografía, Segundo Grado de Educación Secundaria*, 1994, winner of the national competition convened by the Ministry of Education in 1994
Figure 47.	Sketch-map of Peru's maritime zone in J. A. Benavides Estrada, *Geografía del Perú*, *Primer Grado de Educación Secundaria*, undated, in accordance with the official educational curriculum of 1982

Figure 48.	Sketch-map of Peru's maritime zone in J. A. Benavides Estrada and C. A. Benavides Aquije, *Geografía (Geopolítica), Quinto Grado de Educación Secundaria*, 3rd edn, 2001, in accordance with the official educational curriculum
Figure 49.	Sketch-map of Peru's maritime zone in J. A. Benavides Estrada, *Geografía 3, Tercer Grado de Educación Secundaria*, 7th edn, 2003, in accordance with the official educational curriculum
Figure 50.	Sketch-map of Peru's maritime zone in P. Díaz Suárez, M. Narrea Delgado and J. A. Benavides Estrada, *Historia del Perú en el Proceso Americano y Mundial, Quinto Grado de Secundaria*, 2003, in accordance with the official educational curriculum
Figure 51.	Sketch-map of Peru's maritime zone in J. A. Benavides Estrada, *Geografía del Perú*, *Quinto Grado de Primaria*, 2nd edn, undated, in accordance with the official educational curriculum
Figure 52.	Sketch-map of Peru's maritime zone in G. Pons, *Historia del Perú, República, Cuarto Año de Secundaria*, undated, in accordance with the official educational curriculum
Figure 53.	Sketch-map of Peru's maritime zone in J. A. Benavides Estrada, *Geografía*, *Primer Año de Educación Secundaria*, 2nd edn, 1979, in accordance with the official educational curriculum
Figure 54.	Sketch-map of Peru's maritime zone in J. A. Benavides Estrada *Geografía del Perú y del Mundo*, *Tercer Grado de Educación Secundaria*, 3rd edn, 1984, in accordance with the official educational curriculum
Figure 55.	Sketch-map of Peru's maritime zone in D. S. Sotelo Apolaya and C. Sandoval Dávila, *Geografía 5: Introducción a la Geopolítica*, undated, in accordance with the official educational curriculum
Figure 56.	Sketch-map of Peru's maritime zone in L. Navarrete L., *Gran Atlas Universal y del Perú*, undated, in accordance with the official educational curriculum
Figure 57.	Sketch-map of Peru's maritime zone in G. Romero A., *¿De Quién es el Mar?*, 1975

Figure 58.	Sketch-maps of Peru's maritime zone in J. A. Benavides Estrada y C.A. Benavides Aquije, *Atlas del Perú y del Mundo para Educación Primaria*, 2003
Figure 59.	Sketch-map of Peru's maritime zone in J. A. Benavides E., P. Díaz S. and M. Narrea D., *Historia y Geografía*, 2003
Figure 60.	Sketch-map of Peru's maritime zone in A. Paredes Galván, *Geografía*, 2005
Figure 61.	Sketch-map of Peru's maritime zone in Asociación Fondo de Investigadores y Editores, *Compendio Académico de Geografía*, 2007
Figure 62.	Sketch-map of Peru's maritime zone in Fondo Editorial Navarrete, *Geografía del Perú y del Mundo 5, Para Aprender*, undated
Figure 63.	Sketch-map of Peru's maritime zone in J. Villanueva Sotomayor, *Geografía, Primer Grado de Educación Secundaria*, undated

LIST OF DOCUMENTS DEPOSITED WITH THE REGISTRY

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	TEXTS AND DOCUMENTS OF THIRD STATES
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