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International Court of Justice

THE HAGUE

Cour internationale de Justice

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YEAR 2012

Public sitting

held on Tuesday 11 December 2012, at 10 a.m., at the Peace Palace,

President Tomka presiding,

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

VERBATIM RECORD

ANNÉE 2012

Audience publique

tenue le mardi 11 décembre 2012, à 10 heures, au Palais de la Paix,

sous la présidence de M. Tomka, président,

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

COMPTE RENDU

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

Présents : M. Tomka, président
M. Sepúlveda-Amor, vice-président
MM. Owada
Abraham
Keith
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Mmes Xue
Donoghue
M. Gaja
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M. Bhandari, juges
MM. Guillaume
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The PRESIDENT: Good morning. Please be seated. The sitting is open. The Court meets today to hear the arguments and rebuttal by the Republic of Peru.

I call on Professor Vaughan Lowe. You have the floor, Sir.

Mr. LOWE:

EVENTS AND INSTRUMENTS OF 1947-1954

Introduction

1. Thank you, Mr. President, Members of the Court: the first round pleadings have clarified our positions somewhat. We say that there is no maritime boundary between Peru and Chile, and ask you to draw one in accordance with international law. And Chile says that there is an agreement, and offers no further comment on our case.

2. Logically, Chile's objection comes first; and we will meet it head on.

3. I shall respond to Chile's argument that the three States met in 1952 and concluded an agreement that established international maritime boundaries, confirmed in 1954. Sir Michael Wood will respond to Chile's reliance upon the use of the parallel in the practice of States in later years. Professor Treves will answer Judge Bennouna's question, and show that the historical context reinforces the legal conclusion that the Santiago Declaration cannot credibly be said to have established international boundaries. Mr. Bundy will respond to points made about the land boundary and about Ecuador, and Professor Pellet will close our presentation by responding on the outer triangle, and summarizing our case, before our Agent makes our formal submission.

The legal context

4. Chile has emphasized that:

> "It is not Chile's case that the practice of the Parties evidences a tacit agreement. It is not Chile's case that the practice of the Parties is constitutive of title to maritime zones. And it is not Chile's case that the practice of the Parties is a relevant circumstance in drawing the maritime boundary *de novo* or *ab initio*."[1]

[1] CR 2012/31, p. 41 (Petrochilos).

5. In positive terms, Chile's case, repeatedly made, is that a boundary agreement was concluded in 1952. On Thursday, Professor Crawford referred to "agreements"[2] in the plural and to a boundary delimited by agreement "in 1952 or in 1954"[3], but that must have been a slip of the tongue. Its pleaded case is that the boundary was agreed in 1952 and "confirmed" in 1954.

6. There has been discussion of the status of the Santiago Declaration. But more important than the question whether it is or is not a treaty is the question of what it actually *says*. Indeed, our observations on its status were largely directed to the point that, at the time of the adoption of the momentous declaration of international maritime policy, neither Chile nor Peru treated the Declaration as if it had any great legal significance, let alone the historical significance of a permanent, binding agreement with a neighbouring State on the line of an international boundary.

7. The Court has in front of it three main blocks of material: the Santiago Declaration; the minutes of the 1952 and 1954 conferences; and a body of practice in which the parallel has been referred to by the Santiago signatory States. What is the significance of this material for Chile's claim that an international boundary was agreed in the 1952 Santiago Declaration?

8. Chile refers to its significance under Articles 31 (2) *(a)*, 31 (3) *(a)*, and 31 (3) *(b)*, and generally under Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

9. Obviously, one starts from Article 31 (1), with interpretation, and the principle that, as you put it in *Libya/Chad*, "[i]nterpretation must be based above all upon the text of the treaty" (*Territorial Dispute (Libyan Arab Jamahiriya/Chad, Judgment, I.C.J. Reports 1994*, p. 22, para. 41).[4]

10. My first point is that one gives effect to the *terms* of the treaty — to the text as written, as signed by the parties: not to what the text *might* have said. Interpretation is not an opportunity to write into a treaty terms that are not there, or to elevate hopes or assumptions about how States parties might act in future to the status of treaty obligations.

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[2]CR 2012/30, p. 74, para. 11.4 (Crawford).

[3]*Ibid.*, para. 11.7 (Crawford).

[4]See also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 18, para. 33; *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 318, para. 100.

11. Chile is saying that the Court should, by reference to supplementary materials, write into point II or point IV of the Santiago Declaration — I imagine that Chile would be content for you to write it in to any convenient paragraph in the Declaration — provisions that do not appear in the Declaration, that are not referred to in the Declaration, and that are not needed in order to give effect to the Declaration.

12. How this differs from a tacit agreement, I do not know. But in any event, the supplementary materials do not support the interpretation for which Chile contends.

13. It is not necessary to respond to every point made by Chile, though we maintain all of our previous submissions; nor do we need to draw your attention to every point to which Chile makes *no* response, such as the fact that when Chile ratified the Law of the Sea Convention in 1997 — *1997* — it specifically notified the United Nations of its maritime boundary with Argentina but said nothing at all of any maritime boundary with Peru[5].

14. I will not repeat our submissions relating to the terms of Chile's invitations to the Santiago whaling conference, to the sessions that in 1952 settled in the space of around 24 hours the text, contained within a declaration on international maritime policy, that Chile says constitutes an international boundary agreement. And a text which, by a curious historical coincidence, was adopted at the very moment that my mother, on the other side of the world, went into labour before my birth.

15. But I do ask you to pause and consider the implications of the terms of the invitations and of the organization of the conference for a good-faith interpretation of the Declaration. Who thought that all-purpose international political boundaries were to be decided by the conference on whaling? Who thought that they were agreeing on specific boundary lines, rather than on the treatment of the maritime entitlement of islands? If no one did, what is the basis for writing in an implied term on mainland maritime boundaries?

16. Chile did not rebut our point that Peru and Ecuador were invited to a conference on whaling, and that when they left the conference they did not believe — and had no reason to believe — that they had made an international treaty establishing two maritime boundaries.

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[5] http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Chile%20Statement%20made%20upon%20signature%20%2810%20December%201982%29%20and%20confirmed%20upon%20ratification%20%2825%20August%201997%29.

17. I shall return to the Vienna Convention Articles shortly; but before I do so, please let me say plainly what we understand to have happened in Santiago in 1952.

The Santiago Declaration

18. [Slide] In mid-1945, exclusive fishing rights, restricted to the nationals of the coastal State, were generally regarded as limited to a narrow belt of territorial sea, between 3 and 12 miles wide, with a high seas freedom of fishing beyond.

19. [Slide] Later in 1945, the Truman Proclamation on fisheries asserted a right to establish explicitly-bound zones, with no maximum breadth specified, in which fishing would be regulated.

20. And in 1946, the International Whaling Commission was discussing measures that could limit whale catches.

21. These events in the United States and in the International Whaling Commission threatened to deflect [Slide] fishing effort from the north-east Pacific to the south-east Pacific, and to increase pressure on whale and fish stocks there.

22. Unilateral steps taken to assert exclusive rights over marine resources were taken by Mexico in 1945, in 1946 by Argentina, and in 1947 by Chile and Peru.

23. The Santiago Declaration was adopted in 1952. And you have it, again, in tab 90. [Slide]

> "In the light of these circumstances, the Governments of Chile, Ecuador and Peru proclaim as a norm of their international maritime policy that they each possess exclusive sovereignty and jurisdiction over the sea along the coasts of their respective countries to a minimum distance of 200 nautical miles from these coasts."

24. That is what Santiago Declaration point II says. And that is the *entirety* of what Santiago Declaration point II said.

25. So, how does that work in practice?

Point II and Chile's draft

26. [Slide] If you walk along the low-water mark on the coasts of Ecuador, Peru, and Chile and, in accordance with Santiago Declaration point II, claim 200 miles from each point on the coast, you get three 200-mile zones, which overlap.

27. The intuitive reaction may be [slide] to draw equidistance lines to separate the national zones.

28. Who is it who questions this position? It is *Ecuador*. It is not Chile; it is not Peru: it is Ecuador. That is common ground.

29. You will recall the history. The Minutes of 11 August 1952 record the text proposed *by Chile*. It is in our Memorial, Annex 56, and tab 93 in your bundle. We translated the parts to which we referred in our pleadings, but did not translate the parts to which we did not refer — though we did submit the whole of this and every other document to the Court's registry. I will use Chile's new translation, although Peru considers its later translation to be more accurate[6]. [Slide]

30. Chile's draft — and I emphasize, *Chile's* draft — set out the general rule of international maritime policy asserting exclusive sovereignty or jurisdiction over the sea-bed in Article 1; and it extended that to the superjacent waters in Article 2.

31. *Neither* of those Articles specified geographical limits. That was done in Article 3.

32. Article 3, paragraph 1, in the Chilean draft said: "The zone indicated comprises all waters within the perimeter formed by the coasts of each country and a mathematical parallel projected into the sea to 200 nautical miles away from the mainland, along the coastal fringe."

33. That is what Chile called a *tracé parallèle* — a traced replica of the coastline projected into the sea 200 miles away from the mainland. There is no mention in Chile's proposal of the parallel of latitude as a lateral boundary.

34. [Slide] Incidentally, Mr. Colson said that it was possible to achieve a minimum distance of 200 miles by using the *tracé parallèle* method. But that is not correct. On this coastline, *all* parts of Peru's *tracé parallèle* lie less than 200 miles from the shore. You can only get to a *minimum* distance of 200 miles by shifting the *tracé parallèle* something like 370 miles from the coast. But let me get back to my point.

35. So, Chile proposed a 200-mile zone, with no mention of a boundary along the parallel. Chile also proposed two further paragraphs in Article 3, following paragraph 1, to address the position of islands. Neither of them mentions a boundary along the parallel, either.

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[6] "Complete and Revised Translations Submitted by the Government of Chile", 20 Nov. 2012.

36. One said: "In the case of island territories, the zone of 200 nautical miles will apply all around the island or island group."

37. The other said:

> "If an island or group of islands belonging to one of the countries making the declaration is situated at less than 200 nautical miles from the general maritime zone belonging to another of those countries, according to what has been established in the first paragraph of this Article, the maritime zone of the said island or group of islands shall be limited, in the corresponding part, to the distance that separates it from the maritime zone of the other State or country."

38. That was the Chilean draft. Exclusive zones, minimum breadth of 200 miles. No mention of international boundaries along a parallel. Special provision for islands. That was what Chile would have been content with; but that was what *Ecuador* was not content with.

The problem for Ecuador arising from Chile's draft

39. Why should Ecuador have been concerned?

40. [Slide] Well, as Chile has pointed out,[7] 200 miles was a *minimum* distance. Suppose it was extended, to 300 or 400 miles. What happens?

41. You can see on the slide that the Galápagos archipelago is caught right in the cross-hairs of the equidistance line. If that line had been projected from the Peru/Ecuador border, the Galápagos would have lost around one-third of its maritime zone — an area equivalent to the whole of Ecuador's mainland zone. That was the risk under Chile's proposed text.

42. Chile's draft said that islands can have maritime zones that reach *up to* the mainland maritime zones but must not encroach upon them, must not cause interference with them. That might look reasonable in abstract, but not when one looks at the actual configuration of these coasts — a weakness in the Chilean draft that was perhaps excusable in a text prepared for a conference on whaling but would have been very surprising in an international boundary negotiation.

43. That is not a point to be taken lightly. There is absolutely no evidence that the people discussing the Declaration had any maps before them — astonishing, if the meeting had been an international boundary negotiation.

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[7]CR 2012/30, p. 14, para. 3.2 (Van Klaveren).

44. Point IV is not about holding back island claims — why would Ecuador have insisted on adding an express provision that its *own* islands could never generate maritime zones reaching below the parallel with Peru? It makes no sense. You may wish to ask Chile how it could possibly explain that point. Point IV is about *protecting* the maritime entitlement of islands.

45. It makes perfect sense for Ecuador to be concerned to ensure that the "group of islands" in the Galápagos — there are no other "groups of islands" that this could plausibly refer to — would at least maintain a reasonable share of its maritime zone.

46. [Slide] What about Ecuador's other islands? Look at the mainland coast. The Ecuador-Peru land boundary lies inside the Gulf of Guayaquil.

47. [Slide] An equidistance line drawn from the mainland coasts of Ecuador and Peru runs upwards towards the middle of the Gulf, partly cutting off Ecuador's access to the Gulf.

48. [Slide] But Ecuador's Isla Santa Clara has an important effect. If the median line drawn from Santa Clara is taken into account, the cut-off effect is much reduced, though still present.

49. That was Mr. Fernandez' point — and a very shrewd one, too. Ecuador wants its islands to maintain fair entitlements to maritime zones, and not simply to have — as Chile had proposed — whatever was left after the ~~maritime~~ mainland zones had carved out their shares of the area.

50. That is the sequence. Chile presents its draft. Then:

> "Afterwards, Mr. Fernandez observed that it would be advisable to provide more clarity to Article 3, in order to avoid any error in the interpretation of the interference zone in the case of islands, and suggested that the declaration be drafted on the basis that the boundary line of the jurisdictional zone of each country be the respective parallel from the point at which the frontier of the countries touches or reaches the sea."

And then: "All the delegates were in agreement with that proposition."[8]

Point IV

51. That is what gave us point IV:

> "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,

[8]Minutes of 11 August 1952, in "Complete and Revised Translations Submitted by the Government of Chile", 20 Nov. 2012.

> 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."

52. [Slide] How does this work? In the case of Santa Clara, the Peruvian claim does not cut off access to the Gulf of Guayaquil. Santa Clara's entitlement runs down to the parallel.

53. [Slide] In the case of the Galápagos, *if* the zone extended beyond 200 nautical miles, point IV would have limited the encroachment of any Peruvian extension of its mainland zone. That is what Chile called our "highly improbable and impractical" line[9].

54. [Slide] It is similar to the way in which this Court limited the effect of Nicaragua's mainland zone upon the entitlements of Honduras in the *Nicaragua/Honduras* Judgment in 2007.

"If the zone is extended . . ."

55. "*If* the zone extended . . ." In fact it was not extended beyond 200 nautical miles; but that was the contingency that point IV was directed to: "*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 . . ."

56. The drafters did not put in that conditional phrasing — *if* an island — because they were unsure where the islands were — though I must say that Chile's picture of a 24-hour international conference to negotiate two international maritime boundaries, without reference to maps and without the delegates being terribly sure if there were any relevant islands around, is not without a certain entertainment value.

57. Chile says — in its Rejoinder, paragraph 2.64:

> "The truth is, Peru stands Article IV of the Santiago Declaration on its head. The provision does not 'protect' insular zones'. It does the converse. It preserves continental maritime zones up to their full extent, i.e., up to the boundary parallel, confining any overlapping insular zones to the other side of the boundary parallel."

58. But Chile's position makes no sense at all, given that it was *Ecuador* that promoted point IV, after the Chilean draft itself had made no provision for the extension of island zones to the parallel.

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[9]RC, para. 2.62.

Point IV at the Peru-Chile border

59. Chile says that point IV was also directed at the Chile-Peru boundary. So, let us see how that works.

60. [Slide] Chile refers to the Chilean island of Alacrán, and the Peruvian islet of Blanca. Alacrán island was around 0.06 sq km and Blanca is around a third of that size.

62. [Slide] With or without the islands, we would have overlapping mainland claims.

62. [Slide] If we add in the islands of Alacrán and Blanca, it has no effect whatever. The reason is plain: 200-mile zones drawn from the islands do not extend any further than the edge of the 200-mile zone drawn from the mainland. The base points that control the outer edge of the 200-mile arcs of circles lie on the mainland, and not on the islands. It is obvious that features close to the coast, such as Alacrán and Blanca, which are little more than detached rocks a few hundred metres from shore, were not the problem at which point IV was aiming.

63. [Slide] Professor Crawford sought to explain it away on Thursday. His explanation appears at paragraph 3.19 on page 48 of the transcript, referring to an animated slide that found its resting place as tab 41 of the bundle. He said that the first sentence of point IV would give Blanca a radial projection of 200 miles, but that "the effect of the second sentence of Article IV is that the insular maritime zone is truncated at the maritime boundary, and so actually looks like this, a maritime boundary which is apparently non-existent". That was irony!

64. The same, he said, applies to the Chilean island of Alacrán. "The first sentence of point IV would give it a radial projection like this. Obviously, that would be unacceptable. Hence the second sentence truncates the zone at the maritime boundary — according to Peru non-existent — like this."

65. But Professor Crawford's explanation only makes sense if the entitlement to the maritime zone depends *entirely* upon the island — Alacrán or Blanca — and completely ignores the effect of the mainland behind it — a view that he did, indeed, expressly adopt[10]. But that is not the case. It is *not* the radial projection of the island that generates the overlap: the overlap is created in any event by projecting a 200-mile claim from the mainland coasts.

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[10]CR 2012/30, p. 48, para. 3.18: "Insular projections needed special attention, because it was only they that created the overlap." (Crawford)

66. It simply makes no sense to regard point IV as designed to preserve a boundary along the parallel between Peru and Chile by limiting the maritime zones of islands. It is the mainland coasts that produce the overlapping entitlements, not the islands.

67. Chile may well accept this. It said in its Rejoinder in July 2011, at paragraph 2.72, in relation to Alacrán and Blanca,

> "These small islands are mentioned here for the sake of completeness. None of them was mentioned in the negotiating record related to the 1952 Santiago Declaration. Nor were any of the islands shown by Peru on Figure 2.2 of its Memorial, which Peru now says distinguish the Ecuador-Peru situation from the Chile-Peru situation. The only islands that were mentioned in the context of the Santiago Declaration were Ecuador's Galápagos Islands, which would only have become relevant to issues of lateral delimitation if Peru had extended its maritime zone further seaward, as it was permitted to do under Article II of the Santiago Declaration."

68. It is not quite accurate — it ignores the position in the Gulf of Guayaquil — but the comment about the Galápagos is sound. Point IV makes sense as an accommodation of Ecuador's concern to protect the entitlements of its islands. It makes no sense otherwise.

The Santiago Declaration cannot effect a delimitation

69. I have taken you through what we say point IV actually does. This is the effect of what its words say. And in our view, its words say no more, and have no further effects.

70. There is a general, but important, point here. If the Santiago Declaration were given to a group of cartographers, with the instruction that they go out and draw maps to implement it, what could they produce? Even if we ignore the possibility of extending beyond the 200-mile minimum, the Declaration only gets as far as saying that there are 200-mile claims from mainlands and islands. The Declaration contains no wording on how to deal with boundaries or delimitation.

71. There are no island claims that would push the zone as measured from the mainland alone beyond a parallel so as to interfere with a zone of another State — the Galápagos are more than 400 miles from the mainland, and the little islands along the mainland coast produce no effect that is not produced by the mainland itself. So there is nothing for point IV to bite on.

72. If Chile really believes that points II and IV of the Santiago Declaration constitute an international maritime boundary agreement, let them explain to you how anyone, given only the text of the Declaration, could draw the maritime boundaries of the three States on a map. Let them

take you through it, step by step, word by word, relying on points II and IV. We say that they cannot do it.

73. [Slide] As Mr. Peña Prado and his colleagues on the Foreign Affairs Committee of Peru's Congress said in 1955[11], the Santiago Declaration is, as Peru's Ministry of Foreign Affairs had stated, a declarative document that establishes principles, that defines the international maritime policy of the three sovereign countries, and which extends the 200-mile claims to insular territories.

Treaty interpretation

74. But Chile says, do not just look at what the treaty says. Be more imaginative. Look at what the supplementary materials show. Look at points II and IV in the overall context of the whole scheme of treaty interpretation under the Vienna Convention.

75. The context, it says, includes any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty: Vienna Convention Article 31 (2) *(a)*.

76. Chile also points to Article 31 (3) *(a)*, which says that there shall also be taken into account any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.

77. And it refers to the subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation, in accordance with Vienna Convention Article 31 (3) *(b)*.

78. Those are the three provisions to which Chile refers. But bear in mind what it is that they are seeking to establish.

79. First, that you must write into point II or IV of the Santiago Declaration a provision that says, in addition to the effect of point IV in respect of the maritime entitlements of islands, the parallel of latitude shall in all other geographical contexts serve as the maritime boundary between neighbouring signatory States for the purposes of the Santiago Declaration.

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[11]RP, Ann. 6, and tab 99.

80. Second, they say that you must also write in a provision that says, notwithstanding the reference in point II to the circumstances that led to the Santiago Declaration, the boundary along the parallel will be applicable permanently and for all purposes as the definitive international political boundary between the States in question.

81. Well, that is a heavy load for the words of point II and point IV to bear. And it is a lot to ask as a consequence of "taking into account" these extraneous materials when reading the actual words of the Santiago Declaration.

82. Chile also suggests that the context includes what Professor Crawford called the "concordant unilateral proclamations in which they claimed sovereignty over areas extending 200 nautical miles to sea that abutted perfectly and did not overlap"[12]. Mr. Colson said that the Santiago Declaration preserved the 1947 status quo between Chile and Peru[13]. It is not quite clear where that fits under the Vienna Convention; but let me deal with the point.

83. Chile's 1947 Presidential Declaration — Memorial, Annex 27 — proclaimed national sovereignty over the continental shelf and seas adjacent to Chile's coast, without limitation of distance or depth — that is in paragraphs 1 and 2 of the Declaration. Then it said: "protection and control is hereby declared immediately" out to 200 miles, measured by a mathematical parallel, in protection zones for whaling and deep sea fishery — that is paragraph 3. Chile had an indefinite claim to national sovereignty coupled with immediate 200-mile whaling and deep sea fishery — not *coastal* fishery: *deep sea* fishery — zones.

84. Peru's Supreme Decree — Memorial, Annex 6 — proclaimed not "national sovereignty" but "sovereignty and jurisdiction" over the continental shelf, and over the superjacent waters "to the extent necessary to protect, maintain and utilize natural resources". It expressly reserved the right to modify and extend zones in future, but declared that it would exercise "control and protection" of natural resources out to 200 miles measured as a *tracé parallèle* from the mainland and by arcs of circles from islands. Peru had, not a whaling and deep sea fishing zone, but 200-mile zones of sovereignty and jurisdiction over all resources.

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[12]CR 2012/30, p. 72, para. 11.1 (Crawford).

[13]CR 2012/32, p. 30, para. 2.4 (Colson).

85. Neither Chile nor Peru stipulated any co-ordinates, said anything about international boundaries, or indicated how overlapping claims should be resolved.

86. Chile may say, "well, they are close enough". But that is not good enough. If "concordant" is meant to suggest that these were parallel laws slotted into place to provide systematic, co-ordinated legal coverage of the South American Pacific coast, the suggestion is simply not correct.

87. But let me turn to Chile's argument that there is another agreement that bears upon the interpretation of the Santiago Declaration, and which must be taken into account under the Vienna Convention.

Vienna Convention on the Law of Treaties, Article 31 (2) *(a)*

The 1952 Minutes

88. What is the alleged agreement under Article 31 (2) *(a)*? Chile says, the Minutes of 11 and 12 August 1952. Well, we have all, no doubt, occasionally referred back to minutes of meetings that we have attended, and will have a view on their utility as accurate reflections of what happened. But these Minutes are special.

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

So said Professors Crawford and Condorelli[14].

89. There is no authority for that characterization of the areas of agreement recorded in the Minutes; but put that point aside.

90. There is also some confusion in Chile's submissions over what the Vienna Convention says[15]. Agreements on the interpretation or application of a treaty are not part of its context, under Article 31 (2): they are additional materials, covered by Article 31 (3). But put that point aside, as well. Chile misstates the law; but it is the facts that are decisively against it.

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[14]CR 2012/30, p. 50, para. 3.27 (Crawford). See also, CR 2102/32, p. 49, para. 18, p. 53, para. 28, p. 55, para. 35 (Condorelli).

[15]See CR 3012/32, p. 46, para. 8, p. 51, para. 22, p. 53, para. 28, p. 55, para. 35 (Condorelli).

91. What is the alleged "agreement"? I will use Chile's version of this exhibit[16], to avoid any problems. Professor Crawford says that it is the suggestion made by Mr. Fernandez that "the declaration be drafted on the basis [that] the boundary line of the jurisdictional zone of each country be the respective parallel from the point at which the frontier of the countries touches or reaches the sea"[17]. That was done, as Mr. Fernandez said, "in order to avoid any error in the interpretation of the interference zone *in the case of islands*".

92. And so it was. That is it: there is nothing more in the Minutes. The relevant part of the Declaration — point IV — was redrafted. The provisions refer to islands, and only to islands. The Declaration was not redrafted to say that mainland boundaries follow the parallel.

93. If there had been an understanding that international boundaries had been agreed on that Tuesday in August 1952, and that they applied in all geographical circumstances, including to mainland coasts, it would not have been necessary to single out islands for special treatment in point IV. But you have that point.

94. The 1952 Minutes do not support the conclusion that you should imply a term on maritime boundaries into the Santiago Declaration under Article 31 (2) *(a)* of the Vienna Convention.

The 1954 Minutes

95. Professor Crawford next tries to use the Minutes of one of the commissions at the 1954 Conference to get you to the same point[18]. This is one of a number of signs that Chile is trying to shift away from its reliance upon the 1952 Declaration.

96. The alleged agreement here is the phrase "the three countries had agreed on the concept of a dividing line of the jurisdictional sea". You will recall the slide at his tab 42. And, again, I shall use Chile's version of this exhibit[19].

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[16]Minutes of 11 August 1952, in "Complete and Revised Translations Submitted by the Government of Chile", 20 Nov. 2012; CR 2012/30, p. 51, para. 3.35 (Crawford).

[17]CR 2012/30, p. 51, para. 3.35 (Crawford).

[18]*Ibid.*, p. 60, para. 4.27 (Crawford).

[19]"Complete and Revised Translations Submitted by the Government of Chile", 20 November 2012.

97. There are a few comments in the 1954 Minutes that might be relevant, such as the Peruvian proposal to use the term "Maritime Zone" in the draft because it would "encounter less resistance in the international community than the term Territorial Sea". The Chilean delegate said that he did not see any difference between the concepts, or the terms, "maritime zone" and "territorial sea". And this might suggest that the focus was more on maintaining a common front against third States than on creating national maritime zones.

98. But the key passages, on which Chile relies, are the five paragraphs dealing with Mr. Salvador Lara's request for the inclusion of a complementary Article clarifying the concept of the dividing line of the jurisdictional sea.

99. Those paragraphs say less than Chile might wish. The delegates of both Peru and Chile said that "Article 4 of the Declaration of Santiago is sufficiently clear and does not require a new exposition". And as we know, point IV is expressly confined to islands.

100. Mr. Salvador Lara "insists on his belief that a declaration to that effect be included in the Convention, because Article 4 of the Declaration of Santiago is aimed at establishing the principle of delimitation of waters regarding the islands".

101. That is ambiguous. It might mean that because point IV secures the position of islands, the same should be done in this 1954 Agreement; or, it might mean that because point IV secures the position of islands, a wider principle, applicable also to mainland coasts, should be set out in this Agreement.

102. But whichever interpretation is correct — and we are unlikely ever to know — *neither* interpretation suggests that point IV of the 1952 Declaration was regarded in 1954 as an agreement on the delimitation of mainland maritime zones, binding on the three participating States.

103. Mr. Salvador Lara says "that if the other countries consider that no explicit record is necessary in the Convention, he agrees to record in the Minutes that the three countries consider the matter on the dividing line of the jurisdictional waters resolved and that [the] said line is the parallel starting at the point at which the land frontier between both countries reaches the sea". You will note — *both* countries.

104. Mr. Llosa for Peru agrees "but clarifies that this agreement was already established in the Conference of Santiago, as recorded in the relevant Minutes as per the request of the Delegate of Ecuador".

105. If I may mention in passing the next paragraph in the Minutes, you will see that the Secretary of the Permanent Commission says of the provision in Article 6 of the 1952 Resolution on the Permanent Commission, which authorizes the parties to denounce the Agreements upon one year's notice, that it "must be understood as applying to the other three Agreements of Santiago". I think that Professor Crawford misunderstood our point on this. It is not that we are asserting that there is a right to denounce a boundary agreement. Our point is that if there is a provision for the denunciation of an agreement, it is very unlikely that that agreement is one that establishes a permanent international boundary.

106. Chile also directed you to the Minutes relating to the Second Session of Commission I of the 1954 Conference as another example of an "agreement" within the meaning of Vienna Convention Article 31 (2) *(a)*. Here the alleged "agreement" was the clarification offered by Mr. Salvador Lara to the Minutes of the First Session "concerning the concept of the dividing line", that "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".

107. No suggestion that it should be amended to say that the maritime boundaries of the three States had been settled two years earlier; no suggestion that the Minutes should record that the three States agreed to apply the point IV provision on islands to mainland coasts. Nothing, nothing, to take us any further than the previous Minutes.

108. So, even if these *travaux préparatoires* are elevated to the status of Article 31 (2) *(a)* agreements as Professors Crawford and Condorelli wish, when one stops to read them to see what they actually *say*, they do not carry Chile's case forward.

109. And the 1954 Agreement on the Special Zone itself is, as we have said, a good example of the development of a practical arrangement to use an easily identifiable line for the purposes of fisheries policing. Its Preamble makes clear its purpose — avoiding friction arising from small fishing boats on the "high seas" — yes, it actually says "high seas" — small fishing boats that

might not know exactly where they are. It builds on an understanding that plainly predates the 1954 Agreement. It does not purport to change the character of any of the declarations made and agreements concluded at Santiago in 1952; and it supplements not simply points II and IV of the Santiago Declaration but *all* of the agreements made in 1952. So, the question remains, did the 1952 Santiago Declaration establish two international political boundaries, or did it not?

VCLT, Article 31 (3) *(a)*

110. Professors Crawford and Condorelli[20] also referred to Article 31 (3) *(a)* of the Vienna Convention, on taking into account subsequent agreements in interpreting treaties[21]; but their arguments, and their materials, were the same as those that I have already discussed — chiefly, the 1954 Minutes, which they sought to invoke under Article 31 (3) rather than 31 (2). So the points that I have already made are good against that claim, too.

VCLT, Article 31 (3) *(b)*

111. That leaves Article 31 (2) *(b)* — "subsequent practice" as an aid to interpretation. Sir Michael Wood will address that point in a moment; but the short point is that Chile has not yet turned its attention to the question that is critical for its case.

112. When there is a reference to a parallel, in a regulation or a letter or whatever, what does it signify? What does it evidence? Does it show that the State concerned is referring to the parallel as an agreed legal boundary or might it be more in the nature of a provisional line, or of a line for a specific, limited purpose, such as sharing a scarce resource — the words are yours from the *Nicaragua* v. *Honduras* Judgment[22].

113. Does the assertion of jurisdiction over the sea-bed necessarily imply the assertion of jurisdiction over superjacent waters? No — the Truman Proclamation is an example of a clear distinction. Does the exercise of jurisdiction at sea in customs, fiscal, immigration and sanitary matters imply a claim to sovereignty? No — that is why the contiguous zone is distinct from the territorial sea, in the 1958 and 1982 Conventions and in customary international law. Does the

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[20]CR 2012/32, pp. 46-47 para. 8 (Condorelli).

[21]CR 2012/30, p. 60, para. 4.27 (Crawford).

[22]*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 735, para. 253.

exercise of fisheries jurisdiction imply a claim to all EEZ rights, over pollution, scientific research and so on? No — EEZ claims are distinct from claims to exclusive fishing zones.

114. It is not good enough for Chile to say, "but you referred to the parallel". They must focus on the legal issue, and show why they say that this or that particular instance demonstrates that Peru accepted in 1952 that it had signed a treaty that definitively and permanently established its two international maritime boundaries for all purposes.

115. And Chile's analysis avoids that degree of precision. It sweeps together each and every reference to the parallel as if they all self-evidently supported its case. There is a fine example in Annex 120 to its Rejoinder, where it translates a phrase from a 1954 Resolution of the Pacific Commission — in the paragraph labelled 1st on page 43 of the Minutes. The Spanish phrase quite obviously means "the parallel which passes by the point of the coast that signals the limit between the two countries". Chile translates it as "the parallel which constitutes the maritime boundary between the two countries". Those phrases do not have the same meaning, and it is idle to pretend that they do.

116. That is the fault that runs throughout Chile's case; that is the crack that makes Chile's case fall apart.

Chile's treaty claim

117. Let me summarize the position on Chile's treaty claim. Peru says that it did not agree on a permanent, all-purpose maritime boundary in 1952. Chile says that it did.

118. But the words of the Santiago Declaration do not evidence such an agreement.

119. The *travaux préparatoires* from 1952 do not evidence such an agreement.

120. The Minutes from 1954 do not evidence a belief that the 1952 Declaration was an international agreement establishing two permanent international boundaries.

121. Chile's collection of subsequent practice does not evidence a belief that the 1952 Santiago Declaration was an agreement on a permanent, all-purpose maritime boundary.

122. None of Chile's claims provides any justification for the Court writing into the text of the Santiago Declaration words that are not there. Chile has said that point IV is unhappily

drafted[23], and with the benefit of hindsight no doubt it could have been better formulated[24]. Never mind hindsight: if they had wanted to secure a mainland international boundary, any half-competent lawyer could see at once that point IV does not do it. There is no basis for nailing two international boundaries onto the creaking little frame of this paragraph dealing with islands.

123. We have explained the plain, ordinary meaning and effect of points II and IV of the Declaration, and we wait to see how Chile will demonstrate the workings of its interpretation.

124. Professor Crawford closed one of his presentations with the words "quod erat demonstrandum". That was a nice touch, but the wrong tense. *Quod erit demonstrandum* would have been more accurate. Chile has *not* delivered on its statement that it will prove that in 1952 Peru agreed to sign a treaty definitively and permanently establishing its two maritime boundaries for all purposes. It has one day left in which to try. But the documentary record shows that it cannot do it.

Chile does not defend the line

125. Mr. President, please allow me to add one final point. We have responded to Chile's case that the boundary was settled by agreement in 1952. Chile has chosen not to make any response to our case relating to the drawing of a boundary so as to achieve an equitable result.

126. We have submitted that the parallel is patently inequitable as a maritime boundary. We have done so partly in the course of our submission as to what an equitable line would be, and partly to make the point that it defies credibility that Peru should simultaneously have claimed sovereign rights over the seas adjacent to its coasts and tacitly given a large slice of it away forever to Chile.

127. But it leaves Chile in the uncomfortable position of standing behind a position which it does not, and cannot, even pretend to regard as an "equitable boundary" in the sense that international law requires.

128. The requirement of an equitable result is not *jus cogens*, says Professor Crawford[25].

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[23]CR 2012/32, p. 48, para. 15 (Condorelli).

[24]CR 2012/30, p. 48, para. 3.18 (Crawford).

[25]*Ibid.*, p. 55, para. 3.54 (Crawford).

129. Well, maybe not; and Peru does not seek to upset agreements that States have deliberately made to settle boundary disputes. Such agreements are solemn undertakings, which in principle endure forever. But the fact that Chile is arguing for a line that it does not even claim would be equitable must surely give pause for thought.

130. The question is, has Chile demonstrated that there is sufficient evidence for the Court to rewrite the express terms of the Santiago Declaration, so as to write into it an agreement that the signatory States would use the parallels for all purposes, for all time, as the international boundaries between them in the seas? And we, Mr. President, say that it has not done so.

Unless I can be of any further assistance, Mr. President, I would ask you to call upon Sir Michael Wood now.

The PRESIDENT: Thank you, Professor Lowe. And it is for Sir Michael Wood to continue in the pleadings on behalf of Peru. You have the floor, Sir.

Sir Michael WOOD:

CHILE'S RELIANCE UPON SUBSEQUENT PRACTICE AND UPON "RECOGNITION" BY THIRD PARTIES

1. Mr. President, Members of the Court, Chile devoted the whole of Friday morning to what it termed "evidence of the practice implementing the all-purpose maritime boundary between Chile and Peru"[26]. I shall first look at the uncertain legal basis for this part of Chile's case, and then respond to what Mr. Colson, Mr. Paulsson, and Mr. Petrochilos had to say ~~(A)~~.

2. And to conclude, I shall say a few words about Professor Dupuy's presentation, Friday afternoon, of what he called "Recognition of the maritime frontier between Peru and Chile by third parties"[27] ~~(B)~~.

1. Subsequent practice in the interpretation of treaties

3. As Mr. Lowe has just explained, it has become clear, in the course of the first round, that this case turns on the interpretation of the 1952 Santiago Declaration, on whether or not its point IV

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[26]CR 2012/31, p. 12, para. 1.1 (Colson).

[27]CR 2012/32, p. 24, heading (Dupuy).

established an all-purpose maritime boundary. If, as we say, there was no such agreement in 1952, the maritime boundary falls to be determined in accordance with the three-step method, as explained last week by Mr. Bundy: it is an equidistance line.

4. As Mr. Lowe also said, Chile has expressly stated, in the clearest possible terms, that it is not relying upon the practice it cites to establish a tacit agreement on the maritime boundary[28], such as was contemplated, but dismissed, in *Nicaragua* v. *Honduras*[29]. One can well understand why. The onus is heavy ("evidence of a tacit legal agreement must be compelling"): Chile's case is not compelling. But since it is not raised by our opponents, Peru is not called upon to address this hypothesis.

5. Likewise, Chile has expressly stated that it is not relying upon the practice as a special or relevant circumstance that could lead to an adjustment of the provisional equidistance line[30]. Again, one can see why. Quite apart from the fact that Chile refuses to engage on the drawing of a line, international courts and tribunals have been very reluctant to regard such practice — fishing and the like — as a relevant or special circumstance for the purposes of delimitation[31]. Again, since Chile has expressly disclaimed any intention of relying on the practice in this way, it is not something Peru need address.

6. Mr. President, Chile has not referred you to any contemporaneous evidence that the 1952 Declaration was considered to have established two international maritime boundaries. Nothing contemporaneous with the signature of the Declaration in August 1952. Is it reasonable to suppose that the establishment of two international boundaries went unrecorded at the time? Why did the boundary not appear on Chile's maps, on Peru's maps, on Ecuador's maps at that time?

7. Mr. President, what Chile does say about practice is that it is relevant to the interpretation of the 1952 Santiago Declaration, and that is what I shall now address. At the outset, let me note

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[28]CR 2012/31, pp. 40-41, para. 2 (Petrochilos).

[29]*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 735, para. 253.

[30]CR 2012/31, pp. 40 41, para. 2 (Petrochilos).

[31]*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 735, para. 253; *Maritime Boundary between Cameroon and Nigeria, Judgment, I.C.J. Reports 2002,* pp. 447-448, para. 304; *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 310, para. 150; *Guyana/Suriname, Award of 17 September 2007, ILM*, Vol. 47, 2008, paras. 371-391; *Newfoundland and Labrador and Nova Scotia, Award Second Phase (2002),* para. 3.5; *Barbados/Trinidad and Tobago*, 45 *ILM*, p. 798, 2006, para. 364.

that Peru stands accused, by our friends on the other side of the Bar, of ignoring the rules of interpretation set out in Articles 31 and 32 of the Vienna Convention[32]. We have not. We accept that it is appropriate to apply the Vienna rules to the interpretation of the 1952 instrument. But as Mr. Lowe has just shown, it is Chile that plays fast and loose with the Vienna rules. We have constantly, in our written Reply[33] and last week[34], asked Chile to clarify its position on treaty interpretation, particularly as regards the "practice" upon which it places such heavy reliance. Professor Condorelli, last Friday, did treat us to a lengthy exposition of treaty interpretation, but it hardly shed light on Chile's position.

8. Rather than applying the general rule in Article 31 as a whole, which is the standard approach, Professor Condorelli[35] seemed to treat subsequent practice — for the purposes of this case — as something that, to adopt the language of Article 32, confirms the meaning resulting from the application of other parts of Article 31, presumably paragraphs 1 and 2[36]. Mr. Petrochilos was clearer. He at least said "the legal relevance of this practice stems of course from Article 31 (3) *(b)* of the Vienna Convention on the Law of Treaties"[37]. Just to recall, that provision reads as follows:

> "There shall be taken into account, together with the context:
>
> . . . . . .
>
> *(b)* any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;"

9. There are at least four points to be made about Article 31 (3) *(b)*.

10. First, according to Article 31, subsequent practice is not, as such, part of the context. It is a matter to be "taken into account" as part of the application of the general rule of treaty interpretation. "Taken into account" — it is one factor among others, and it is not something that replaces or detracts ~~for~~ the primacy of the text.

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[32]CR 2012/32, p. 45, para. 4 (Condorelli).

[33]RP, paras. 2.87, 3.147, 4.2.

[34]See, for example, CR 2012/28, p. 27, paras. 4-5 (Wood); CR 2012/27, p. 61, para. 14 (Wood).

[35]CR 2012/32, pp. 56-58, paras. 36-40 (Condorelli).

[36]*Ibid.*, p. 56, para. 36 (Condorelli).

[37]CR 2012/31, p. 40, para. 1 (Petrochilos).

11. Second, the practice has to be subsequent practice "in the application of the treaty", a point emphasized by the Court in *Kasikili/Sedudu* (*Kasikili/Sedudu Island (Botswana/Namibia) Judgment, I.C.J Reports 1999 (II)*). According to the Court, this entails that while one side must act under the belief that they are entitled to do so in a treaty, the other party was not only fully aware of the conduct but also "accepted this as a confirmation of the Treaty boundary" (*ibid.*, p. 1094, para. 74). In *Kasikili/Sedudu*, the Court found that some of the practice invoked by Namibia, well known to Botswana, did not appear to Botswana "to be connected with the interpretation of the terms of the . . . Treaty" (*ibid.*, p. 1095, para 74). Therefore, it concluded that it did not constitute "subsequent practice in the application of the treaty" within the meaning of Article 31 (3) *(b)* (*ibid.*, p. 1095, para 75). In order to be relevant for the interpretation of the treaty, the practice concerned has to be in application of the treaty. That rules out virtually all of the so-called practice relied upon by Chile. Much of it, for example, was concerned with practical or technical matters unconnected with the Santiago Declaration. One such example was the construction of the coastal lights, to which I shall come shortly.

12. Third, it follows from this that the practice must be that of the parties concerned, not that of third parties, a point to which I shall return towards the end of this intervention. In the case of the Santiago Declaration there were, of course, originally three parties — and now there are four.

13. Fourth, and most important, the subsequent practice has to *"establish"* the "*agreement* of the parties" regarding the interpretation of the treaty. It is not sufficient that the practice shows what one of the parties thinks, and thinks at a particular moment in time. What the practice must show, in order to be taken into account, is the "agreement" of the parties.

14. The practice must be such as to establish the agreement of the parties regarding the interpretation of the treaty. The onus is on the party that relies on such an agreement to show that the subsequent practice does indeed establish such an agreement. I quoted in the first round the relevant passage from the Chamber's 1992 judgment in the *Land, Island and Maritime Frontier Dispute* case and it is worth requoting:

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

appropriate to compare them with the terms generally or commonly used in order to convey the idea that a delimitation is intended."[38]

15. That is precisely the case before you today. Yet Professor Condorelli studiously ignored the 1992 Judgment. But he did refer — and it is not at all a bad reference — to Sir Ian Sinclair's formulation, which seems to have been taken up by the Appellate Body of the World Trade Organization in *Alcoholic Beverages*: the practice must be a "concordant, common and consistent sequence of acts or pronouncements"[39]. To which I would add "clear". Concordant, common, consistent, clear. As we have shown throughout our written and oral pleadings, the so-called practice to which you have been taken by Chile is none of these. It is not concordant; it is not common; it is not consistent; and it is anything but clear. In addition much of it was not practice in the application of the instrument being interpreted, the Santiago Declaration of 1952.

16. In *Kasikili/Sedudu*, the Court having analysed the practice in some depth, concluded as follows:

> "From all of the foregoing, the Court concludes that the above-mentioned events, which occurred between 1947 and 1951, demonstrate the absence of agreement between South Africa and Bechuanaland with regard to the location of the boundary around Kasikili/Sedudu Island and the status of the Island. Those events cannot therefore constitute 'subsequent practice in the application of the treaty [of 1890] which establishes the agreement of the parties regarding its interpretation' (1969 Vienna Convention on the Law of Treaties, Art. 31, para. 3 *(b)*). *A fortiori*, they cannot have given rise to an 'agreement between the parties regarding the interpretation of the treaty or the application of its provisions' (*ibid.*, Art. 31, para. 3 *(a)*)." (*Kasikili/Sedudu Island (Botswana/Namibia) Judgment, I.C.J Reports 1999 (II)*, p. 1087, para. 63.)

17. Again, Members of the Court, that is just our case. Far from establishing the agreement of the parties on the interpretation of the Santiago Declaration, if anything the events cited by Chile demonstrate the complete absence of agreement. They cannot, therefore, constitute subsequent practice in the application of the Declaration which establishes the agreement of the parties regarding its interpretation.

18. Mr. President, there is no need for a comprehensive response to all that Chile has said about so-called "practice" or third party attitudes. Chile has adopted a global view, seeking to overwhelm you with citation after citation, without taking you to the details. They have, to use a

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[38]CR 2012/28, p. 27, para. 5 (Wood).

[39]CR 2012/32, p. 57, para. 38 and Note 91 (Condorelli).

very English expression, thrown in everything but the kitchen sink. And they have done so mostly at the Rejoinder stage.

19. As you will have seen, most of the practice Chile relies on relates to fishing, and concerns what the Law of the Sea Convention refers to as "provisional arrangements of a practical nature"[40]. Isolated incidents in other fields cannot amount to a concordant, common and consistent sequence of acts. For example, there is nothing about the sea-bed, other than a single cable authorization in 2000. Indeed, much of the alleged practice, such as that relating to scientific research, dates from long after 1952, from a time when Chile was seeking to construct its legal case for the existence of an agreed all-purpose boundary. And there are many inconsistencies, uncertainties, and contradictions, including in Chile's own practice. Chile is very far from establishing, as required by Article 31 (3) *(b)*, "the agreement of the parties [to the Santiago Declaration] regarding its interpretation".

20. Before I turn to what counsel for Chile said last Friday, let me first recall what they did *not* say in response to Peru. We heard not a word last week about the absence from Chile's legislation of *any* reference to a lateral maritime boundary with Peru in the north[41], by contrast with the references to their boundary in the south with Argentina. ~~[On screen]~~ In tab 100 of your folders, and on the screen, is a table with Chilean legislation regarding maritime issues, including the Supreme Decree that approved the Santiago Declaration, in which there is no mention of a maritime boundary with Peru. ~~[Off screen]~~

21. We heard not a word last week on what we said about the absence of *any* Chilean charts or maps showing a lateral maritime boundary with Peru over a period of over 40 years following the adoption of the Santiago Declaration, until in fact the early 1990s[42]. We heard *not a word* about the Bazán legal opinion, which — you will recall — among other things, noted that point IV of the Santiago Declaration "does not constitute an express pact for determining the lateral

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[40]UNCLOS, Arts. 74.3 and 83.3.

[41]CR 2012/28, pp. 41-42, paras. 61-64 (Wood); *ibid.*, p. 63, para. 36 (Bundy); MP, Ann. 29; *ibid.*, Ann. 92; *ibid.*, Ann. 31; CMC, Ann. 117; Supreme Decree No. 432; MP, Ann. 30.

[42]CR 2012/28, p. 55-56, paras. 4-5 (Bundy).

boundary of the respective territorial seas" and that Article 1 of the 1954 Agreement "does not involve a pact whereby the parties have established their maritime boundaries"[43].

22. A persistent theme in Chile's pleadings is that Peru did not react to Chile's many references to a maritime frontier, International Political Boundary, etc., etc. And that Peru, by its actions or more often its inaction, respected the parallel. Mr. Petrochilos went so far as to assert that Peru "cannot now resile from" its "official acknowledgments of the maritime boundary"[44].

23. There are three points to make about this argument based on restraint. First, there are many reasons why a Government may decide to exercise restraint, not least the need for harmonious relations with an important neighbour, a neighbour with whom relations have not always been peaceful. This was a bilateral relationship with other important matters to be resolved, not least, throughout the relevant time, the long-delayed implementation of a peace treaty[45]. I would recall that in the *Jan Mayen* case, the Court considered that a provision in Danish law was "explained, in particular, by the Parties' concern not to aggravate the situation pending a definitive settlement of the boundary" (*Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993,* p. 54, para. 35).

24. Second, such restraint should be encouraged, not discouraged, which would be the case if States believed that their legal position would be prejudiced. That is what underlies the provisions in the Law of the Sea Convention to the effect that States should enter into provisional arrangements of a practical nature which "shall be without prejudice to the final delimitation"[46].

25. And third, in so far as Chile may be hinting at some kind of estoppel or acquiescence, it is important to recall that, in international law, estoppel may only arise if a State has acted or made statements to a certain effect, and another State has relied on that conduct or statements to its own detriment[47]. The former is then precluded from reneging on its consistent and unequivocal conduct or statements[48]. As stated by this Court in *North Sea Continental Shelf*, the alleged conduct or

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[43]CR 2012/28, p. 43, paras. 66-68 (Wood); RC, Ann. 47.

[44]CR 2012/31, p. 42, para. 6 (Petrochilos).

[45]MP, paras. 1.32-1.37.

[46]UNCLOS, Arts. 74.3 and 83.3.

[47]*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, pp. 304-305, para. 129.

[48]*Ibid.*

statements must be clear, consistent and definite (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, pp. 25-26, paras. 28-30). Likewise, the party claiming estoppel needs to show that the past conduct has caused it "in reliance on such conduct, detrimentally to change position or suffer some prejudice" (*ibid.*, para. 30). These requirements have particular significance when it comes to the establishment of maritime boundaries[49]. Chile has not made any such case. Chile has not even attempted to show that it has relied upon Peru's statements or conduct to its detriment.

26. Mr. President, Members of the Court, I shall now turn briefly to some of the points made last Friday by our friends opposite: the 1955 Supreme Resolution, naval regulations, fishing, the coastal lights, scientific research, and Bolivia's access to the sea. We have of course already set out our position on these matters in the written pleadings and last week.

The 1955 Supreme Resolution

27. Mr. President, Members of the Court, you will recall that Peru's 1955 Supreme Resolution was addressed to the cartographic and geodesic authorities. On Friday, Mr. Colson devoted the whole of his speech to this Resolution[50]. It was yet another example where Chile reads into a text that which it wishes to see — wishful reading one might call it.

28. Mr. Colson's constant mantra was that the Resolution's purpose was to depict Peru's 200-mile zone[51], by which he meant "all of its limits"[52]. He suggested that "the whole purpose of this Resolution would be defeated if indeed it was to be applied and understood as Peru's counsel claim"[53], that is, dealing only with the zone's outer limit.

29. But that was indeed precisely its purpose. The purpose was clearly stated in the first operative paragraph, which reads: "The said 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." The purpose of the

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[49] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 735, para. 253.

[50] CR 2012/31, pp. 12-19 (Colson).

[51] *Ibid.*, p. 12, paras. 2.1, 2.5 ("to specify how the zone is to be depicted"), 2.12 ("for the purpose of specifying how its zone is to be depicted") (Colson).

[52] *Ibid.*, p. 13, paras. 2.3 (Colson).

[53] *Ibid.*, p. 15, para. 2.14 (Colson).

Resolution was to instruct the cartographic and geodesic authorities of the State how to depict the outer limit of the 200-mile zone. It was to be a zone of 200 nautical miles, and it was to be *"limited at sea"* by a line drawn in a particular way. I explained last week that the immediate reason for the Resolution was the Onassis incident that had taken place on 15 November 1954, just two months before the Resolution was issued, and which had raised in a dramatic way the question of how the outer limit of Peru's zone was to be drawn. The Onassis fleet was caught fishing outside the *tracé parallèle* line but within the arcs-of-circles line.

30. Contrary to Mr. Colson's assertion[54], the 1955 Resolution had nothing to do with the 1954 Agreement, to which it made no reference, and which concerned artisanal fishing near the coast.

31. Mr. Colson contested our interpretation of paragraph 1 of the Resolution as referring to the arcs-of-circles method. Yet that is precisely what was meant by the words "at a constant distance from the coast", which had already been used in the Petroleum Law of 1952. One does not need to read Euclid to know that a circle is a figure whose boundary — the circumference — consists of points that are equidistant from, at the same distance from, at a constant distance from, a fixed point — the centre. "At a constant distance from the coast" means what is says: every point on the line is precisely 200 miles from the nearest point on the coast. Under the *tracé parallèle* method, the distance between the coast and the outer limit is anything but constant; in the case of Peru, for example, it ranges from just under 95 miles from the coast to 200 miles. Let me recall how the *tracé parallèle* method works in practice. ~~[On-screen demonstration]~~ You will now see on the screen, an animation showing how the parallels are used purely as construction lines — or "lines of reference"[55] as Mr. Colson seems to prefer. It starts rather slowly, but it speeds up. At the end of the exercise — it is a long coastline — the construction lines are removed. The final result is a single line — the outer limit. The constructions lines are like scaffolding. At the end of the construction, they are removed. They do not remain as lateral boundaries. ~~[Demonstration off]~~ The outer limit is not a "figment of construction lines" as Professor Crawford put it last week[56]. He

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[54]CR 2012/31, p. 13, para. 2.4; p. 14-15, para. 2.11 (Colson).

[55]CR 2012/30, p. 36, para. 1.4 (Colson).

[56]*Ibid.*, p. 46, para. 3.10 (Crawford).

was right to say that the Onassis fleet was not arrested for transgressing construction lines[57]; it was arrested for transgressing the outer limit of the 200-mile zone.

32. The difference in practice between the *tracé parallèle* and the arcs-of-circles method is considerable. It would have been well known to those who prepared the Supreme Resolution, who were concerned, following the Onassis incident, about the impracticality of the *tracé parallèle* method. They did not use the language of the *tracé parallèle*, such as had been used in the 1947 Supreme Decree. They spoke of the outer limit being at a constant distance from the coast, just as they had done in the Petroleum Law. And as Mr. Lowe has just explained, the arcs-of-circles method was the only way to give effect to the Santiago Declaration's objective of a zone extending "to a minimum distance of 200 nautical miles" from the coasts.

33. But Mr. Colson went further. He said "[t]he question when Peru began to use the arcs-of-circles method to determine the outer limit of its zone is largely irrelevant . . .: the reason that we are here is the lateral limit"[58]. That contrasts strangely with what he said the day before, in the context of the 1947 Supreme Decree: then, according to Mr. Colson, use of the *tracé parallèle* had no less than "four important consequences"[59]. And Professor Crawford clearly thought that it mattered when he said that "the method of projection used in the Supreme Decree meant that Peru simply had no maritime claim south of the parallel of latitude"[60].

34. Mr. Colson sought to bolster his interpretation of the 1955 Resolution by referring to a sketch-map that is reproduced in a book written by Mr. García Sayán. We do not know who prepared the sketch, which is not referred to in the text. In any event, the sketch is now on the screen, and it is at tab 102 in the folders. Mr. Colson said "[t]here is no doubt that on this map, Peru's zone is limited to the north and south by parallels of latitude — and that the outer limit is determined by the trace parallel technique"[61]. In fact, it shows neither. First, the sketch does *not* to show an international maritime boundary to the north or the south. As you can see, unlike the line depicting the outer limit, there is no black line to the north or the south. Instead, the sketch area

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[57]CR 2012/30, p. 56, para. 4.5 (Crawford).

[58]CR 2012/31, p. 13, para. 2.6 (Colson).

[59]CR 2012/30, p. 37, para. 2.1 (Colson).

[60]*Ibid.*, p. 42, para. 2.17 (Crawford).

[61]CR 2012/31, p. 17, para. 3.4 (Colson).

simply stops, a typical cartographic device to indicate an undetermined border. ~~[Next image]~~ Second, as you can now see on the screen, when we superimpose the *tracé parallèle* line ~~[next image]~~, there is no doubt that the outer limit on the map is an arcs-of-circles line. The difference in the outer limit resulting from the two methods is clear and substantial. ~~[Map off screen]~~

Naval regulations

35. Mr. President, on Friday, Mr. Petrochilos insisted that he could find support for Chile's position in several naval arrangements[62]. He stressed in particular a Peruvian Supreme Decree of 1987 dividing its jurisdictional waters into maritime districts[63].

36. He showed you a sketch-map, including Chile's understanding that Peru's most southern district, No. 31, ended at the Chilean claimed parallel[64]. He rejected our interpretation that when the district was described as defined as running "from the provincial limit between Caraveli and Camaná (Parallel 16 25' South) to the frontier boundary between Peru and Chile", the frontier boundary referred to was the land boundary[65]. Mr. President, if you look at the description of the districts in the Decree, you will notice that the most northern district, No. 11, ends at the north at "the maritime frontier with Ecuador". The southern limit of district 31, by contrast, contains no such reference. All other district limits — north and south — are defined by parallels of latitude. All but one: District 31 in the south, makes no mention of a parallel, no mention of a maritime boundary, has no exact co-ordinates. The vagueness might disturb Mr. Petrochilos, but clearly, it was done out of necessity: Peru and Chile had not delimited their boundary and therefore the southern limit of district 31 remained undefined. If that is a convenient moment for the break, Mr. President? Otherwise I would be happy to continue.

The PRESIDENT: I think you could still continue and when we come to the third country in the region, you can stop.

Sir Michael WOOD: Fine.

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[62]CR 2012/31, pp. 47-50, paras. 26-38 (Petrochilos).

[63]RC, Ann. 90.

[64]CR 2012/31, p. 48, paras. 29 (Petrochilos).

[65]*Ibid.*, paras. 31-33.

Fisheries

37. As I said earlier, most of the alleged "practice" referred to by Chile concerns fishing, particularly inshore artisanal fishing. One such element is the proposed understanding between naval officers of 1995[66]. Mr. Petrochilos presented incidents of handing over fishing boats as evidence of the existence of an all-purpose maritime boundary[67]. He promised "the fuller picture"[68]. But he did not mention that the proposed understanding of 1995 remained a proposal and that its purpose was to implement the practical arrangement of 1954[69]. The proposal was entitled "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"[70]. The 1954 agreement was mentioned three times. The Santiago Declaration, the alleged delimitation treaty, was mentioned nowhere. And by 2003, there were disagreements between the two navies over the proposal; Mr. Petrochilos did not mention that as a result of Peru's objections both navies agreed to put it aside a year later[71].

38. Mr. Petrochilos also showed the Court a sketch-map, taken from the Appendix to Chile's Counter-Memorial, with Chile's arrests of Peruvian fishing boats from 1984, 1994 and 2009[72]. Mr. Petrochilos said we were "lucky" to have had such records available[73]. Perhaps we are. [Show tab 81 of Chile] On your screens, and at tab 103, you have Chile's mapping of incidents from their Friday presentation. But out of these arrests, how many occurred in 1984 [next slide], before the Bákula Memorandum? And more importantly, where did they occur? [Next slide] As Mr. Bundy showed you last Tuesday, all of those arrests took place just offshore, and all but one took place south of the equidistance line. Similarly located are the vast majority of fishing incidents Chile relies on. And a lonely "little red dot on the left", as it was termed, does not change the picture. [Slide off]

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[66]CMC, Ann. 21.

[67]CR 2012/31, pp. 57-58, paras. 62-63 (Petrochilos).

[68]*Ibid.*, p. 58, para. 65 (Petrochilos).

[69]CMC, Ann. 21.

[70]*Ibid.*

[71]RP, Ann. 90, Agreement A-11-III, para. 2

[72]CR 2012/31, p. 56, para. 58 (Petrochilos).

[73]*Ibid.*

The 1968/69 coastal lights

39. Mr. President, Members of the Court, last Friday, Mr. Paulsson spoke, and at some length, about exchanges between the parties concerning the construction of the coastal lights. His argument seemed to be that, in 1968 and 1969, the two sides somehow confirmed the existence of the all-purpose international maritime boundary[74].

40. But he misrepresented Peru's position and resorted to quoting small extracts from diplomatic and other communications, without regard to their purpose, context, or actual content. He placed emphasis on the "Act of the Chile-Peru Mixed Commission in Charge of Verifying the Location of Hito No. 1 and Signalling the Maritime Boundary"[75]. He asserted that "Peru's written pleadings said *nothing* about this Act"[76]. In fact, we did[77].

41. One thing Chile and Peru appear to agree on is the reason for constructing the lights. Mr. Paulsson confirmed that, "both Chile and Peru saw the need for measures to stop . . . transgressions"[78]. It is hardly surprising, therefore, that he spoke at length about the *Diez Canseco* incident in relation to the lights and their purpose[79]. It is in the context of "help[ing] fishermen in the area"[80], in the words of Mr. Paulsson, that the references to a maritime frontier should be understood. Mr. Paulsson accepted that the lights "were intended to help fishermen in the area within 12 nautical miles of the coast, where there was no buffer zone"[81]. Not a delimitation line, not an all-purpose boundary, but a practical arrangement for fisherman.

42. In fact, the key instruments in relation to the lights are not those referred to by Chile, but the original Exchange of Notes between the two Governments of 6 February and 8 March 1968. All the work on the lights, all the subsequent documents upon which Chile relies, were based upon the agreement constituted by this Exchange of Notes, which fixed the object and the purpose of the installation of lights.

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[74]CR 2012/31, pp. 20-22, paras. 7-15 (Paulsson).

[75]*Ibid.*, paras. 8, 19.

[76]*Ibid.*, para. 9.

[77]MP, paras. 4.126-128.

[78]CR 2012/31, p. 20, para. 8 (Paulsson).

[79]*Ibid.*, pp. 24-25, paras. 21-23.

[80]*Ibid.*, p. 28, para 30.

[81]*Ibid.*

43. On 6 February 1968, Peru's Ministry of Foreign Affairs sent a Note to the Chargé d'affaires of Chile, saying that the Government of Peru considered:

> "it is convenient for both countries to build reasonably big leading marks or beacons and visible at a great distance, at the point where the common boundary reaches the sea, close to Boundary Marker Number One"[82].

44. The wording is clear. The Ministry of Foreign Affairs of Peru proposed the building of marks or beacons at the point where the land boundary reached the sea, close to Boundary Marker Number 1, in order to guide small vessels and prevent fishing incidents. There is no reference to the installation of boundary markers to demark or materialize the maritime boundary — and I note in passing that the Note makes a clear distinction between the endpoint of the land boundary "at the point where the common boundary reaches the sea", and the point at which by agreement of the parties the leading marks for fishermen would be placed — "close to *[not at]* Boundary Marker Number One".

45. The Government of Chile responded positively. By an Embassy Note of 8 March[83], Chile accepted Peru's proposal. In this Note, Chile accepted all of the terms and repeated the wording we have just seen as to the purpose of the arrangements established by the Exchange of Notes. It was, said Chile:

> "for the two countries to build reasonably big leading marks or beacons and visible at a great distance, at the point where the common boundary reaches the sea, close to Boundary Marker Number One".

46. Before we move on, Mr. President, let me make one final observation on the coastal lights. As I noted just now, Chile recognizes that the lights were meant to assist fishermen in the near-shore area, "within 12 nautical miles of the coast". According to Chile's sketch on Friday[84], the light was only visible up to 13.2 nautical miles.

47. ~~[Show Peru figure 4.3 from MP]~~ In its Memorial, Peru submitted that, based on a British Admiralty chart, the same light went out to a distance of 9 nautical miles[85]. But whatever may be the case, the picture is clear: the lights were to assist those fishing in very close proximity to the

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[82]MP, Ann. 71, Ministry of Foreign Affairs of Peru, Note sent to the Embassy of Chile in Lima, 6 Feb. 1968.

[83]MP, Ann. 72.

[84]CR 2012/31, Chile judges' folders, tab 59.

[85]MP, fig. 4.3.

shore. This shows once again that the so-called practice Chile has deployed before the Court was in any event only relevant to what happened in the vicinity of the coasts of the parties. [Slide off]

The PRESIDENT: Thank you, Sir Michael. I think now is the moment to take a 15-minute coffee break. The hearing is suspended for 15 minutes.

The Court adjourned from 11.35 to 11.55 a.m.

The PRESIDENT: Please be seated. The hearing is resumed. I invite Sir Michael Wood to continue. You have the floor, Sir.

Sir Michael WOOD: Thank you, Mr. President. Mr. President, before the short break I was taking the Court to some of the elements of practice which Chile has relied upon and I will continue with one or two more.

Bolivia's access to the sea

48. The first is Bolivia's access to the sea.

49. A word about the maps produced by Chile. Mr. Petrochilos argued last Friday that the maps produced by Chile were not misleading. He said that "Chile did not suggest, in its pleadings, nor does the sketch-map [in Rejoinder, Annex 87] say, that it was produced by Peru." However, the map was reproduced in Chile's Annex so that it appeared to be part of the Memorandum; the Annex, including the map, was entitled simply "Memorandum of 18 November 1976 of the Embassy of Peru in Chile". But I say no more about that.

50. Mr. President, it is important to recall that Article 1 of the Supplementary Protocol to the 1929 Treaty of Lima did not require Peru to accept or not the Chilean proposal. What it did require was "prior agreement" between Peru and Chile before territory was ceded to Bolivia for its access to the sea. It was in that context that Peru was consulted by Chile and presented a positive, alternative and different formula to that of Chile.

51. Mr. Petrochilos gave only a brief account of the 1976 exchanges regarding Bolivia's access to the sea. He recalled that Chile proposed a Bolivian corridor that ran along the maritime boundary that Chile claims exists between the parties. Though he acknowledged that this proposal

was not acceptable to Peru, he claimed that "[i]n a meeting between Chile and Peru in July 1976, it was common ground that their maritime boundary had been established". He relied on Chilean "records of the discussion". But these are internal Chilean documents, and perhaps it is not surprising that they reflect Chile's position. Such unilateral records are inherently unreliable. As Mr. Lowe indicated this morning, we all know from experience how participants in a meeting often come away with different impressions of what happened, not infrequently related to what they wanted to happen. Moreover, the records only present the substantive discussion of the fourth meeting of the second round of negotiations, and, even the alleged records from that meeting are incomplete.

52. Mr. Petrochilos also said that, in its Memorandum, Peru "accepted that Chile" — Chile and not Peru — could grant Bolivia "[e]xclusive sovereignty . . . over the sea". But there is nothing surprising in that. The negotiations were between Chile and Bolivia. Peru's Memorandum said nothing about which areas of sea Chile would grant to Bolivia.

53. The Peruvian Foreign Minister, in a Note sent to his Chilean counterpart, put forward a completely different counter-proposal as its starting-point for the negotiations, in reaction to Chile's proposal. This proposal, as we made clear in the first round, did not acknowledge Chile's position on the maritime boundary. It did not mention the parallel, or Hito No. 1. Peru's Foreign Minister, moreover, stated that

> "a number of substantial elements exist between which there is an obvious relation; the reciprocal proposals formulated by Chile and Bolivia . . . and the consequences which would arise from the fundamental alteration of the legal status, the territorial distribution . . . of an entire region".

54. Clearly, Peru's position was that the territorial divisions in the area were still to be negotiated.

Other elements cited by Chile

55. Mr. President, Members of the Court, in its oral presentation, Chile touched briefly upon three elements of practice, other than inshore fishing. More than anything else, the short accounts given by Mr. Petrochilos[86] demonstrated how little practice there is in these other fields. For Chile,

[86]CR 2012/31, pp. 59-64, paras. 68-87 (Petrochilos).

one isolated authorization for laying a submarine cable is enough to establish subsequent practice regarding the continental shelf[87]. That hardly meets the standards for subsequent practice.

56. Take, for example, scientific research. Chile produced evidence of twelve research projects, from 1977 to 2005, which it claimed show it exercised its sovereign rights over the sea-bed and water column up to the parallel, while noting that Peru had not produced any evidence of its own in this respect[88]. It argues that the Court should infer from this that Peru has recognized the jurisdiction of Chile south of the parallel[89].

57. This argument fails to show subsequent practice demonstrating the agreement of the Parties, for several reasons. As a factual matter, while Chile has authorized scientific research south of the parallel, it was not alone in so doing. As can be found on the public website of the National Oceanographic Data Center (NODC) of the United States Department of Commerce, two Peruvian vessels conducted scientific research regarding fisheries and other matters south of the parallel line between 1961 and 1975[90]. These expeditions were not met by any protest by Chile. ~~[Image on screen]~~ On your screens and in tab 106 of your folders, you can see an image from the NODC website, mapping locations where Peruvian vessels conducted scientific research. ~~[Next image with highlights]~~ As is readily visible, Peruvian vessels conducted research well south of Chile's claimed boundary line, and no significance was attached to this parallel. Thus, the issue of scientific research, if it were relevant to prove the existence of a maritime boundary, the practice shows no significance given to Chile's parallel by the Parties. ~~[Image off]~~

58. A closer look at the authorizations issued by Chile for scientific research, shows that they did not provide for the location of a northern boundary of Chile's jurisdictional waters until 2000, by which time the dispute between the parties had become apparent[91]. In fact, only one authorization predates 1996[92]. Ironically, as with much of the evidence produced by Chile, even in

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[87]CR 2012/31, p. 59, para. 69 (Petrochilos).

[88]*Ibid.*, pp. 61-62, paras. 77-80 (Petrochilos).

[89]*Ibid.*

[90]http://www.nodc.noaa.gov/cgi-bin/OAS/prd/country/details/174. These vessels include the Peruvian Navy ships, the Bondy, and the Unanue. It also contains a reference to a fleet of vessels allowed to conduct research by Peru (the reference to the "NN") (last visited 9 December 2012),

[91]CMC, Ann. 155-156.

[92]RC, Ann. 56.

the three authorizations it provided that actually refer to the location of a maritime boundary with Peru, the Chilean Navy's Hydrographic and Oceanographic Service was unable to decide on its location. Two provide for parallels with differing co-ordinates[93] and one places the boundary between Arica and a point of latitude 20°S[94].

2. "Recognition" by third parties

59. Mr. President, Members of the Court, I now turn to the second part of what I have to say this morning and it will be much shorter. Professor Dupuy devoted a good part of his speech on Friday to what he described as the "recognition of the maritime frontier between Peru and Chile" by third parties. In the course of his intervention he lumped together States, organizations and authors. But at no point did he explain the relevance of the attitude of such third parties to the interpretation of the Santiago Declaration. Where, in Articles 31 or 32 of the Vienna Convention, do we find any reference to the attitude of third parties to a treaty?

60. The fact that a third State, non-party to a treaty, has adopted a particular position, whether as a party to litigation or otherwise, is of strictly no probative value in the interpretation of an instrument. It cannot affect the meaning of a treaty for the parties thereto. Otherwise the parties' obligations would depend on the actions of others. Just as it is only a party to a treaty that may be affected by the interpretation given to a treaty by this Court, and so has the right to intervene under Article 63 of the Statute, so too it is only the subsequent practice of the parties that may be taken into account in the interpretation of a treaty.

61. Chile repeatedly referred to the fact that Peru had not reacted to this or that element of practice, or to the statements of third parties or writers. They seem to be suggesting that this somehow means that Peru has accepted the views of others or is somehow bound by its silence. But States are under no obligation, in circumstances such as these, to react to what third parties say. No question of estoppel or acquiescence arises here, and Chile does not seem to have suggested otherwise.

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[93]RC, Ann. 56.

[94]CMC, Ann. 146.

62. *A fortiori*, the personal views of authors, however eminent, are not an element to be taken into account in treaty interpretation. They are not even a "subsidiary means"[95] for the interpretation of a treaty.

63. I shall turn briefly to some of the "third party" material relied upon by Chile last week.

64. The texts from the CPPS show nothing of interest. The 1954 Technical Commission Resolution[96] predates the 1954 Agreement and adds nothing. Nor does the CPPS Secretary-General's 1972 report on violations, though it is interesting to see that it is entitled "Violations in the Maritime Zone of the South Pacific"; that it only deals with violations by foreign vessels, that is, vessels other than those of Peru, Chile and Ecuador; that the waters of the Galapagos islands are included in the Zone; and that the term "Maritime Zone" is used in the singular. All that is an indication of how at least the CPPS viewed things.

65. Towards the end of his speech, Professor Dupuy drew attention yet again to the United States State Department's *Limits in the Seas* publication[97]. It sometimes feels as though Chile's case was dreamt up in the Office of the Geographer of the State Department, sometime in the 1970s, so much does Chile cling to its publications — publications which understandably contain a heavy disclaimer to the effect that they "are intended for background purposes only", and that they "do not represent 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 drafting of the lines"[98]. This time Professor Dupuy mentioned *Limits in the Sea* No. 42 from 1972. That actually dealt with Ecuador's 1971 straight baseline system along its coast and around the Galapagos Islands. The section headed — rather deceptively — "Analysis" baldly asserts that "[t]he Ecuador-Peru maritime boundary is delimited in two separate declarations emanating from two conferences of the Permanent Commission of the South Pacific", and contents itself with reproducing some of their paragraphs, without discussion. In no way does this publication, or any of the other publications in the *Limits in the Seas* series that Chile parades before you, amount to

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[95]ICJ Statute, Art. 38 (1) *(d)*.

[96]CR 2012/32, p. 26, para. 11 (Dupuy).

[97]*Ibid.*, p. 27, para. 14 (Dupuy).

[98]See, for example, CMC, Vol. IV, Ann. 213, p. 1267.

official "recognition", as Professor Dupuy claims, that the maritime frontiers between Peru, Chile and Ecuador had been "fixed" by the Santiago Declaration and "completed" — these are his words — by the 1954 Agreement. The only question is: was *Limits in the Seas* correct? The answer, we say, is "No". Endless recycling of the same material does not add to its authority.

66. The position of China's State Oceanographic Administration's Policy Research Office appears to be similar. Its publication too, which we have been shown more than once, contains a disclaimer: "The content of this book does not represent an official acceptance of the PRC of the boundaries represented."[99] The same is true of United Nations publications.

67. The copycat effect is shown to perfection in the list of learned authors, some of whom were counted more than once, which Professor Dupuy "placed at your disposition"[100], as he put it, in a tab in Chile's folders. Even if this legal miscellany is — as he says it is — even if it is only representative of the literature on the subject, it proves nothing, absolutely nothing. The writings of authors, however learned, do not establish or confirm maritime boundaries. The fact that for the most part they probably copied each other, and each other's errors, is all the more reason why no weight attaches to them for our purposes. A good number do little more than reference *Limits in the Seas*. It is also striking that the earliest of these authors is from 1975. None is contemporaneous. Only one is Chilean. So, it seems that for the first 23 years after the adoption of the Santiago Declaration, no one, not even one Chilean author, viewed the Declaration as a delimitation treaty.

68. Professor Dupuy has given you yet another list, referring to States and organizations[101]. Most of these references seem to be what was said by litigating States about the Santiago Declaration to promote their arguments in delimitation proceedings before this Court. It is not surprising that, in litigation, States will cite each and every matter that helps their case. But by doing so they cannot be said to be "recognize" the existence of a particular boundary, or be taking a position on a dispute between third States.

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[99]CMC, Ann. 218, p. 1299.

[100]CR 2012/32, p. 28, para. 16 (Dupuy).

[101]*Ibid.*, pp. 27-28, para. 15 (Dupuy); Chile's tab 99 of the judges' folders.

3. Conclusion

69. Mr. President, Members of the Court, to conclude: if the Declaration of Santiago of 1952 were as clear as our colleagues opposite claim, why do they have no contemporaneous evidence that this was so? And why do they need to refer to such volumes of practice? Their written pleadings include over 500 annexes, ranging from Supreme Resolutions to schoolbooks. Many in the name of practice! And much of the rest of the voluminous material provided by Chile sets out the views, more or less, more often less, considered, of private jurists and others. It is all, no doubt, fascinating stuff. But, almost by definition, if it takes so much to prove a point, the point is weak.

70. The Santiago Declaration, on which — by its own admission — Chile's whole case stands or falls, can hardly be clear if it takes so much exposition and legal gymnastics to read into it a maritime boundary agreement.

71. Mr. President, Members of the Court, that concludes what I have to say and I request that you next call upon Professor Treves.

The PRESIDENT: Thank you, Sir Michael, and I give the floor to Professor Tullio Treves. You have the floor, Sir.

Mr. TREVES:

LACK OF CREDIBILITY OF A DELIMITATION AGREEMENT CONCLUDED IN 1952 AND THE ROLE OF EQUITY

1. Mr. President, Ladies and Gentlemen of the Court, the main purpose of the present pleading is to show that it would have been extraordinary if the Parties had concluded a delimitation agreement in the context of the Santiago Declaration and Conference. This will bring me to give, at the outset, the answer of Peru to the question Judge Bennouna put to the Parties last Friday. I will continue going back to the core of the Peruvian case in the perspective — evoked by Judge Bennouna's question — of the time the Santiago Declaration was adopted. In response to some remarks by Professor Crawford, I will then dwell on the importance for Peru's case of equity as the result to be achieved in delimitation.

Judge Bennouna's question

2. The question put to both Parties by Judge Bennouna has the great merit of bringing the focus of the discussion back to the time Peru and Chile proclaimed 200-mile zones and signed, together with Ecuador, the Declaration of Santiago.

3. Judge Bennouna's question is as follows:

> "Do you consider that, as signatories of the Santiago Declaration in 1952, you could at that date, in conformity with general international law, proclaim and delimit a maritime zone of sovereignty and exclusive jurisdiction over the sea that washes upon the coasts of your respective countries up to a minimum distance of 200 miles from those coasts?"

4. In answering this question, or in connection with the answer, I will try to revisit the time of the Santiago Declaration and show that, in the perspective of that time, it would have been highly unlikely and quite extraordinary, that, as Chile claims, Peru and Chile would have concluded a delimitation treaty in the context of the Santiago Conference.

5. As I had the opportunity to show in the pleading I had the honour to address to the Court on 3 December, Peru and Chile were fully aware that a claim to exercise sovereign rights and jurisdiction in a maritime area of 200 nautical miles was something that did not correspond to the international law of the time.

6. In making their proclamations and in strengthening and confirming them by adopting the Santiago Declaration, they knew perfectly well that other States would consider their claims as contrary to international law.

7. And indeed opposition arose quickly. Already in 1948, before the Santiago Conference was convened, strong protests were addressed to Peru and Chile by the naval powers of the time. After 1952 opposition continued to mount. As remarked by Professor Crawford in his oral pleading of last Thursday[102], the "extended maritime claims made trilaterally in the Santiago Declaration" were met, with protests by the United Kingdom, the United States, Norway, Sweden, Denmark and the Netherlands.

8. As your Court said in 2009 in *Romania* v. *Ukraine,* in 1949 "[t]he concept of an exclusive economic zone in international law was still some long years away" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009,* p. 87, para. 70). In light of this,

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[102]CR 2012/30, p. 55, para 4.3 (Crawford).

the very conclusion of an agreement concerning delimitation of a zone of this kind is very difficult to conceive. As we will see further on in the present pleading, the International Court of Justice and arbitral tribunals have rejected requests to interpret existing delimitation agreements as applicable to maritime zones not yet established and whose future establishment is not contemplated in the agreements.

9. The intention of Chile and Peru, to which Ecuador added its voice at Santiago, was, first and foremost, to protect their essential fishing resources by declaring a maritime zone out to a minimum of 200 nautical miles. Other States had started this trend earlier. The signatory States knew that this would challenge the international law of the sea of the time. They hoped that international law would change, and change radically. And this is what ultimately happened.

10. The three States knew that customary law evolves through actions that may be contrary to the law at the beginning but become accepted generally through a process that may be long. Repeating a quotation from the speech of the leader of the Peruvian Delegation made at the Geneva Conference, a few years after Santiago: "It would be a long time before the slow process of the progressive development of international law absorbed such new principles."[103] In 1954 the reference to fishermen with insufficient knowledge of navigation "on the high seas" in the Preamble to the Agreement on the Special Frontier Maritime Zone[104] shows a measure of uncertainty as to the legal qualification of the zones claimed.

11. This answers Judge Bennouna's question as to whether, under general international law, Chile and Peru could "proclaim" an exclusive maritime zone extending to a minimum of 200 miles from their coasts. Chile, Peru and Ecuador could make such a "proclamation", but it would not have been in conformity with general international law at that time and, for the same reason, would not have been opposable to third States. Clearly, their claims were *de lege ferenda.* What the three signatories had in mind was to have the law in force at the time changed.

12. In fact, their 200-mile zones were simply claims, incompatible at the time with international law. Accordingly, as of 1952, the signatories to the Santiago Declaration could not, in

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[103]MP, Ann. 100.

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

conformity with general international law, delimit a maritime zone of sovereignty and exclusive jurisdiction over the sea up to a minimum distance of 200 nautical miles.

Agreement on delimitation at Santiago lacks credibility

13. Be it as it may, contrary to what Chile holds, in fact no agreement was concluded on delimitation in 1952. Professor Lowe has explained this morning why the Chilean arguments are unpersuasive. What I would like to add now is that, in the perspective of the time of the Santiago Conference, that the parties would have agreed on delimitation of their claims lacks credibility.

14 I will only make two sets of observations.

15. First, the Chilean narrative, as expounded by Professor Crawford on 6 December[105], is that, while in fact there was from the beginning no problem of delimitation because the Chilean and Peruvian zones proclaimed in 1947 abutted and did not overlap, the parties in any case agreed on delimitation along the line of the parallel. But, Mr. President, if they decided to do so, why would they do it through the obscure formulation of point IV, which does not speak of delimitation, and through an "agreement" reached, always according to the Chilean narrative, in a Commission of the Conference and not reflected in the text of the Declaration?

16. And how can this narrative be credible in light of the reluctance, evident from the Minutes, of the Chilean and Peruvian representatives to address explicitly, notwithstanding the insistence of their Ecuadorian colleague, the question of delimitation?

17. And how can the Chilean story be credible in light of the fact that the parties did not resort in the Minutes to the solemn and unequivocal formulation they used to indicate an agreement reached — and reflected in the text of the Declaration — on the question of the "minimum" character of the 200-mile claims? This formulation, which you can read on the screen and at tab 107 of your folder[106] is as follows:

> "The motion to keep special record of the foregoing statements in the Minutes of this Commission's Sessions was unanimously agreed, in order to serve as a true record [*historia fidedigna* in the Spanish original] of the extent, sense and accuracy of interpretation of this part of the Declaration. It was also agreed to provide each delegation with an authenticated copy of these Minutes so that it is attached to the declaration for the purposes each country may deem appropriate."

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[105]CR 2012/30 pp. 38 *et seq.*

[106]CMC, Vol. 2, Ann. 34, p. 294 (Spanish), p. 295 (English).

18. Thus, the States convened at Santiago knew how to express in the Minutes an agreement they had reached during the discussions. But, with respect to the part of the Minutes concerning the agreement on delimitation allegedly concluded in the same Commission the day before, no provision for "special record", no indication of "true record of the extent, sense and accuracy of interpretation", or of "authenticated copies" was included! It therefore follows that point IV of the Santiago Declaration should be read as it stands, not as Chile would wish it to read.

19. My second observation, Mr. President, Ladies and Gentlemen of the Court, is as follows. The alleged agreement concluded in 1952 would have been — if we put together all the elements emerging from the Chilean narrative — a rather sophisticated agreement corresponding to modern notions but certainly not to the rather rudimentary law of delimitation of 1952.

20. The agreement, always following the Chilean narrative, not only would follow the parallel, but

— would be an all-purpose one;

— would provide for a line separating Peru's maritime domain from the Chilean 200-mile zone and from the high seas; and

— would entail a waiver of the inherent rights of Peru to part of its just proclaimed area of 200-mile maritime domain.

21. This heavy content seems too much to read into an agreement whose mere existence Chile could not demonstrate persuasively.

22. The intention to adopt an all-purpose boundary is always clearly spelled out, as in the Colombia-Ecuador Agreement concerning Delimitation of Marine and Submarine Areas and Maritime Co-operation signed at Quito on 23 August 1975[107]. This agreement expressly indicates the will of the parties to establish a lateral boundary "between their respective marine and submarine areas, *which have been established or may be established in the future*" — this is Article 1.

23. The lack of an express intention to cover zones yet to be established in the 1960 Delimitation Agreement between France and Portugal brought the Arbitral Tribunal in the

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[107]United Nations, *Treaty Series (UNTS)*, Vol. 996, p. 237, Arts. 1 and 3.

Guinea-Bissau v. *Senegal Case Concerning Delimitation of Maritime Areas* to exclude that the agreement could function as an all-purpose delimitation treaty and include in its scope the exclusive economic zone that did not exist at the time of conclusion[108]. The Tribunal stated:

> "To interpret an agreement concluded in 1960 so as to cover also the delimitation of areas such as the 'exclusive economic zone' would involve a real modification of its text and, in accordance with a well-known dictum of the International Court of Justice, it is the duty of the court to interpret treaties, not to revise them. We are not concerned here with the evolution of the content, or even of the extent, of a maritime space which existed in international law at the time of the conclusion of the 1960 agreement, but with actual non-existence in international law of a maritime space such as the 'exclusive economic zone' at the date of the conclusion of the 1960 agreement."[109]

24. Your Court, following an analogous reasoning, has stated in its Judgment on *Romania* v. *Ukraine* that a delimitation agreement concerning the territorial sea could not apply to the continental shelf and exclusive economic zones, as the parties "would be expected to conclude a new agreement for this purpose" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), I.C.J. Reports 2009*, p. 87, para. 69).

25. Similarly, the intention to adopt a line separating one State's maritime zone from an area of high seas is clearly evidenced in the relevant agreements and in the corresponding maps, as it emerges by the examples given on Friday by Mr. Colson[110], especially the Russian-Norwegian Treaty of 15 September 2010. This is not the case with the Santiago Declaration.

Inequity of the line and the role of equity

26. It is simply not credible that Peru would have agreed to a delimitation line that entails a profoundly inequitable sharing of the maritime area facing its coasts and those of Chile. The inequity of the consequences of the parallel delimitation line, that Chile claims to have been agreed, has been explained in detail by Professor Pellet on 4 December[111]. To obtain a striking visual impression of this, it is sufficient to look at the map submitted last Tuesday by

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[108]United Nations, *Reports of International Arbitral Awards (RIAA), Delimitation of Maritime Boundary Guinea Bissau and Senegal*, Vol. 20, p. 151, para. 85 (authentic French text; an English translation in International Court of Justice, Annex to the Application Instituting Proceedings of the Government of the Republic of Guinea-Bissau, 23 August 1989, available in www.icj-cij.org/docket/files/82/11289.pdf).

[109]*Ibid.*, internal quotations omitted.

[110]CR 2012/32, pp. 37 *et seq.*

[111]CR 2012/29, pp. 25 *et seq.*

Professor Pellet showing the different effect of the parallel and of the equidistance line claimed by Peru. For ease of reference you can see it again on the screen and at tab 108 of your folders.

27. At this juncture one misunderstanding must be dispelled. It is not Peru's case that delimitation effected by a line running along a parallel is per se, by definition, inequitable. A delimitation line following a parallel may be equitable, and thus in conformity with international law, if it meets the requirements set out in the jurisprudence of the International Court of Justice and of the other international tribunals. The delimitation line must not be removed from equidistance or, as the case may be, from a bisector line, unless in the presence of relevant circumstances. It must, in any case, meet the "disproportionality test" which consists in ascertaining whether the line leads "to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), I.C.J. Reports 2009*, p. 103, para 122; and also, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia),* Judgment of 19 November 2012, para. 193).

28. The map of the Pacific coast of South America, which is on the screen and which you will find at tab 109 of your folders, which was shown by Chile in its pleadings and whose title is not, in Peru's view, entirely exact, shows the various delimitation agreements following the line of a parallel concluded between coastal States of that region, as well as the parallel allegedly delimiting the maritime zones of Peru and Chile. The map does not show the well-known delimitation line agreed between Chile and Argentina, which does not use the parallel. A perusal of this map, shows, without need of calculations, that there is a difference between the Panama-Colombia, Colombia-Ecuador and Ecuador-Peru delimitation lines, and the parallel, which according to Chile, separates the Peruvian from the Chilean maritime zone.

29. Going from north to south, the line adopted in the Agreement between Panama and Colombia follows the parallel coupling it with an equidistance line to take into account the geographic circumstances of their coasts. The parallel adopted in the Agreement between Colombia and Ecuador, in view of the concavity of the Colombian coast, also meets the requirements for an equitable solution. This also applies to, and is particularly true, as regards the Ecuador-Peru delimitation agreement of 2 May 2011. As Mr. Bundy will show in a few minutes,

the coastal geography on both sides of the parallel used in the Agreement to define the maritime boundary makes it roughly coincide with an equidistance line and no special circumstances or disproportion can be observed. The maritime boundary line following the parallel in these cases achieves an equitable result.

30. This contrasts with the case of the parallel in the Chile-Peru relationship. The sharp angle between the parallel and the Peruvian coast, as compared with the equivalent length of relevant coasts, immediately shows that the non-disproportionality criterion is not satisfied.

31. Mr. President, Ladies and Gentlemen of the Court, the pleadings of Chile seem to evidence a certain lack of sympathy as regards reliance on equity in delimitation. Professor Crawford remarked in his pleading last Thursday that: "equitable solutions are not *jus cogens* and, depending on their situation, States may differ on equity . . ."[112]. In his concluding pleading last Friday he further stated: "Equity is not a tool for overturning existing boundary agreements, no matter that one State may seek to portray that that boundary agreement is unfair by relying on a method of delimitation established or recognized after the agreement was concluded."[113]

32. Peru's position is not that an existing delimitation agreement should be overturned because it is inequitable, but that its sheer inequity makes it highly unlikely that Peru could have accepted it in the first place.

33. I imagine that by "overturning" Professor Crawford has in mind a process to declare the treaty null and void. Peru's argument is for the non-existence of the delimitation agreement, not for voiding it.

34. When Professor Crawford speaks of "equity" he seems to oscillate between the common parlance meaning of the term, as when he says that "States may differ on equity, as the Court has had recent occasion to observe"[114], and the technical legal notion developed in the jurisprudence on delimitation and accepted in Articles 74 and 83 of the Law of the Sea Convention, to which he

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[112]CR 2012/30, p. 55 para. 3.54 (Crawford).

[113]CR 2012/32, p. 60 para. 2.4 (Crawford).

[114]CR 2012/30, p. 55, para. 3.54 (Crawford).

seems to allude when he refers to "a method of delimitation established or recognized after the agreement was concluded"[115].

35. In fact, as shown in a previous pleading, while, at the time of the Santiago Conference, equidistance could at most be seen as a technique to reach an equitable result, the very idea of the equitable principles was already current in international law. It was explicitly set out in the Truman Proclamation, as the International Court of Justice remarked in the *North Sea Continental Shelf* Judgment[116], and could be inferred, as I showed in my pleading last Monday, in the Gulf of Paria Treaty of 1942[117].

36. In their sovereign discretion, States then could, as they can now, accept treaty obligations entailing an inequitable delimitation, but their intention to accept such obligations could not, as it cannot, be presumed or inferred from non-explicit texts. The "establishment of a permanent maritime boundary", as your Court has remarked in a much quoted passage, "is not easily to be presumed" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, p. 735, para. 253). This is even truer as regards a patently inequitable permanent maritime boundary.

37. Peru agrees that to achieve an equitable solution is not an obligation of *jus cogens*. It has, however, to remark that to effect delimitation by agreement is not a *jus cogens* obligation either. As all obligations "to agree", it is a weak obligation because two States — notwithstanding good faith efforts — may always fail to reach agreement.

38. Unlike in the case of land boundaries, lack of delimitation of maritime boundaries is not uncommon. States are in this situation before they conclude agreements, or before a court or tribunal adopts a boundary line for them. This situation may last for many years and not always does it entail conflicts.

Thank you, Mr. President and Members of the Court, for your kind attention. May I kindly request you to give the floor to Mr. Bundy, the next speaker for Peru.

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[115]CR 2012/32, p. 60, para. 2.4 (Crawford).

[116]*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 33, para. 47.

[117]CR 2012/27, p. 54, para. 42 (Treves).

The PRESIDENT: Thank you, Professor Treves. Maître Bundy, you have the floor.

Mr. BUNDY:

THE PERU-ECUADOR AGREEMENT AND THE STARTING-POINT FOR THE MARITIME BOUNDARY BETWEEN PERU AND CHILE

1. Thank you very much, Mr. President, Members of the Court. In this presentation, I shall address two issues which continue to divide the Parties that are relevant to the task with which the Court is seised.

2. In the first part of my pleading, which I hope to be able to conclude by the lunch break, I shall discuss the significance of the maritime boundary agreement concluded between Peru and Ecuador in May 2011, responding as necessary to arguments that Professor Dupuy raised on Friday afternoon. And in the second part, following that, I will turn to the starting-point for determining the maritime boundary between the Parties to this case, and will respond to what Mr. Paulsson had to say on the subject last Friday morning.

1. The Peru-Ecuador Agreement

3. Professor Dupuy's exposition on the Peru-Ecuador boundary situation was remarkable in two respects.

4. In the first place, Chile's counsel exhibited what was really a quite uncanny ability to speculate as to what Peru and Ecuador were thinking about throughout their dealings leading up to the conclusion of their maritime boundary agreement. Amongst other things that Professor Dupuy told us were that:

— Ecuador is particularly interested in the interpretation that the Court will give to the nature and juridical scope of the Santiago Declaration (CR 2012/32, p. 12, para. 5);

— in 2005, fever mounted in Peru's capital. Peru felt encircled by Ecuador and Chile to the north and south (CR 2012/32, p. 16, para. 19);

— in 2010, Peru was facing an urgency (CR 2012/32, p. 17, para. 25);

— for its part, Ecuador wanted to take precautions to dot the "i"s to underline that it considered the Santiago Declaration and the 1954 Agreement to have defined the limits of its maritime zone with Peru (CR 2012/32, pp. 18-19, para. 30); and

— Ecuador has not intervened today because it has nothing to fear from the Court's judgment (CR 2012/32, p. 22, para. 46), a view which contrasts with counsel's earlier assertion that Ecuador is particularly interested in the judgment.

5. The second aspect of counsel's pleading was that he devoted that entire pleading to discussing what he claimed were the attitudes of Peru and Ecuador *before* their boundary agreement of 2 May 2011, and how Chile reacted to that agreement when it went knocking on Ecuador's door *after* the agreement was concluded. But he said absolutely nothing about the actual terms of the Peru-Ecuador Agreement, and nothing about how Peru and Ecuador, who were the parties to the agreement after all, characterized that agreement afterwards.

6. Why this reluctance to deal with what Peru and Ecuador actually did? When two States conclude a boundary agreement, anything that they may have said beforehand about their views on the boundary situation becomes irrelevant. What is legally important is what they actually say in their agreement and, also, what they do not say in that agreement.

7. The Peru-Ecuador Agreement stands on its own and speaks for itself. It is a clear delimitation agreement — a point that Professor Dupuy did not dispute. It did not say that it was being entered into pursuant to the Santiago Declaration or the 1954 Agreement. It did not say that it was merely confirming a maritime boundary that had already been established. And in fact, it made no reference whatsoever to either the 1952 Declaration or the 1954 instruments. Rather, it stated in clear terms that it establishes the maritime boundary between the two countries.

8. That was a boundary that had never been delimited before. That is apparent not only from the terms of the agreement, but from the joint declaration made by the Presidents of Peru and Ecuador afterwards — a matter that I shall come back to in a few minutes[118]. Thus, when Chile's counsel referred to a statement made by Ecuador's Congress in March 2012 that the 2011 Agreement ratified the boundary established by the 1952 and 1954 instruments, he was citing

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[118]Peru's Annex A. 2, authorized by the Court on 30 Nov. 2012.

a statement that was dead wrong. Nothing in the 2011 Agreement supports that proposition (CR 2012/32, p. 20, para. 37). The 1952 and 1954 instruments were never mentioned in the 2011 Agreement; and the terms of the Peru-Ecuador Agreement certainly did not say that a boundary line allegedly created by those earlier instruments was somehow being ratified.

9. Let me return to the terms of the Agreement, which Professor Dupuy had no desire to address. Paragraph 2 of the Agreement made it clear that the boundary was being delimited along the course set out therein in the light of the existence of special circumstances in the area adjacent to the land frontier: and the obvious special circumstances that exist adjacent to the terminus of the land boundary are Ecuador's islands, which I pointed out last week.

10. Paragraph 2 went on to state that the limit of the maritime spaces of the parties *"shall extend"* along a particular line, not that they had already been delimited or that all the agreement was doing was merely confirming a previously established boundary.

11. Paragraph 3 of the Agreement defined the "starting point of the maritime boundary" with specific co-ordinates. ~~[Place the map attached to the Agreement on the screen with a red arrow pointing to the starting point — tab 110.]~~ You can see this, that the starting point — you can see it from the map on the screen, this is the map that was attached as an integral part of the Agreement, and it is also in tab 110. The starting point of the maritime boundary as set out in the 2011 Agreement does not lie at the point where the land frontier between the States concerned reaches the sea. It starts out to sea along Ecuador's straight baselines — and these were baselines that were only promulgated in 1971. That further confirms that the Agreement was not based on the Santiago Declaration.

12. It should be recalled that Ecuador's 1971 Decree promulgating a straight baseline across the Gulf of Guayaquil tasked Ecuador's Military Geographic Institute with tracing Ecuador's baselines on a nautical chart[119]. That was clearly stated in the 1971 Decree. But the tracing of those baselines on a nautical chart by the Military Geographic Institute was only done in August 2010, when Ecuador issued a Presidential Decree approving the publication of Chart I0A 42, a chart that had been prepared pursuant to the 1971 Decree[120].

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[119]CMC, Vol. IV, Ann. 212, Art. 5.

[120]RC, Vol. III, Ann. 109.

13. It thus took Ecuador 39 years to get around to plotting its baselines on a map and showing a maritime boundary with Peru. And I would note that this was just one year less than the amount of time it took Chile to change its maps following the Santiago Declaration so as to depict a maritime boundary between Peru and Chile for the first time.

14. In yet another example of Professor Dupuy's predilection to engage in mind reading, he asserted that Ecuador's publication of Chart I0A 42 in August 2010 was in response to Peru's President Garcia's earlier letter of 9 June 2010, addressed to Ecuador's President, in which President Garcia indicated that the second part of point IV of the Santiago Declaration addressed a situation that was only applicable as between Peru and Ecuador (CR 2012/32, p. 19, para. 31 (Dupuy))[121]. The assertion that Ecuador then published its chart in August — two months later — as a response to President Garcia's letter is plainly wrong. If you look at Ecuador's 2010 August Decree approving the publication of the chart it specifically stated that this was being done in conformity with the 1971 Decree, not in response to anything Peru had said. And the notion, or the suggestion, that Ecuador rushed to prepare this nautical chart in the brief period between President Garcia's letter and the approval of the chart is frankly absurd.

15. I would add — just to be clear, because Professor Dupuy failed to mention this point — that Peru only accepted the boundary line that appeared on Chart I0A 42 on 2 May 2011 when, and after, it had agreed and concluded the boundary agreement with Ecuador. That is only when Peru's approval came forward, because that was the day the Agreement was signed and in that approval Peru did not accept anything else except the boundary line depicted on Ecuador's chart — not any of the text or other references that appeared on that chart.

16. I pointed out last week that, just as the 1984 Agreement between Chile and Argentina contained all the elements that one expects to find in a maritime delimitation agreement, so did the Peru-Ecuador Agreement and obviously the Santiago Declaration did not.

17. Now, rather than respond to this point, Professor Dupuy emphasized instead what he considered to be the similarities between the Santiago Declaration and the Maroua Declaration establishing part of the maritime boundary between Cameroon and Nigeria, and the

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[121] RP, Vol. II, Ann. PR 81.

1967 France-Monaco agreement delimiting what was at that time their three-mile territorial seas (CR 2012/30, p. 24, paras. 15-16). But these two sets of instruments are very different, once again, from the Santiago Declaration.

18. Unlike the Santiago Declaration, the Court will recall that the Maroua Declaration stated — very clearly — that it was for "the delineation of the maritime boundary between the two Countries from Point 12 to Point G"; it identified with co-ordinates the starting point of the boundary; it set out the entire course of the boundary line, including the co-ordinates of its turning points and its endpoint; and it annexed an Admiralty chart that illustrated the agreed boundary. The Santiago Declaration did nothing of the kind, the Peru-Ecuador Agreement did.

19. Similarly, the France-Monaco Declaration also constituted an unequivocal delimitation agreement. It too described the course of the maritime boundary and it attached two technical diagrams showing how the boundary was positioned and calculated. Again, that is in stark contrast to the Santiago Declaration.

20. Just as Chile promptly followed up on its agreement with Argentina by including the boundary line on its charts, registering the agreement with the United Nations and referring to it in legislation and regulations — conduct which I would note is inconsistent with the way that it acted with respect to its now alleged boundary with Peru — so also did Peru and Ecuador follow the same course.

21. The Peru-Ecuador Agreement was promptly registered with the United Nations. Peru amended its baselines to conform with the Agreement. And in November of this year, the Presidents of both Peru and Ecuador issued a Joint Declaration relating to the Gulf of Guayaquil [on screen] in which they specifically referred to the Agreement by Exchange of Notes of Identical Content of 2 May 2011 "*which establishes* the maritime boundaries between both countries considering the existence of special circumstances"[122] (emphasis added) (tab 111).

22. Mr. President, Members of the Court, that is a clear confirmation by the Heads of State of Peru and Ecuador that the maritime boundary between their two countries was established by the

[122]Peru's Annex A. 2, authorized by the Court on 30 Nov. 2012.

May 2011 Agreement. No mention is made of any other instrument having delimited that boundary, and none had done so.

23. The Agreement between Peru and Ecuador, and the Joint Declaration made by their Presidents, speak for themselves. The maritime boundary between Peru and Ecuador was delimited by the 2011 Exchange of Notes, not by the Santiago Declaration.

[Proportionality maps]

24. Now that boundary, as Professor Treves has indicated, produces an equitable result — you can see this from the map on the screen, which is also in tab 112. That is because the coastal geography on both sides of the land boundary is balanced and there is no radical change in the direction of one party's coast that disadvantages the other when a parallel of latitude is used as the delimitation line.

[Peru-Chile proportionality map]

25. In contrast, consider the result, as we saw a few minutes ago, that Chile asks you to endorse in this case —that is in tab 113. The parallel is obviously, in fact grossly, inequitable, and it has never been agreed between Peru and Chile as the maritime boundary between them.

Mr. President, that concludes what I wish to say on the Peru-Ecuador Agreement, perhaps, with the Court's leave, this would be a good time to take the lunch break and I would return afterwards to deal with the relevance of the starting point of the land boundary between the Parties to this case.

The PRESIDENT: Thank you very much, Mr. Bundy. The Court will meet again this afternoon at 3 o'clock so that you can continue in your pleading, and then for final presentation of the Peruvian case and the final submissions to be read on behalf of Peru by the Agent. The sitting is adjourned.

The Court rose at 12.55 p.m.