INTERNATIONAL COURT OF JUSTICE

MARITIME DISPUTE
(PERU v. CHILE)

MEMORIAL OF THE GOVERNMENT OF PERU

VOLUME I

20 MARCH 2009

"States should bear in mind:

(a) That legal disputes should as a general rule be referred by the parties to the International Court of Justice, in accordance with the provisions of the Statute of the Court.

...

Recourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be considered an unfriendly act between States."

Manila Declaration on the Peaceful Settlement of International Disputes. Approved by the United Nations General Assembly. Resolution No. 37/10 of 15 November 1982.

TABLE OF CONTENTS

LIST OF MAPS AND FIGURES IN VOLUME I

INTRODUCTION

1. This case was brought before the International Court of Justice on 16 January 2008 by means of an Application filed by the Republic of Peru (hereinafter "Peru") against the Republic of Chile (hereinafter "Chile"). In its Application to the Court, Peru requested it –

> "to determine the course of the boundary between the maritime zones of the two States in accordance with international law … and to adjudge and declare that Peru possesses exclusive sovereign rights in the maritime area situated within the limit of 200 nautical miles from its coast but outside Chile's exclusive economic zone or continental shelf."[1]

2. The Court, by means of the Order dated 31 March 2008, fixed 20 March 2009 as the time limit for submitting the Memorial of the Republic of Peru in the *Case Concerning Maritime Dispute (Peru v. Chile)*. This Memorial is filed pursuant to that Order.

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[1] Application instituting proceedings of the Republic of Peru, filed before the I.C.J. on 16 January 2008, pp. 4-5.

I. Jurisdiction

3. In its Application Peru has indicated that:

> "The jurisdiction of the Court in this case is based on Article XXXI of the American Treaty on Pacific Settlement (Pact of Bogotá) of 30 April 1948 ..."[2].

This Article reads as follows:

> "In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:
>
> *a)* The interpretation of a treaty;
> *b)* Any question of international law;
> *c)* The existence of any fact which, if established, would constitute the breach of an international obligation;
> *d)* The nature or extent of the reparation to be made for the breach of an international obligation."[3]

4. Both Peru and Chile are Parties to the Pact of Bogotá. Peru ratified it on 28 February 1967 and Chile did so on 21 August 1967. No reservation in force at the present date has been made by either Party under the Pact. Peru notified the Secretariat General of the Organization of American States of the withdrawal of its initial reservations on 27 February 2006[4].

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[2] *Ibid.*, p. 2.

[3] Annex 46.

[4] See Signatories and Ratifications on the Pact of Bogotá <http://www.oas.org/juridico/english/sigs/a-42.html> accessed 1 December 2008.

5. There can be no doubt that Article XXXI of the Pact of Bogotá is a sufficient basis of jurisdiction in case of a legal dispute between two States Parties. The question was decided by the Court on the occasion of the case filed by Nicaragua against Honduras relating to *Border and Transborder Armed Actions*.

6. In its Judgment of 20 December 1988, on *Jurisdiction and Admissibility* in that case, the Court made clear that Article XXXI of the Pact –

> "is an autonomous commitment, independent of any other which the parties may have undertaken or may undertake by depositing with the United Nations Secretary-General a declaration of acceptance of compulsory jurisdiction under Article 36, paragraphs 2 and 4, of the Statute. Not only does Article XXXI not require any such declaration, but also when such a declaration is made, it has no effect on the commitment resulting from that Article."[5]

7. The "jurisdictional system of the Pact of Bogotá" was considered again by the Court in the case concerning the *Territorial and Maritime Dispute* between Nicaragua and Colombia[6]. In its Judgment of 13 December 2007, the Court stressed "[t]he importance attached to the pacific settlement of disputes within the inter-American system"[7] and reiterated its previous interpretation[8]. In that case the International Court of Justice lacked jurisdiction only in respect of one part of the Nicaraguan claims since that part of the dispute had been settled by a treaty "valid and in force on the date of the conclusion of the Pact of Bogotá in 1948, the date by reference to which the Court must decide

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[5] *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 85, para. 36; see also p. 88, para. 41. In the *Case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* the jurisdiction of the Court was also based on Article XXXI of the Pact of Bogotá (see the I.C.J. Judgment of 8 October 2007, para. 1).

[6] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, I.C.J. Judgment of 13 December 2007*, paras. 53-59.

[7] *Ibid.*, para. 54.

[8] *Ibid.*, para. 134.

on the applicability of the provisions of Article VI of the Pact of Bogotá setting out an exception to the Court's jurisdiction under Article XXXI thereof"[9]. Such a question does not arise in the present case, where the issue of the extent and limits of the respective maritime zones of the Parties are at stake and were not settled in 1948.

8. There can therefore be no question in the present case that the Court's jurisdiction is established under Article XXXI of the Pact of Bogotá.

II. The Maritime Dispute

A. A Brief History

9. Peru and Chile became independent without being neighbouring States. Peru gained its independence from Spain in 1821 and Chile did so in 1818. Peru did not have a common border with Chile owing to the fact that lying between the two countries was the Colonial Spanish territory of Charcas and, as from 1825, the new Republic of Bolivia.

10. In 1879 Chile declared war against Peru and Bolivia, in what is known historically as the War of the Pacific. By the Treaty of Peace and Friendship signed by Chile and Peru in 1883 (hereinafter "the 1883 Treaty of Ancón"), Peru had to cede to Chile in perpetuity the coastal province of Tarapacá and the possession for ten years of the Peruvian provinces of Tacna and Arica[10]. Further, by a treaty of 1904, Bolivia ceded to Chile all the territory of its coastal province of Antofagasta, thus losing its maritime status. That is how Peru and Chile came to be neighbouring States after, and as a result of, the War of the Pacific.

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[9] *Ibid.*, para. 81; Article VI of the Pact of Bogotá reads: "The aforesaid procedures, furthermore, may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty." Annex 46.

[10] See paras. 1.20-1.31 below.

11. It was only after 45 years, in 1929, that under the Treaty for the Settlement of the Dispute regarding Tacna and Arica, and its Additional Protocol (hereinafter "the 1929 Treaty of Lima")[11] the situation was solved with the partition of the provinces, so that Tacna was reincorporated to Peru and Arica (a coastal province to the south of Tacna which possesses the only natural harbour in the area) was ceded in perpetuity to Chile. Other important provisions of this Treaty, regarding Peruvian rights and servitudes in Arica, were implemented by Chile 70 years later, in 1999[12]. None of the treaties over these coastal provinces mentioned the adjacent sea or maritime limits.

B. Peru-Chile and the Modern Law of the Sea

12. Despite important and delicate territorial questions which remained unresolved, in 1952 Peru and Chile, together with Ecuador, embarked on a process of maritime co-operation with a view to protecting the adjacent sea from the predatory activities of foreign fleets. This joint action was preceded by the unilateral claims made in 1947 by Chile and by Peru in relation to new maritime areas[13], which formed part of the foundations of the modern Law of the Sea. The Declaration on The Maritime Zone of 18 August 1952 (hereinafter "the 1952 Declaration of Santiago"), established the guidelines for a common maritime policy of the signatory States, stating *inter alia*:

> "II) 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.

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[11] The 1929 Treaty of Lima is Annex 4 to the Application. It is joined anew for the convenience of the Court as Annex 45.

[12] The Execution Act concerning Article 5 of the 1929 Treaty of Lima was signed by the two countries in 1999. Annex 60.

[13] Annexes 27 and 6, respectively.

> III) The exclusive jurisdiction and sovereignty over this maritime zone shall also encompass exclusive sovereignty and jurisdiction over the seabed and the subsoil thereof."[14]

Spanish text reads as follows:

> "II) Como consecuencia de estos hechos, los Gobiernos de Chile, Ecuador y Perú proclaman como norma de su política internacional marítima, la soberanía y jurisdicción exclusivas que a cada uno de ellos corresponde sobre el mar que baña las costas de sus respectivos países, hasta una distancia mínima de 200 millas marinas desde las referidas costas.
>
> III) La jurisdicción y soberanía exclusivas sobre la zona marítima indicada incluye también la soberanía y jurisdicción exclusivas sobre el suelo y subsuelo que a ella corresponde."

13. The 1952 Declaration of Santiago was the basis of the position adopted by the signatory States[15] at the Third United Nations Conference on the Law of the Sea (hereinafter "UNCLOS III"). Thus, in a joint declaration dated 28 April 1982, they stated the following:

> "The delegations of Chile, Colombia, Ecuador and Peru wish to point out that the universal recognition of the rights of sovereignty and jurisdiction of the coastal State within the 200-mile limit provided for in the draft Convention is a fundamental achievement of the countries members of the Permanent Commission of the South Pacific, in accordance with the basic objectives stated in the Santiago Declaration of 1952.
>
> Those objectives have been compiled and developed by the Convention on the Law of the Sea, which incorporates into international law principles and institutions which are essential for a more appropriate and fairer exploitation of the resources contained in coastal waters, to the benefit of the over-all

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[14] Annex 47.

[15] Colombia had joined the 1952 Declaration of Santiago in 1979.

> development of the peoples concerned, on the basis of the duty and the right to protect those resources and to conserve and guarantee that natural wealth for those peoples."[16]

14. Neither the 1952 Declaration of Santiago, nor the various implementing agreements signed by the Parties relate to maritime delimitation. Thus, the negotiation of a maritime delimitation treaty – which would divide the large area of sea claimed by means of the 1952 Declaration of Santiago and whose main outlines were incorporated in the 1982 United Nations Convention on the Law of the Sea (hereinafter "the 1982 Convention on the Law of the Sea") – remained outstanding[17].

15. On 27 August 1980, after evaluating the result of the negotiations at UNCLOS III, Peru stated at that Conference its position on the maritime delimitation of States with adjacent or opposite coasts. The Head of the Peruvian delegation stated:

> "Where a specific agreement on the delimitation of the territorial sea, exclusive economic zone and continental shelf between States with opposite or adjacent coasts did not exist or where there were no special circumstances or historic rights recognized by the parties, the median line should as a general rule be used, as suggested in the second revision, since it was the most likely method of achieving an equitable solution."[18]

C. Peru's Proposals to Reach an Agreement on Maritime Delimitation with Chile

16. After the 1982 Convention on the Law of the Sea had been adopted, the Peruvian Government carried out its first relevant act vis-à-vis the Chilean Government in relation to maritime delimitation. The diplomatic Memorandum annexed to the Note of the Embassy of Peru dated 23 May 1986, summarized

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[16] Annex 108.

[17] See paras. 4.80-4.81 below.

[18] Annex 107.

the presentation made by a Peruvian envoy to the Chilean Minister of Foreign Affairs. This Memorandum said:

> "One of the cases that merits immediate attention is the formal and definitive delimitation of the marine spaces, which complement the geographical vicinity of Peru and Chile and have served as scenario of a long and fruitful joint action."[19]

Spanish text reads as follows:

> "Uno de los casos que merece una inmediata atención, se refiere a la delimitación formal y definitiva de los espacios marinos, que complementan la vecindad geográfica entre el Perú y Chile, y que han servido de escenario a una larga y fructífera acción común."

17. This meeting between the Peruvian envoy and the Chilean Minister of Foreign Affairs was dealt with by the Chilean Government in an official communiqué dated 13 June 1986, which stated:

> "During this visit, Ambassador Bákula expressed the interest of the Peruvian Government to start future conversations between the two countries on their points of view regarding maritime delimitation.
>
> The Minister of Foreign Affairs, taking into consideration the good relations existing between both countries, took note of the above stating that studies on this matter shall be carried out in due time."[20]

Spanish text reads as follows:

> "Durante esta visita, el Embajador Bákula dio a conocer el interés del Gobierno peruano para iniciar en el futuro

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[19] Annex 76.

[20] Annex 109.

> conversaciones entre ambos países acerca de sus puntos de vista referentes a la delimitación marítima.
>
> El Ministro de Relaciones Exteriores, teniendo en consideración las buenas relaciones existentes entre ambos países, tomó nota de lo anterior manifestando que oportunamente se harán estudio [*sic*] sobre el particular."

18. Several events occupied Peru's attention during the decades that followed the adoption of the 1982 Convention on the Law of the Sea. Among others, Peru was concerned with the implementation of the 1929 Treaty of Lima which provided rights and servitudes in Arica in favour of Peru. In 1992 and 1993 Peru and Chile carried out intensive, but unsuccessful negotiations on this matter.

19. In 1995 an armed conflict took place between Peru and Ecuador. With the co-operation of Argentina, Brazil, Chile and the United States – the four guarantor countries of the 1942 Rio de Janeiro Protocol between Peru and Ecuador – both countries focussed their efforts on reaching a final solution to their differences regarding the demarcation of the land boundary. This matter was settled by means of the Presidential Act of Brasilia in 1998. Subsequently, in 1999, Peru resumed negotiations with Chile regarding the rights and servitudes in Arica provided in favour of Peru by the 1929 Treaty of Lima. This was finally achieved by means of the Execution Act of 1999 signed by Peru and Chile[21] 70 years after the signature of the Treaty of Lima.

20. Meanwhile, in 1997 Chile ratified the 1982 Convention on the Law of the Sea, stating that it did not accept the application of the procedures provided for in Part XV –Settlement of Disputes –, Section 2, to disputes concerning sea boundary delimitation[22].

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[21] Annex 60.

[22] Chile made the following declaration: "In accordance with article 298 of the Convention, Chile declares that it does not accept any of the procedures provided for in part XV, section 2, with respect to the disputes referred to in article 298, paragraph 1(a), (b) and (c) of the Convention." United Nations Division for Ocean Affairs and the Law of the Sea, *Law of the Sea Bulletin* No. 35, p. 11.

D. The Chilean Allegations

21. Despite the fact that Chile had acknowledged in 1986 that the maritime delimitation with Peru was a matter which remained to be examined, in 2000 it lodged with the Secretary-General of the United Nations a chart purporting to depict the baselines in the northern sector of its coast as well as the outer limits of the territorial sea, the contiguous zone, the exclusive economic zone (hereinafter "EEZ") and the continental shelf. On that chart Chile unilaterally depicted the parallel 18°21'00" S WGS84 as the international maritime limit with Peru[23]. Peru protested and formally objected to the chart. In a document addressed to and circulated by the Secretary-General of the United Nations, Peru complained about Chile's behaviour and emphasized the fact that there is no maritime boundary agreement between Peru and Chile. It stated clearly that:

> "To date Peru and Chile have not concluded a specific maritime delimitation treaty pursuant to the relevant rules of international law. The mention of parallel 18°21'00" as the maritime boundary between the two States is, therefore, without legal basis."[24]

22. It should be stressed that Peru has constantly reiterated its unwavering position that it does not accept the parallel of latitude as the international maritime boundary: Chile's allegation that it is an international boundary is without any foundation. At the same time, Peru has decided to continue with its policy of caution and moderation in the handling of the dispute concerning the maritime boundary, in order not to jeopardize compliance with the purposes and principles of the Charter of the United Nations, and particularly Article 2.3 thereof. It was also in accordance with these purposes and principles that Peru decided to bring this case before the International Court of Justice.

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[23] See **Figure 2.6** in Vol. IV. See also the list of geographical co-ordinates deposited by Chile with the Secretary-General of the United Nations, in Annex 110.

[24] Note No. 7-1-SG/005 of 9 January 2001, from the Permanent Mission of Peru to the Secretary-General of the United Nations. Statement by the Government of Peru concerning parallel 18°21'00", referred to by the Government of Chile as the maritime boundary between Chile and Peru. Annex 78.

23. Peru decided to approach the Court after a long process during which the dispute came to a head and in view of the refusal of Chile to negotiate a maritime delimitation treaty. Thus, following the initial proposal made by Peru in 1986, on 19 July 2004 Peru's Minister of Foreign Affairs stated in a formal diplomatic Note addressed to Chile:

> "Peru considers that the stability of friendly and cooperative bilateral relations with Chile, as well as the promotion of shared interests in all aspects of the bilateral relationship will find a larger dynamism to the extent that an agreement on the juridical dispute could be reached, whose solution is still pending.
>
> These considerations, of utmost importance in our bilateral relation, lead me to formally submit a proposal, to Your Excellency, for the commencement, as soon as possible, of bilateral negotiations to solve this dispute. I also suggest that these negotiations start within the next 60 days. They could be carried out in the city of Lima, in the city of Santiago de Chile or in the city chosen by mutual agreement. The purpose of these negotiations should be the establishment of the maritime limit between Peru and Chile, according to the provisions of International Law, through a specific treaty on this issue."[25]

Spanish text reads as follows:

> "El Perú estima que la estabilidad de las relaciones bilaterales, de amistad y cooperación con Chile, así como la promoción de intereses compartidos en todos los ámbitos de la relación bilateral encontrarán un mayor dinamismo en la medida en que se pueda obtener un acuerdo sobre esta controversia jurídica cuya solución está aún pendiente.
>
> Estas consideraciones, de la mayor importancia en la relación bilateral, me llevan a proponer formalmente a Vuestra Excelencia el inicio, a la brevedad posible, de negociaciones bilaterales para resolver esta controversia. Propongo, asimismo, que estas negociaciones comiencen dentro de los próximos sesenta días.

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[25] Annex 79.

> Las mismas podrían llevarse a cabo en la ciudad de Lima, en la ciudad de Santiago de Chile o en la ciudad que se escoja de común acuerdo. La finalidad de estas negociaciones deberá ser el establecimiento del límite marítimo entre el Perú y Chile de conformidad con las normas del Derecho Internacional, mediante un tratado específico sobre esta materia."

24. By means of a Note dated 10 September 2004, Chile rejected this proposal, thus closing definitively the door to the possibility of negotiating a maritime delimitation treaty with Peru[26].

25. Very shortly afterwards there was a formal acknowledgment by Chile of the existence of the bilateral controversy concerning maritime delimitation. In the Joint Communiqué signed by the Ministers of Foreign Affairs of Peru and Chile in Rio de Janeiro, on 4 November 2004, it was stated that:

> "We, the Ministers of Foreign Affairs have reiterated that the subject of maritime delimitation between both countries, in respect of which we have different positions, is a question of juridical nature and it strictly constitutes a bilateral issue that must not interfere in the positive development of the relationship between Peru and Chile."[27]

Spanish text reads as follows:

> "Los Cancilleres hemos reafirmado que el tema de la delimitación marítima entre ambos países, respecto del cual tenemos posiciones distintas, es una cuestión de naturaleza jurídica y que constituye estrictamente un asunto bilateral que no debe interferir en el desarrollo positivo de la relación entre Perú y Chile"

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[26] Annex 80.

[27] Annex 113.

E. Summary

26. To summarize, the guiding principle of the joint international maritime policy, as it was agreed and explained in the 1952 Declaration of Santiago, is that each State which is a Party to the Declaration has rights over the adjacent sea out to a distance of at least 200 nautical miles measured from its coastline. Chile's position denies Peru that right, and the resulting situation is totally inequitable.

27. Peru has not ceded to Chile its sovereignty or its sovereign rights and jurisdiction over maritime areas generated by Peru's coast; nor has any maritime area belonging to Peru been transferred to the high seas. It is absurd to think that Peru could have given up tenths of thousands of square kilometres of sea in favour of a neighbouring country. It is equally absurd to consider that Peru has relinquished its sovereign rights to areas that lie within 200 miles from its shores (approximately 30,000 square kilometres), and which are therefore part of Peru's maritime domain. However, Chile has recently deemed these areas to be high seas and part of its "Presential Sea", a concept unilaterally devised by Chile.[28]

28. In the course of the present case, Peru will demonstrate that it has not concluded with Chile any agreement establishing international maritime limits, nor has it given up, expressly or tacitly, the maritime zones which belong to it under international law.

29. Faithful observance of treaties, compliance with international law, peaceful settlement of disputes and fulfilment of the purposes and principles of the United Nations Charter are the foundations of the Peruvian foreign policy.

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[28] See para. 7.8 *ff.* below.

III. Outline of this Memorial

30. The present Memorial contains the following chapters:

(a) Chapter I: Historical Background.

This chapter explains how the agreed land boundary between Peru and Chile – including the point at which the land boundary meets the sea – was fixed. It begins by explaining the relations between Peru and Chile since Colonial times and their early Republican life. It also examines the consequences of the War of the Pacific (1879-1883) as a result of which Peru lost vast and rich territories and became a neighbour of Chile, as well as the Chilean failure to organize the agreed Plebiscite on the final legal status of the Peruvian provinces of Tacna and Arica. It then describes the events that led to the 1929 Treaty of Lima which fixed the land boundary between the two countries and established rights and servitudes for Peru, the implementation of which took 70 years. It also records the fruitful co-operation started by Peru and Chile in the 1950s, together with Ecuador and later also with Colombia, for extending their maritime sovereign rights out to a distance of at least 200 nautical miles off their coasts, and their contribution to the modern Law of the Sea. The chapter finally underlines the expanding relations between Peru and Chile and gives the context of Peru's Application to the International Court of Justice in 2008 as a means of solving the dispute without affecting the development of the relationships between both countries.

(b) Chapter II: The Geographical Setting.

This chapter addresses the geographical setting within which the delimitation is to be effected by the Court. It also describes the general configuration of the Peruvian and Chilean coasts, including both countries' baselines. Finally, it discusses the characteristics of the area to be delimited, the natural resources therein, and the crucial importance of access to those resources for the well-being of Peru's southern provinces and of the country as a whole.

(c) Chapter III: Peru's Maritime Entitlements under International Law.
This chapter discusses the sources of law applicable to the present dispute under Article 38 of the Statute of the International Court of Justice, with reference to the delimitation of the continental shelf and the column of water. It demonstrates that under the general principles of the contemporary Law of the Sea Peru is entitled to an exclusive maritime zone extending to a distance of 200 nautical miles from its baselines. Further, it explains that Chile has recognized these Peruvian maritime entitlements as a matter of principle.

(d) Chapter IV: Lack of an Agreement on Maritime Delimitation.
This chapter adopts a chronological approach, explaining developments that fall into three natural periods: (i) up to 1945, before the expanded claims made in and following the Truman Proclamations in 1945; (ii) from 1945 up to 1980, during which time the 200-nautical-mile claims made by Peru, Chile and other States remained contentious and had not gained general acceptance among the traditional "maritime" States; and (iii) after 1980, when developments at the UNCLOS III indicated that the 200-nautical-mile zone was practically certain to be a central element of the new legal regime then being negotiated at the Conference. This chapter also describes the dealings by the Parties insofar as they are relevant to the question of the maritime boundary and explains how all those dealings were reactions to the pressure of immediate events, foremost among which was the refusal of certain States whose vessels fished off the coasts of the American South Pacific States to recognize the validity of the 200-nautical-mile claims made by those States. It further discusses the key characteristic of those dealings, which is the defence of an American South Pacific maritime zone against opposition and violations by third States. The chapter explains the provisional nature of this maritime zone, as well as the intention of the Parties to regulate certain specific functions in the vicinity of the coast and the absence of any intention to divide up areas of ocean space. The chapter concludes that in the absence of a maritime agreement between Peru and Chile their maritime boundary remains to be determined by the Court.

(e) Chapter V: The Map Evidence Confirms that There Is No Pre-Existing Maritime Delimitation between the Parties.

This chapter shows that the official cartography of Peru and Chile confirms that there is no pre-existing maritime delimitation between them. It discusses the fact that, contrary to normal State practice and to Chile's own delimitation practice, no map has ever been issued jointly by the Parties depicting a maritime boundary between them. It also demonstrates that the official cartography of both Parties shows that Peru has never published any official map indicating that a maritime boundary exists between itself and Chile, and that it was only in 1992 that Chile began to change its cartographic practice by publishing a map relating to its "Presential Sea" claim which purported to show a maritime boundary between Chile and Peru.

(f) Chapter VI: The Principles and Rules of International Law Governing Maritime Delimitation and Their Application in this Case.

This chapter reviews the principles and rules of international law relevant to maritime delimitation and their application to the geographical and other circumstances of the present case in order to achieve an equitable result. It starts by examining the "equitable principles/relevant circumstances" rule as the basic rule of maritime delimitation in the absence of an agreed boundary. Then it identifies the relevant coasts of the Parties for the purposes of the delimitation, and the relevant area within which the "equidistance/special circumstances" rule falls to be applied. It addresses the starting-point for the delimitation, where the land boundary between the Parties meets the sea, and shows the manner in which that point was agreed in 1929-1930. It then discusses the construction of the provisional equidistance line and shows that there are no special or relevant circumstances characterizing the area to be delimited which call for the adjustment of that line, and that the equidistance line itself results in an equal and equitable division of the areas appertaining to the Parties without any "cut-off" effect or undue encroachment. Finally, it demonstrates that a delimitation based on the application of the equidistance method satisfies the test of proportionality and achieves an equitable result based on the facts of the case.

(g) Chapter VII: Peru's Maritime Entitlements Off Its Southern Coast – The 'Outer Triangle'.

This chapter describes the rights claimed by Chile beyond its 200-mile zone through its concept of the so-called "Presential Sea", and shows that Chile's claimed "Presential Sea" encroaches deeply upon Peru's maritime domain, well within the 200-mile area to which Peru is entitled. Finally, it demonstrates that such a claim is clearly incompatible with the exclusive sovereign rights appertaining to Peru.

(h) Chapter VIII: Summary.

In accordance with Practice Direction II of the International Court of Justice, a summary of Peru's reasoning is presented in this final chapter.

31. Following the Summary in Chapter VIII, Peru presents its Submissions. In accordance with Article 50 of the Rules of the Court, Peru's Memorial also contains two (2) volumes of documentary annexes (Volumes II and III) together with a volume of maps and figures (Volume IV). A list of the documentary annexes and of the maps and figures appears after Peru's Submissions as well as a list of documents filed with the Court's Registry in accordance with Article 50(2) of the Rules of the Court.

CHAPTER I

HISTORICAL BACKGROUND

I. Introduction

1.1 The Government of Peru has chosen to submit its maritime dispute with Chile to the International Court of Justice so that the matter can be settled on the basis of international law, and respecting the sovereign equality of the two States. This is the method of dispute settlement for which the American States provided in the Pact of Bogotá and is a reflection of the principles of mutual respect and good-neighbourliness which guide relations between the American States.

1.2 In order to explain how the agreed land boundary between Peru and Chile – including the point at which the land boundary meets the sea and from which the maritime delimitation must start – was fixed, this chapter focuses upon some important historical facts in the context of the maritime dispute between Peru and Chile.

1.3 Although Peru and Chile did not share territorial boundaries until 1883, they had a strong relationship during a period in which Peru enjoyed an exceptional position in the region. Since their independence (Chile in 1818 and Peru in 1821), Chile struggled to achieve a predominant role in the South-East Pacific. The War of the Pacific (1879-1883) declared by Chile against Bolivia and Peru was a direct consequence of that objective.

1.4 As a result of territorial losses by Peru and Bolivia in that war, Peru and Chile became bordering neighbours. With the 1929 Treaty of Lima, Peru and Chile reached an agreement on outstanding issues arising from the war, a final land border was established and their relationship improved.

1.5 Starting from the 1952 Declaration of Santiago, Peru, Chile and Ecuador – later joined by Colombia – worked together in order to defend their claim to a maritime zone of 200 nautical miles and took on a pioneering role in the creation of the modern Law of the Sea.

1.6 The relationship between Peru and Chile has continued to develop in many areas during recent decades and Peru's Application to the Court seeks a solution of the dispute without impeding the development of friendly relations between the two countries.

II. Colonial Times and Early Republican History

1.7 The Viceroyalty of Peru was the most important Spanish dominion in South America. During the colonial period the bond between the Viceroyalty of Peru and the Captaincy-General of Chile was quite strong. Through trade and the mining industry, a complex productive and commercial system that extended throughout Peru, Bolivia, northern Argentina and Chile was established during the first centuries of that period[29]. Trade was carried out under the control of Lima-based merchants (the 'Lima Consulate') who owned the ships and in many ways actually set the rules of the commercial exchange[30].

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[29] Sempat Assadourian, Carlos: *El Sistema de la Economía Colonial: Mercado Interno, Regiones y Espacio Económico*. Lima, IEP, 1982, pp. 11-17.

[30] Flores Galindo, Alberto: *Aristocracia y Plebe. Lima, 1760-1830*. Lima, Mosca Azul Editores, 1984, pp. 54-59; Villalobos, Sergio: *Chile y Perú. La historia que nos une y nos separa 1535-1883*. Santiago de Chile, Editorial Universitaria, 2002, pp. 13-16; Céspedes del Castillo, Guillermo: *Historia de España*. Barcelona, Editorial Labor S.A., 1983, Vol. VI (América Hispánica), pp. 83, 157.

1.8 After its independence, Peru did not share any boundary with Chile because Bolivia's territory lay between the two countries (see **Figure 1.1**). Therefore, the relationship between Peru and Chile at that time did not give rise to any territorial or maritime questions.

1.9 In the 1830s Diego Portales, a prominent Chilean statesman who was Minister of Interior, Foreign Affairs, War and Navy, argued for the adoption of a clear principle in Chilean foreign policy: Chile had to prevent Peru from attaining once more the political and military predominance it had enjoyed in Colonial times. This principle has been a key element in Chile's foreign and security policies since the nineteenth century[31].

1.10 The application of this principle was evident when Bolivian President Andrés de Santa Cruz organized the Peru-Bolivian Confederation in 1836. This raised the concerns of Diego Portales, who advised the Chilean President to take action against the Confederation. Portales recorded his thoughts about the Confederation in the following way:

> "The Confederation must forever disappear from the American scene. By its geographical extent; by its larger white population; by the combined wealth of Peru and Bolivia, until now scarcely touched; by the rule that the new organization would try to exert in the Pacific, taking it away from us … the Confederation would drown Chile" [32].

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[31] See Collier, Simon and Sater, William F.: *A History of Chile 1808-1994*. Cambridge, Cambridge University Press, 1996, pp. 63-69; Góngora, Mario: *Ensayo Histórico Sobre la Noción de Estado en Chile en los Siglos XIX-XX*. Santiago de Chile, Editorial Universitaria, 1998, pp. 68-71.

[32] De la Cruz, Ernesto and Feliú Cruz, Guillermo: *Epistolario de Don Diego Portales 1821-1837*. Santiago de Chile, Dirección General de Prisiones, 1937, Vol. III, p. 453. On this point, Robert Burr's interpretation of Portales thought is noteworthy: "Chile's dominant political figure thus proved himself to be the possessor of a thoroughly sophisticated concept of power … And in his sense of Chile's inferiority to the former viceregal capital, Portales reflected the attitudes of Chilean leaders as they confronted the growing power of Santa Cruz, and decided that that power must be definitively destroyed." See Burr, Robert N.: *By Reason or Force*. Los Angeles, University of California Press, 1965, pp. 38-39.

Spanish text reads as follows:

> "La Confederación debe desaparecer para siempre jamás del escenario de América. Por su extensión geográfica; por su mayor población blanca; por las riquezas conjuntas del Perú y Bolivia, apenas explotadas ahora; por el dominio que la nueva organización trataría de ejercer en el Pacífico, arrebatándonoslo … la Confederación ahogaría a Chile".

1.11 Bernardo O'Higgins, considered the "father of the Chilean Nation", at that time in exile in Peru, warned about the possibility that Diego Portales would use a pretext to declare war against the Peru-Bolivian Confederation. Backing the efforts displayed by the Confederation to avoid the war, O'Higgins wrote to Argentine General José de San Martín, with whom he had collaborated in the independence of Peru: "… Minister Portales … having disposed himself for war, fears his fall in times of peace"[33], adding:

> "… [Portales] should repent himself of kindling wars and enmities that lead to the ultimate ruin of our common Nation! To those to whom nothing has cost and wish to elevate themselves on the ruin of those who sacrifice themselves for their dear homeland, national honour, the prosperity of America and public peace are of small regard, because lacking entitlement to govern and unleash their aspirations, they want to prevail by force over reason and justice."[34]

Spanish text reads as follows:

> "… que [Portales] se arrepienta de encender guerras y enemistades que conducen a la última ruina de nuestra común patria! A los que nada les ha costado y quieren elevarse sobre la ruina de los que se sacrifican por su caro suelo, poco les importa el honor nacional, la prosperidad de la América y la

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[33] Archivo Nacional: *Archivo de don Bernardo O'Higgins*. Santiago de Chile, Imprenta Universitaria, 1951, Vol. IX, p. 33. (Spanish text: "… el Ministro Portales … habiéndose dispuesto para la guerra, teme su caída en la paz.").

[34] *Ibid.*


FIRST OFFICIAL MAP OF PERU
Prepared in 1864 by order of the
Minister of Foreign Affairs Mariano Felipe Paz-Soldán
Mapa
DEL
PERU
Ramon Castilla.
MARIANO FELIPE PAZ-SOLDAN
IMPERIO DEL BRASIL
REPUBLICA DE BOLIVIA

Figure 1.1

> pública tranquilidad, porque no teniendo título para gobernar y dar anchura a sus aspiraciones, quieren por la fuerza sobreponerse a la razón y a la justicia."

1.12 Nevertheless, Chile decided that a political entity like the Peru-Bolivian Confederation was a threat for Chilean security. Chile therefore organized two military expeditions against the Confederation. The first expedition failed, but the second defeated the Confederation's army in 1839[35] resulting in the break-up of the Confederation.

1.13 With the introduction of steamships in the 1840s, the passage of merchant ships from the Atlantic Ocean to the Pacific Ocean through the Strait of Magellan and Cape Horn increased substantially, allowing Chile to develop its own trade policies[36]. In the nineteenth century there was strong competition between the ports of Callao (Peru) and Valparaíso (Chile), which vied for the role of hub in the South-East Pacific Ocean. This competition focused on tariffs and tax policies[37].

III. The War of the Pacific (1879-1883)

1.14 The War of the Pacific (1879-1883) fundamentally changed the relationship between Peru and Chile. In 1879, Chile asserted that Bolivia had breached an international treaty signed by the two countries in 1874, which had set out conditions for the exploitation of Bolivian nitrates by Chile. On 14 February 1879, Chile invaded the Bolivian province of Antofagasta, where Chile had significant investments in nitrates[38].

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[35] Fernández Valdés, Juan José: *Chile-Perú. Historia de sus Relaciones Diplomáticas entre 1819-1879*. Santiago de Chile, Editorial Cal & Canto, 1997, pp. 91-120.

[36] Querejazu Calvo, Roberto: *Guano, Salitre, Sangre. Historia de la Guerra del Pacífico (La Participación de Bolivia)*. La Paz, Librería Editorial "Juventud", 1998, pp. 28, 32.

[37] Wagner de Reyna, Alberto: *Historia Diplomática del Perú 1900-1945*. Lima, Fondo Editorial del Ministerio de Relaciones Exteriores del Perú, 1997, p. 31.

[38] The Bolivian province of Antofagasta and the Peruvian southern province of Tarapacá were rich in nitrates and guano. Nitrates were used to manufacture gunpowder and also as a fertilizer. It was a lucrative business during the second half of the nineteenth and early twentieth century. Guano is a natural fertilizer produced by seabirds.

1.15 Peru was a Party to a Defence Alliance Treaty with Bolivia and tried to find a peaceful solution to the dispute between Chile and Bolivia. These efforts were unsuccessful, and on 5 April 1879, Chile declared war on Peru and Bolivia.

1.16 When the war broke out Chile had far more and better weapons and ships than both Peru and Bolivia. The burden of the war fell mainly on Peru because Bolivia had lost most of its army early in the conflict. Despite the military handicap, the Peruvian Admiral Miguel Grau succeeded in holding back the Chilean Navy for several months, but Chile won control of the sea and then initiated the land campaign. Peruvian Colonel Francisco Bolognesi and a handful of Peruvian patriots died on 7 June 1880 defending the Morro de Arica, in a key battle on Peruvian soil. By 1881, despite a staunch defence – particularly in the highlands, under the command of Andrés Cáceres – Chile had occupied a great expanse of the Peruvian territory, including Lima, the capital.

1.17 The effects of the war were traumatic for Peruvians. There were thousands of civilian casualties and cities were destroyed. Many public buildings and institutions, including San Marcos University and the National Library in Lima, were plundered[39]. In addition, Chile undertook control of guano[40] and nitrate production; furthermore, set fire to the coastal sugar plantations and their modern refineries. As a result, the Peruvian economy was destroyed[41].

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[39] Pradier Fodéré, Paul: *Le Chili et le droit des gens.* Gand, L. de Busscher, 1883, pp. 4-10. Some of the books and archives taken from Lima were returned to Peru as recently as 2008.

[40] Guano was used as fertilizer since ancient times, as shown by the discovery of pre-Inca (Mochica) tools in deep layers of fossilized guano. It was also used as fertilizer by the Incas and later, during colonial times, by native Peruvians. Peruvian guano had been studied in Europe since 1804 and attracted particular attention from the time of the industrial revolution. In London its price reached 25 pounds per ton, and many businessmen tried to get permits from the Peruvian Government for its extraction and sale. See Querejazu Calvo, Roberto, *op. cit.*, pp. 27-28.

[41] Basadre, Jorge: *Historia de la República del Perú 1822-1933.* 7th ed. Lima, Editorial Universitaria, 1983, Vol. VI. pp. 214-216; also Pradier Fodéré, Paul, *op. cit.*, pp. 4-6.

1.18 Peru signed and ratified the 1883 Treaty of Ancón while Chilean troops were still occupying its territory. With the military victory in the War of the Pacific, Chile's international pre-eminence in the area increased[42].

1.19 Mario Góngora, a well-known Chilean historian, understood that war was the means by which the Chilean State consolidated in the nineteenth century. Conquering wars expanded its territorial domain. Góngora wrote:

> "Well then, in the nineteenth century war also becomes a key historical factor … along the century, the 1836-1839 war against the Peru-Bolivian Confederation of Santa Cruz, the naval war against Spain (1864-1866), the War of the Pacific (1879-1883) – which was lived as a national war – follow one another.
> …
> The last century is, thus, marked by war.
> …
> Starting with the wars of Independence, and after the successive victorious wars of the nineteenth century, a sentiment and a properly 'national' conscience – 'Chileanness' – has been progressively under construction."[43]

Spanish text reads as follows:

> "Pues bien, en el siglo XIX la guerra pasa a ser también un factor histórico capital … se suceden, a lo largo del siglo, la guerra de 1836-1839 contra la Confederación Perú-Boliviana de Santa Cruz, la guerra naval contra España (1864-1866), la guerra del Pacífico (1879-1883), vivida como guerra nacional.
> …
> El siglo pasado está pues marcado por la guerra.
> …
> A partir de las guerras de la Independencia, y luego de las sucesivas guerras victoriosas del siglo XIX, se ha ido constituyendo un sentimiento y una conciencia propiamente 'nacionales', la 'chilenidad'."

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[42] Collier, Simon: "From Independence to the War of the Pacific". In: Leslie Bethell ed., *Chile Since Independence*. Cambridge, Cambridge University Press, 1993, p. 31.

[43] Góngora, Mario, *op. cit.*, pp. 66-67, 72.

IV. The 1883 Treaty of Ancón and the Plebiscite on Tacna and Arica

1.20 The terms of the 1883 Treaty of Ancón were very harsh for Peru. By this Treaty, Peru lost the coastal province of Tarapacá, rich in natural resources. Besides guano, the areas obtained by Chile had nitrate mines which were of great significance for its economy. Much later, copper mines – many of them in the conquered territories – would become the source of the key export item of the Chilean economy. At the same time, social and economic interaction was broken between the provinces conquered by Chile and southern Peru.

1.21 Furthermore, Article 3 of the 1883 Treaty of Ancón stated that:

> "The territory of the Provinces of Tacna and Arica … shall continue in the possession of Chile … during a period of ten years … After the expiration of that term a plebiscite will decide by popular vote whether the territory of the above-mentioned Provinces is to remain definitely under the dominion and sovereignty of Chile or is to continue to constitute a part of Peru."[44] (See **Figure 1.2**).

Spanish text reads as follows:

> "El territorio de las Provincias de Tacna y Arica ... continuará poseído por Chile ... durante el término de diez años ... Expirado este plazo, un plebiscito decidirá en votación popular si el territorio de las Provincias referidas queda definitivamente del dominio y soberanía de Chile ó si continúa siendo parte del territorio peruano."

1.22 Chile occupied not only Tarapacá, Arica and Tacna but also the province of Tarata, acting contrary to the 1883 Treaty of Ancón. Peru unsuccessfully demanded the return of Tarata on the grounds that Chile had no right to that province under the Treaty[45].

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[44] Annex 43.

[45] García Salazar, Arturo: *Historia Diplomática del Perú 1884-1927*. Lima, Imprenta A. J. Rivas Berrio, 1928, p. 136; Ríos Gallardo, Conrado: *Chile y Perú. Los Pactos de 1929*. Santiago de Chile, Editorial Nascimento, 1959, pp. 77, 149-151.


CHILE'S TERRITORIAL ACQUISITIONS
RESULTING FROM THE WAR
OF THE PACIFIC
Mercator Projection
Datum: WGS-84
Scale accurate at 18°S
0 50 100 150 200
Nautical Miles
0 100 200 300
Kilometers
Coastal configuration is based on Peruvian nautical chart 300 and Chilean nautical charts 1000 & 2000.
Prepared by: International Mapping
PERU
BOLIVIA
CHILE
ARGENTINA
PACIFIC
OCEAN
Tanaca
Atico
Ocoña
Quilca
Mollendo
Ilo
Tacna
Boca del Rio
Arica
Cuya
Pisagua
Iquique
Tocopilla
Antofagasta
Paposo
TARAPACA
ANTOFAGASTA
Peruvian Territory to be Administered by Chile for ten years, starting in 1883.
Territory ceded to Chile by Peru (1883)
Territory ceded to Chile by Bolivia
80°W
78°W
76°W
74°W
72°W
70°W
68°W
66°W
16°S
18°S
20°S
22°S
24°S
26°S

Figure 1.2

1.23 For several decades, problems concerning the implementation of the 1883 Treaty of Ancón gave rise to great difficulties in the relationship between Peru and Chile.

1.24 In spite of Peruvian demands, Chile did not hold the plebiscite in 1894, as it was obliged to do under article 3 of the Treaty. It delayed the plebiscite in order to create pro-Chilean sentiment in the provinces of Tacna and Arica, through a process known as "Chilenization"[46]. When, finally, it was ready to discuss the possibility of holding a plebiscite, Chile sought to impose unacceptable conditions on the process[47].

1.25 In the twentieth century, Peru severed diplomatic relations with Chile twice: in 1901, and again in 1910, because of Chile's failure to convene the plebiscite and because of the worsening of the "Chilenization" policy in Tacna and Arica.

1.26 By 1919, the Peruvian Government came to the conclusion that any solution of the dispute with Chile would probably have to involve a process of arbitration in which the President of the United States would be a key actor.

1.27 In 1922 Peru and Chile accepted the participation of the United States Government in the search for a solution to the dispute. Under the auspices of the United States Secretary of State, both countries signed a Protocol of Arbitration, with Supplementary Act, under which the President of the United States was to act as arbitrator[48].

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[46] García Salazar, Arturo, *op. cit.*, pp. 84-86, 96-105; Ulloa, Alberto: *Para la Historia Internacional y Diplomática del Perú: Chile*. Lima, Editorial Atlántida, 1987, pp. 318-326; González Miranda, Sergio: *El dios Cautivo. Las Ligas Patrióticas en la Chilenización Compulsiva de Tarapacá (1910-1922)*. Santiago de Chile, Lom ediciones, 2004, pp. 47-112. For a detailed account of the policy applied by Chile in those territories, see also the "Tacna-Arica question (Chile, Peru)", United Nations, *Reports of International Arbitral Awards*, Vol. II, pp. 935-944 <http://untreaty.un.org/cod/riaa/cases/vol_II/921-958.pdf> accesed 5 December 2008.

[47] García Salazar, Arturo, *op.cit.*, pp. 166-171.

[48] *Ibid.*, pp. 295-329; Ríos Gallardo, Conrado, *op. cit.*, pp. 68-76.

1.28 On 4 March 1925, the Award of the President of the United States ordered the following measures:

(a) Article 3 of the 1883 Treaty of Ancón related to Tacna and Arica (quoted above, paragraph 1.21) was to remain in force.

(b) A Plebiscitary Commission with control over the plebiscite was to be created.

(c) The province of Tarata was to return to Peru[49].

1.29 Article 3 of the 1883 Treaty of Ancón stipulated that the plebiscite had to be held after 10 years, a deadline which, by 1925, had long expired. The President of the United States determined that Article 3 nonetheless remained valid because Peru and Chile had been negotiating its implementation throughout the preceding decades. In accordance with the ruling of the Arbitrator, a Plebiscitary Commission was appointed consisting of three members – one appointed by Peru, one appointed by Chile, and one, who chaired the Commission, appointed by the President of the United States. The Commission had two successive chairmen: General John J. Pershing and Major General William Lassiter.

1.30 General Pershing resigned in January 1926. The Commission continued under Major General William Lassiter, ending its work unsuccessfully a few months later with the adoption of a Resolution by which he proposed the termination of the plebiscitary proceedings in the following terms:

> "Pursuant to the terms of the Treaty of Ancon … the creation and maintenance of conditions proper and necessary for the holding of a free and fair plebiscite … constituted an obligation resting upon Chile … the Commission finds as a fact that the failure of Chile in this regard has frustrated the efforts of the Commission to hold the plebiscite as contemplated by the Award.
> …
> The Plebiscitary Commission accordingly decides,
> …

---

[49] See para. 1.22 above.

> First, That a free and fair plebiscite as required by the Award is impracticable of accomplishment".[50]

1.31 Later, General Pershing and Major General Lassiter made a joint report to the Arbitrator regarding the conditions for the plebiscite. That report pointed out –

> "the true cause of this delay, as well as the real reason of this lack of greater progress, is none other than the conduct of the Chilean authorities in the control of the plebiscitary territory, who in disregard of the Treaty of Ancon, the Protocol of Arbitration, and the Award of the Arbitrator, and in flagrant fraud of their provisions, have since the date of the submission of the Counter Cases to the Arbitrator, April 18, 1924, and the date of the Award, March 9, 1925, maintained a veritable reign of terror in the plebiscitary territory."[51]

V. The 1929 Treaty of Lima

1.32 Peru and Chile re-established diplomatic relations in September 1928. From October 1928 to May 1929 a complex and rapid process of negotiation took place. On 3 June 1929, Peru and Chile signed the Treaty of Lima and its Additional Protocol, solving the outstanding issues concerning Tacna and Arica.

1.33 Under this Treaty, Tacna returned to Peru while Chile retained Arica, thus disrupting the natural economic unit formed by the two provinces. Peru kept some rights and servitudes in Arica, such as the use of the Uchusuma and Mauri water channels, and rights on the railway from Tacna to Arica. The Treaty provided that Chile would build substantial railway and port facilities

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[50] *Joint Report to the Arbitrator, Tacna-Arica Arbitration, by General John J. Pershing, First President, and Major General William Lassiter, Second President, of the Plebiscitary Commission, Tacna-Arica Arbitration*, "Text of Resolution to Terminate Plebiscitary Proceedings", pp. 364-365. Annex 86.

[51] *Ibid.*, "True Cause of Delay", pp. 152-153.

for the exclusive use of Peru in Arica's harbour. The result of the Treaty was that although Tacna would remain in Peru, while its city-harbour of Arica would henceforth belong to Chile, Tacna and Arica would both maintain strong connections in order not to deprive Tacna from access to its natural port and allow both provinces to develop.

1.34 Article 2 of the 1929 Treaty of Lima stipulated how the border between the two countries was to be drawn:

> "The territory of Tacna and Arica shall be divided into two portions of which Tacna, shall be allotted to Peru and Arica to Chile. The dividing line between the two portions, and consequently the frontier between the territories of Chile and Peru, shall start from a point on the coast to be named 'Concordia', ten kilometres to the north of the bridge over the river Lluta. It shall continue eastwards parallel to the line of the Chilean section of the Arica La Paz railway and at a distance of ten kilometres therefrom, with such sinuosities as may be necessary to allow the local topography to be used, in the demarcation, in such a way that the sulphur mines of the Tacora and their dependencies shall remain within Chilean territory. The line shall then pass through the centre of the Laguna Blanca, so that one portion thereof shall be in Chile and the other in Peru."[52]

Spanish text reads as follows:

> "El territorio de Tacna y Arica será dividido en dos partes, Tacna para el Perú y Arica para Chile. La línea divisoria entre dichas dos partes y, en consecuencia, la frontera entre los territorios del Perú y de Chile, partirá de un punto de la costa que se denominará 'Concordia', distante diez kilómetros al Norte del puente del Río Lluta, para seguir hácia el Oriente paralela a la vía de la sección chilena del Ferrocarril de Arica a La Paz y distante diez kilómetros de ella, con las inflexiones necesarias para utilizar, en la demarcación, los accidentes

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[52] The Treaty of Lima of 3 June 1929 is included as Annex 4 to the Application. It is joined anew for the convenience of the Court as Annex 45.

> geográficos cercanos que permitan dejar en territorio chileno las azufreras del Tacora y sus dependencias, pasando luego por el centro de la Laguna Blanca, en forma que una de sus partes quede en el Perú y la otra en Chile."

Additionally, Article 5 of that Treaty stipulated that:

> "For the use of Peru, the Government of Chile shall, at its own costs, construct within one thousand five hundred and seventy-five metres of the Bay of Arica a landing stage for fair-sized steamships, a building for the Peruvian Customs office, and a terminal station for the Tacna railway. Within these zones and establishments the transit traffic of Peru shall enjoy the freedom that is accorded in free ports under the most liberal régime."[53]

Spanish text reads as follows:

> "Para el servicio del Perú el Gobierno de Chile construirá a su costo, dentro de los mil quinientos setenta y cinco metros de la bahía de Arica un malecón de atraque para vapores de calado, un edificio para la agencia aduanera peruana y una estación terminal para el Ferrocarril a Tacna, establecimientos y zonas donde el comercio de tránsito del Perú gozará de la independencia propia del más amplio puerto libre."

1.35 Peru received back the province of Tacna on 28 August 1929, before the demarcation process started.

1.36 During the demarcation process, delegates could not agree on the exact location on the ground of point "Concordia", the starting-point on the coast of the land border. This disagreement was resolved by the Peruvian and Chilean Ministers of Foreign Affairs, who agreed to instruct their delegates that point Concordia was to be the point of intersection between the Pacific Ocean and an arc with a radius of ten kilometres having its centre on the bridge over the River Lluta. It was also agreed that "[a] boundary marker shall be placed at

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[53] *Ibid.*

any point of the arc, as close to the sea as allows preventing it from being destroyed by the ocean waters."[54]

1.37 The commitments that Chile had made towards Peru were finally fulfilled seven decades later, in 1999, when the Execution Act concerning Article 5 of the 1929 Treaty of Lima was signed by the two countries[55].

VI. Peru-Chile Expanding Relations

1.38 Notwithstanding the difficulties in relations between the Parties discussed above, it is striking that Peru and Chile (together with Ecuador) subsequently became pioneers in the development of a number of key elements of the modern Law of the Sea. In 1947 Peru and Chile proclaimed maritime rights extending out to a distance of 200 nautical miles from their coasts. This was followed by the 1952 Declaration of Santiago pursuant to which Peru, Chile and Ecuador acted jointly to declare their rights out to a minimum distance of 200 nautical miles from their coasts, in order to protect and preserve their natural resources adjacent to their territory.

1.39 In addition, the three countries signed a further Convention by which they created the Permanent Commission for the South Pacific, a new subregional organization that contributed to shape the world's modern vision of the international Law of the Sea. The Commission had the task of co-ordinating political joint action in defence of the 200-mile zone and supporting the scientific and economic co-operation among the member States.

1.40 At the time, these three countries knew that they were creating the basis for a new Law of the Sea, and it is no understatement to say that their efforts changed the way in which much of the rest of the world would come to

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[54] Instructions from the Chilean Government to its delegation with the Agreement of the Ministries of Foreign Affairs (of Peru and Chile) are reproduced in Brieba, Enrique: *Límites entre Chile y Perú*. Santiago de Chile, Instituto Geográfico Militar, 1931, Vol. I: Estudio técnico y documentos, p. 39. (Spanish text: "[s]e colocará un hito en cualquier punto del arco, lo más próximo al mar posible, donde quede a cubierto de ser destruido por las aguas del océano."). See Annex 87.

[55] Annex 60.

understand and approach the extent of a coastal State's rights over maritime areas situated off the coast. While these initiatives did meet with opposition at the time, they were the clear precursor to several important principles forming the basis of the modern Law of the Sea.

1.41 From the First United Nations Conference on the Law of the Sea, held in Geneva in 1958, Peru, Chile and Ecuador worked together in an effort to change international law. Nonetheless, at that time they did not get the necessary support from other delegations in favour of the 200-mile zone. The fundamental contribution subsequently made by the three countries at UNCLOS III, which gave birth to the modern Law of the Sea, is well recognized.

1.42 Relations between Peru and Chile have strengthened and extended, notably during recent decades, in spite of their complexity and sometimes difficult situations. Several common actions in issues of foreign policy at the bilateral and multilateral level, economic co-operation, high level visits, mutual good-will gestures and confidence-building measures by both Parties have all contributed greatly to the enhancement of their relations. Trade and investment have also substantially increased between the two countries, as well as migration.

1.43 Peru and Chile share interests in the Latin American region and in international relations. Chile recently rejoined the Andean Community as an associated member, both countries participate actively in the South American integration process and continue to strengthen their co-operation in the framework of the Permanent Commission for the South Pacific. Peru and Chile are also the only South American members of the Asia-Pacific Economic Cooperation Forum (APEC), and are jointly promoting the establishment of an association of the Latin American countries facing the Pacific Rim.

1.44 In that context Peru's request to the International Court of Justice to settle the maritime dispute is intended to keep the controversy strictly on legal grounds without affecting the development of the relationships between both countries.

CHAPTER II

THE GEOGRAPHICAL SETTING

2.1 This chapter addresses the geographical setting within which the delimitation is to be effectuated. Section I describes the general configuration of the Parties' coasts, including the Parties' baselines. Section II discusses the characteristics of the delimitation area including the incidence of natural resources in the area and the importance of having access to such resources for Peru.

I. The General Configuration of the Peruvian and Chilean Coasts

2.2 As can be seen from **Figure 2.1**, the continental coasts of Peru and Chile are situated on the west coast of South America. Peru is located about one-third of the way down the Pacific coast. To the north of Peru lies Ecuador while, to the south, Peru shares a land boundary with Chile that meets the sea at a point named Concordia, whose co-ordinates are 18°21'08" S, 70°22'39" W WGS84[56]. The coast of Chile comprises the southern half of the Pacific littoral of South America. It stretches from the land border with Peru to the southern tip of Cape Horn where Chile's border with Argentina is located.

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[56] See para. 2.13 below.

2.3 It can also be seen from **Figure 2.1** that the general direction of the west coast of South America changes markedly very close to the point where the starting-point of the Peru-Chile land boundary is situated. North of the Peru-Chile boundary, the orientation of the coasts of Peru, Ecuador and Colombia assumes a convex configuration with Peru's coast, south of approximately the 5° S latitude, trending in a northwest-southeast direction down to the land boundary with Chile. This general trend ends abruptly near where the Peru-Chile land boundary meets the sea. The Chilean coast, to the south, thereafter runs in an almost due north-south direction.

2.4 In other words, the land boundary between the Parties meets the sea close to the deepest point in the concavity formed by the Peruvian coast to the north, which trends in one direction, and the Chilean coast in the south, which extends in another. It is this geographical configuration which gives rise to overlapping maritime entitlements and is thus central to the present dispute.

A. Peru's Coast

2.5 Peru's coastal front spans a length of 2,905 kilometres. For the most part, Peru's coast is uncomplicated. From the starting-point on the land boundary with Chile, it extends in a north-westerly direction to the city of San Juan situated just below the 15° S latitude. From here the coast tracks more in a north-northwest direction past the capital city of Lima, which is the only South American capital lying on the Pacific Ocean, to a point (Punta Falsa)[57] situated just south of the 5° S latitude. At that point, Peru's coast turns to the north for a short stretch before it recedes back to the northeast into the Gulf of Guayaquil where the land boundary between Peru and Ecuador terminates.

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[57] These locations can be seen in **Figure 2.3**.


110°W
100°W
90°W
80°W
70°W
0°
10°S
20°S
30°S
40°S
50°S
VENEZUELA
COLOMBIA
Galápagos Islands
Quito
ECUADOR
Gulf of Guayaquil
PACIFIC OCEAN
BRAZIL
I. Lobos de Tierra
I. Lobos de Afuera
PERU
Lima
I. San Lorenzo
BOLIVIA
Punta Atico
Punta Coles
Punta Angamos
I. San Felix
I. San Ambrosio
CHILE
Santiago
I. Alejandro Selkirk
I. Robinson Crusoe
I. Santa Maria
ARGENTINA
I. Mocha
ATLANTIC OCEAN
Tierra del Fuego
Cape Horn
GENERAL CONFIGURATION OF THE PERUVIAN AND CHILEAN COASTS
Mercator Projection
WGS-84 Datum
(Scale calculated at 20°S)
0 250 500 750 1,000
Nautical Miles
0 500 1,000 1,500
Kilometers
Coastal configuration is based on World Data Bank II.
Prepared by: International Mapping

Figure 2.1

2.6 There are a number of Ecuadorian islands in the vicinity of Ecuador's land boundary with Peru. These include Isla Puná and the smaller island of Santa Clara situated within the Gulf of Guayaquil, and the Isla Pelado, Isla Salango and Isla de la Plata, located a short distance to the north. These features are depicted on **Figure 2.2**. While none of these islands has any bearing on the delimitation of maritime zones between Peru and Chile, they are mentioned here because their location is relevant to the interpretation of two instruments entered into by Peru, Chile and Ecuador relating to their maritime zones – the 1952 Declaration of Santiago and the 1954 Agreement relating to a Special Maritime Frontier Zone (hereinafter "the 1954 Agreement on a Special Zone") – discussed in Chapter IV below.

2.7 For its part, Peru possesses a modest number of islands, such as the Lobos Islands located just south of Punta Falsa, and a few small islands lying off Peru's northern coast, between the 10° and 15° S latitudes. However, there are no Peruvian islands in the vicinity of the land boundary with Chile and, consequently, no Peruvian islands that are relevant for delimitation in this case, as can be seen on the map of the two border areas appearing as **Figure 2.2**.

2.8 The land boundary between Peru and Chile meets the sea at Point Concordia, the co-ordinates of which, as noted above, are 18°21'08" S, 70°22'39" W WGS84. While this aspect of the case is addressed in more detail in Chapter VI, suffice it to note here that the initial segment of the land boundary, including the point where it meets the sea, was established pursuant to the 1929 Treaty of Lima entered into by Peru and Chile on 3 June 1929[58].

2.9 The reference to Tacna and Arica in the 1929 Treaty of Lima is to two provinces and towns bearing these names located close to the land boundary[59]. As can

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[58] Annex 45.

[59] See paras. 1.32-1.35 above.

be seen on **Figure 2.3**, the city of Tacna is located in Peruvian territory some 40 kilometres inland from the coast. The port-city of Arica (originally a Peruvian town and Tacna's natural harbour) is now situated in Chile and lies a few kilometres south of the boundary. The 1929 Treaty of Lima also refers to Concordia as the point on the coast from which the land boundary starts[60].

2.10 **Figure 2.3** also shows how the initial point on the land boundary lies almost exactly at the point where the configuration of the Pacific coast of South America changes direction. The Peruvian coast north of the land boundary runs in a southeast-northwest direction while Chile's coast to the south adopts a north-south orientation.

2.11 On the Peruvian side, there are three departments[61] which border the sea in this area. From south to north these are the departments of Tacna, Moquegua and Arequipa. The principal Peruvian fishing port along this part of the coast is Ilo, located within the department of Moquegua and depicted on **Figure 2.3**. It lies about 120 kilometres northwest of the initial point of the Peru-Chile land boundary. **Figure 2.3** also shows the location of a number of other Peruvian coastal towns and fishing ports situated within the three departments mentioned above.

2.12 Peru's coast north of the land boundary is relatively smooth with no distinct promontories, offshore islands or other distinguishing features until the stretch of coast north of the 15° S latitude is reached.

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[60] See paras. 1.34-1.36 above.

[61] The territory of the Republic of Peru is divided in departments which are, in turn, subdivided into provinces.


ECUADORIAN ISLANDS
NEAR PERU'S NORTHERN
LAND BOUNDARY
Mercator Projection
Datum: WGS-84
(Scale accurate at 3°S)
0 25 50
Nautical Miles
0 50 100
Kilometers
Coastal configuration is based on Peruvian nautical chart 100 and Ecuadorian nautical charts 106 & 107.
Prepared by: International Mapping
81°W
80°W
2°S
3°S
4°S
5°S
Montecristi
Isla de la Plata
Jipijapa
Machalilla
Isla Salango
Isla Pelado
Río Nuevo
Punta Santa Elena
Río Salado
Río Zapotal
Punta Ancon
Chanduy
Guayaquil
Playas
Punta Chapoya
Punta Del Morro
Gulf of Guayaquil
Isla Puná
Punta Salinas
I. Santa Clara
Punta Jambeli
Punta Payana
Machala
Punta Capones
Punta Malpelo
Zarumilla
Tumbes
Zorritos
Río Tumbes
PACIFIC OCEAN
ECUADOR
Máncora
Los Órganos
Punta Restin
Lobitos
Punta Capullana
Talara
Punta Pariñas
Negritos
PERU
Río Chira
Paita
I. Foca
Piura


LACK OF PERUVIAN ISLANDS
NEAR PERU'S SOUTHERN
LAND BOUNDARY
Mercator Projection
Datum: WGS-84
(Scale accurate at 18° S
0 10 20
Nautical Miles
0 10 20 30 40
Kilometers
Coastal configuration is based on Peruvian nautical chart 300 and Chilean nautical chart 1000.
Prepared by: International Mapping
71°W
18°S
19°S
Hospicio
Río Ilo
Ilo
Camiara
Punta Coles
PERU
Río Locumba
Punta Sama
Río Sama
Tacna
Boca del Río
Río Lluta
Arica
CHILE
Caleta Vitor
Punta Argolla
Chaca
Cuya
Punta Camarones
PACIFIC OCEAN

Figure 2.2

2.13 Peru's baselines are set out in Law No. 28621 dated 3 November 2005 (Peruvian Maritime Domain Baselines Law, hereinafter "Peru's Baselines Law"). This law includes, in Annex 1 thereto, the geographical co-ordinates of the various points which determine Peru's baselines[62]. There are 266 such points, starting in the north with Point 1, which is the starting-point on the land boundary with Ecuador, and ending in the south with Point 266 (18°21'08" S, 70°22'39" W WGS84), which coincides with Point Concordia, where the Peru-Chile land boundary meets the sea. In compliance with Article 54 of the Peruvian Political Constitution of 1993 and in accordance with international law, Peru's Baselines Law establishes the baselines from which Peru's 200-mile maritime domain is measured. In this respect, Article 4 of the Law provides:

> "In accordance with the Political Constitution of the State, the outer limit of the maritime domain of Peru is traced in such a manner that every point of the mentioned outer limit is at a distance of two hundred nautical miles from the nearest baselines point, pursuant to the delimitation criteria established in International Law."[63]

Spanish text reads as follows:

> "De conformidad con la Constitución Política del Estado el límite exterior del dominio marítimo del Perú es trazado de modo que cada punto del citado límite exterior se encuentre a doscientas millas marinas del punto más próximo de las líneas de base en aplicación de los criterios de delimitación establecidos por el Derecho Internacional."

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[62] Law No. 28621, Peruvian Maritime Domain Baselines Law of 3 November 2005 is Annex 5 to the Application. It is joined anew for the convenience of the Court as Annex 23.

[63] *Ibid.*

2.14 For the most part, Peru's baselines are constituted by "normal" baselines that follow the low-water mark along its coast. However, as depicted on **Figure 2.3**, there are a few limited areas along Peru's coast where a system of straight baselines is provided for. All of these areas lie close to, or north of, the 15° S latitude and thus more than 200 nautical miles from the land boundary with Chile. Accordingly, they fall outside the area of concern for purposes of this case. As noted above, within 200 nautical miles of the initial point on the land boundary with Chile, Peru's coast is relatively smooth and uncomplicated and there are no islands in this area.

2.15 Article 5 of Peru's Baselines Law provides that the Executive Branch of the Peruvian Government is responsible for issuing Peru's cartography depicting the limit of its maritime domain as set out in Article 4. On 11 August 2007, Supreme Decree No. 047-2007-RE[64] was enacted in furtherance of Peru's Baselines Law. That Decree provides that the cartography depicting Peru's maritime domain would be elaborated in three sectors: a northern sector between base points Nos. 1 to 74, a central sector from base points 74 to 146, and a southern sector from base points 146 to 266. Attached to the Decree is a chart illustrating the outer limit – southern sector – of the maritime domain of Peru – the sector that is relevant to delimitation with Chile.

2.16 A copy of the chart in question is reproduced as **Figure 2.4**. It shows the 200-nautical-mile maritime domain claimed by Peru in the southern sector. Also depicted on the chart is the "Area in Dispute" between Peru and Chile – a "kite" shaped area of about 68,000 square kilometres which, for purposes of comparison, is more than twice the size of the territory of Belgium.

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[64] Supreme Decree No. 047-2007-RE is Annex 7 to the Application. It is joined anew for the convenience of the Court as Annex 24.


80°W
75°W
70°W
0°
5°S
10°S
15°S
20°S
Punta Galera
Cabo Passado
Jama
Quito
COLOMBIA
ECUADOR
I. de la Plata
Machalilla
I. Pelado
Punta Ancon
Guayaquil
I. Santa Clara
Punta Malpelo
Punta Pariñas
Talara
Paita
1
Punta Falsa
Reventazón
I. Lobos de Tierra
2
San José
I. Lobos de Afuera
BRAZIL
Punta Malabrigo
Malabrigo
I. Guañape
3
Puerto Casma
Vegueta
4
PERU
Lima
I. San Lorenzo
Punta Lobos
PACIFIC
OCEAN
5
I. San Gallan
Pisco
I. Independencia
Nazca
6
7
San Juan
Tanaca
AREQUIPA
Lake Titicaca
Atico
Punta Atico
Ocoña
Arequipa
Quilca
MOQUEGUA
Mollendo
Ilo
TACNA
Punta Coles
Tacna
Point Concordia
Arica
Pisagua
Iquique
Punta Lobos
Punta Arenas
CHILE
Tocopilla
PERU'S COASTLINE AND STRAIGHT BASELINES
Mercator Projection
Datum: WGS-84
(Scale accurate at 10°S)
0 50 100 150 200 250
Nautical Miles
0 100 200 300 400 500
Kilometers
Coastal configuration based on Peruvian nautical charts 100, 200 & 300;
Chilean chart 1000; and Ecuadorian charts 100, 101, 102, 103, 104, 105, 106 & 107.
Prepared by: International Mapping

Figure 2.3

MAP SHOWING THE OUTER LIMIT – SOUTHERN SECTOR OF PERU'S MARITIME DOMAIN

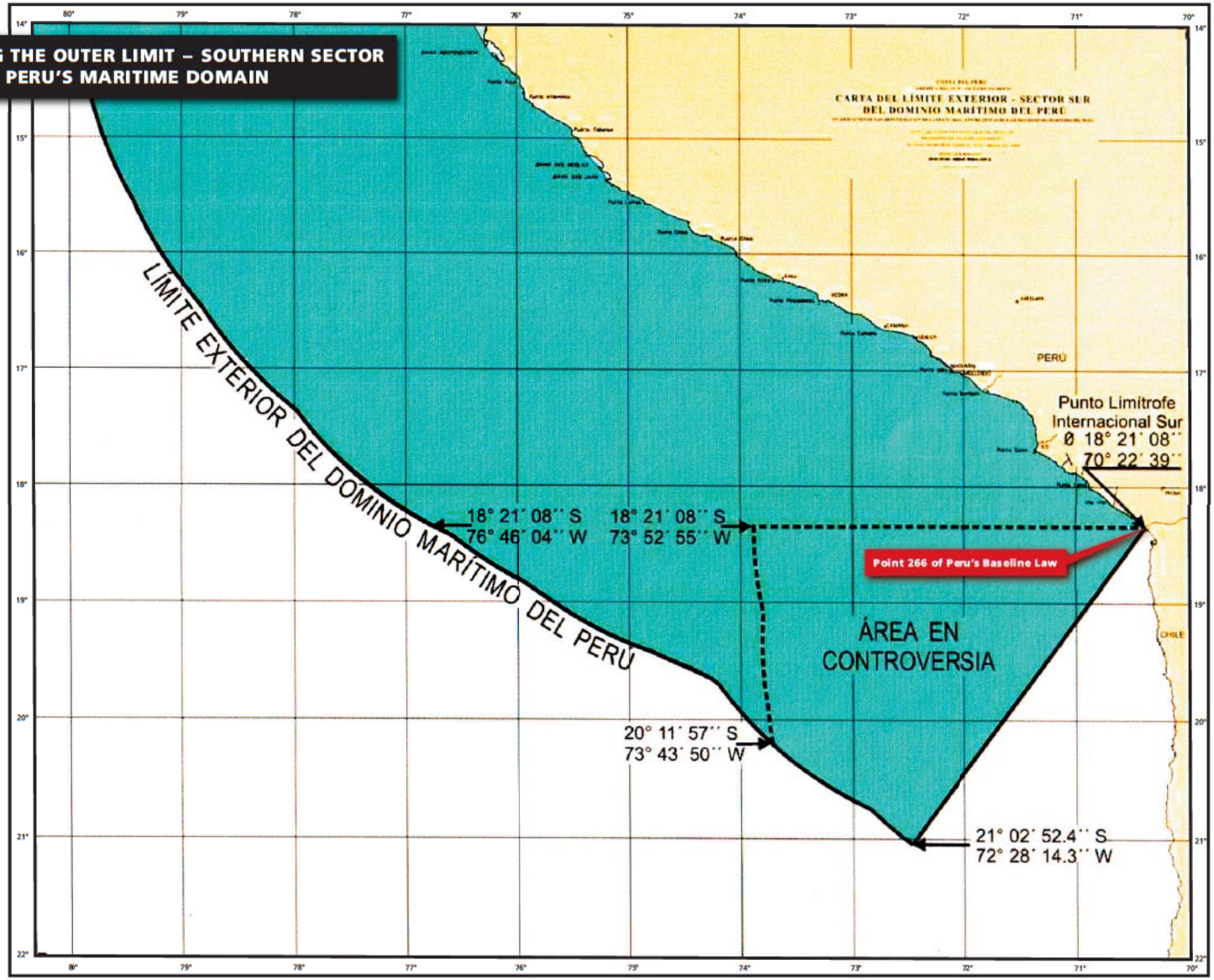

Figure 2.4

2.17 This area in dispute comprises the maritime area between (*a*) a line drawn from Point 266 on Peru's baselines situated at the initial point of the land boundary with Chile (Point Concordia) perpendicular to the general direction of Peru's southern coast to a distance of 200 nautical miles corresponding to Peru's 200-mile maritime domain, and (*b*) a line drawn along a parallel of latitude from the land boundary to a distance of 200 nautical miles, corresponding to the line that is claimed by Chile as the maritime boundary between the two countries. The dashed line that runs south on the chart from the end of Chile's claim line corresponds to the 200-nautical-mile limit of Chile's continental shelf and EEZ entitlement without prejudice to the issue of delimitation.

2.18 To the west, or seaward, of the "Area in Dispute" is a triangular-shaped area of about 28,350 square kilometres (equivalent to the size of Albania) which lies further than 200 nautical miles from Chile's coast but within 200 nautical miles of the coast of Peru. This is the area referred to in paragraphs 1, 12 and 13 of Peru's Application, with respect to which Peru requests the Court to adjudge and declare that Peru possesses exclusive sovereign rights given that it does not fall within 200 nautical miles of Chile's baselines – in other words, it constitutes an area over which Chile, contrary to its claims, has no legal entitlement. Peru's exclusive rights with respect to this area are discussed in greater detail in Chapter VII below.

B. Chile's Coast

2.19 Chile's coast is aligned in a general north-south orientation from the land boundary with Peru, in the north, to Cape Horn, in the south. The northern two-thirds of Chile's coast is relatively smooth with no marked promontories or other defining features. South of the 40° S latitude, Chile's coast becomes more complex, and is characterized by a series of indentations and island fringes. However, this stretch of coast lies far to the south of the relevant area which is the focus of the present delimitation, and is thus not germane to the case[65].

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[65] See Chap. VI, Sec. III.

2.20 Well to the south of the maritime area lying off the land boundary with Peru, there are a number of isolated features, such as the islands of San Félix and San Ambrosio, and the Juan Fernández group which can be seen on **Figure 2.5**. None of these islands has any bearing on the delimitation in this case given their distance from the starting-point of the Peru-Chile land boundary and from the coasts of the Parties that are relevant to the delimitation.

2.21 In 1977, Chile enacted a system of straight baselines[66]. As can be seen on **Figure 2.5**, these baselines only apply between the 41° and 55° S latitudes where Chile's coast is deeply indented – in other words, well south of the relevant area in the present case. In the vicinity of the land boundary at Point Concordia, Chile's coast exhibits no special geographical circumstances, and Chile's baselines are "normal" baselines constituted by the low-water mark along its coast. On 21 September 2000, Chile deposited with the United Nations charts showing its baselines, territorial sea, contiguous zone, EEZ and continental shelf[67]. Chile claims a 200-nautical-mile continental shelf and EEZ measured from its baselines, as well as a so-called "Presential Sea" beyond this limit, the ill-founded nature of which is discussed in Chapter VII.

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[66] Chilean Decree No. 416 of 14 July 1977. Annex 34.

[67] See **Figure 2.6** in Vol. IV. See also the list of geographical co-ordinates deposited by Chile with the Secretary-General of the United Nations in Annex 110. That list of co-ordinates indicates that point No. 1 of the Chilean baselines is located at 18°21'00" S WGS84. The 18°21'00" S WGS84 parallel of latitude corresponds to Marker No. 1 of the land boundary, located to the northeast of the point where the land boundary between both countries meets the sea according to the 1929 Treaty of Lima (Point Concordia, at the 18°21'08" S WGS84 parallel of latitude). Chilean cartography will be further discussed in Chap. V, Sec. III.


90°W
80°W
70°W
20°S
30°S
40°S
50°S
PACIFIC
OCEAN
ATLANTIC
OCEAN
BOLIVIA
ARGENTINA
CHILE
Atico
Punta Atico
Mollendo
Punta Coles
Tacna
Arica
Iquique
Punta Angamos
Antofagasta
Chañaral
I. San Felix
I. San Ambrosio
Coquimbo
Juan Fernandez Group
I. Alejandro Selkirk
I. Robinson Crusoe
Santiago
I. Santa Maria
I. Mocha
Nehuentúe
Chile's Straight Baselines
Tierra del Fuego
Cape Horn
CHILE'S COASTLINE AND STRAIGHT BASELINES
Mercator Projection
WGS-84 Datum
(Scale calculated at 30°S)
0 250 500 750
Nautical Miles
0 500 1,000 1,500
Kilometers
Coastal configuration based on Peruvian nautical chart 300, and Chilean nautical charts 1000, 2000, 3000, 4000, 5000, 6000, 7000, 8000, 9000, 10000, 11000, 12000, and 13000.
Prepared by: International Mapping

Figure 2.5

II. The Characteristics of the Maritime Area and Its Resources

2.22 The maritime area subject to delimitation between Peru and Chile is characterized by a number of distinct geological and geomorphological features, which limit the physical (as opposed to legal) continental shelves of the Parties, and by oceanographical elements which contribute to making the area rich in fishing resources. These will be discussed below.

A. The Characteristics of the Sea-Bed and the Subsoil

2.23 The area offshore Peru and Chile represents a convergence zone between two tectonic plate boundaries: the Nazca Plate, which is a sub-set of the more extensive Pacific Plate lying under the Pacific Ocean, and the South American Plate underlying the continent of South America. The process of convergence between these two plates, with the former subducting under the latter, has resulted in the formation of a plate boundary and an offshore trench – the Peru-Chile trench – which parallels the coastline of the two countries and passes just offshore the point where the two countries' land boundary meets the sea[68].

2.24 Due to the geological and geomorphological characteristics of this offshore region, up to now the maritime area in dispute has not been the subject of hydrocarbon exploration. However, with advances in drilling technology, and with exploration being able to be carried out in increasingly deep ocean areas, this may very well change in the future. Moreover, the shelf area is also of interest for the presence of sedentary species and mineral resources.

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[68] This can be seen on **Figure 6.1** in Chapter VI of this Memorial.

B. The Fishing Potential of the Area

2.25 In contrast, the areas lying off the coasts of Peru and Chile are rich in marine resources. The particular area of concern in this case is located in the Humboldt Current Large Marine Ecosystem – a system driven by the Humboldt Current which flows in a southeast-northwest direction from the southern tip of Chile to the vicinity of the land boundary between Peru and Chile and thence offshore Peru's coast.

2.26 The Humboldt Current is one of the major upwelling systems of the world supporting an abundance of marine life and constituting a highly productive ecosystem in terms of biomass and overall biodiversity. Approximately, 18-20% of the world's fish catch comes from the Humboldt Current Ecosystem, with particular pelagic species such as anchovies, sardines, jack mackerel and chub mackerel being amongst the most important. In the past, whaling was also important, but is now prohibited.

2.27 It was the enormous whaling and fishing potential of the areas situated off the coasts of Peru, Chile and Ecuador that lay at the root of their initiative in 1952 to proclaim 200-nautical-mile zones to protect and preserve the marine resources located therein under the 1952 Declaration of Santiago. While the species and quantity of fish caught in this area has varied over the years due to climatic changes, such as the *El Niño* phenomenon, access to the fish resources of the area remains critical to Peru's economy as a whole, and in particular to the economic well-being of the Peruvian population living in the coastal regions of the departments of Tacna, Moquegua and Arequipa where fishing represents a central segment of the economy both in terms of employment and of food production. Peru's southern ports account for 15% of the total fishing product of the country[69].

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[69] Percentages derived from the total unloading in the ports of Atico, La Planchada, Mollendo, Matarani and Ilo. See Ministerio de la Producción: *Peru: Desembarque Total de Recursos Marítimos según Puerto, 1998-2007* <http://www.produce.gob.pe/RepositorioAPS/3/jer/DESEMSUBMENU02/01_14.pdf> accessed 20 January 2009.

2.28 As in the past, current Peruvian fishery activities in its southern waters continue to be vital to its people and both to its regional and national economies. Their main component, industrial fishery, has been particularly active in the three above-mentioned southern Peruvian departments since 1939[70], particularly in Ilo (in the department of Moquegua) and Matarani (in the department of Arequipa). In Moquegua, for example, the fishing industry is the second most important economic activity, after mining, and Ilo represents one of Peru's main fishing ports and the most important fishing centre in southern Peru. Ilo also supports a fishmeal and oil industry, plus a significant developing frozen fish industry. There are currently 12 frozen fish plants in the southern region of Peru.

2.29 This southern maritime region is one of the four Peruvian fishing regions (the other three regions correspond to those of the coast of Paita, Chimbote and Callao). It is also part of the so-called "Peruvian-Chilean elbow area"[71], an ictiologically rich maritime space which both countries share.

2.30 In addition to industrial fishing, there is an important artisanal fishing activity (some 475 craft) in southern Peru. Most of the artisanal fleet operates off the departments of Tacna and Moquegua.

2.31 Access to the waters off the coast of southern Peru is therefore of critical importance to the local population and the country as a whole. However, this access has been hampered by the absence of a delimited maritime boundary with Chile, and the fact that, to avoid friction and incidents between the two countries, Peruvian fishermen's activities have been limited on a provisional

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[70] Alvarez Velarde, Félix: *La Pesquería en Ilo y su Contexto Nacional*. Lima, Centro de Investigación, Educación y Desarrollo, 1984, p. 24.

[71] Alvarez Velarde, Félix: "Pesquería Industrial del Sur, un peligro anunciado". (*Pesca Responsable, Revista Institucional de la Sociedad Nacional de Pesquería*, Year IV, No. 15, Lima, 2000, May, p. 19). Quoted in Agüero Colunga, Marisol: *Consideraciones para la Delimitación Marítima del Perú*. Lima, Fondo Editorial del Congreso del Perú, 2001, p. 225.

basis to the line of latitude and the zone of tolerance established in the 1954 Agreement on a Special Zone. In this respect, Peru has exhibited considerable self-restraint, but the need for a definitive delimitation is now critical.

2.32 This is one of the key reasons why a delimitation is now sought by Peru in order to provide the countries with a well-defined and stable maritime boundary and Peru's coastal population with an equitable access to the marine resources of the disputed area.

CHAPTER III

PERU'S MARITIME ENTITLEMENTS UNDER INTERNATIONAL LAW

3.1 One of the main aspects of the present case is that Chile denies to Peru its entitlements to sovereignty or sovereign rights in and over important parts of the sea adjacent to its coasts.

3.2 In its Application, Peru's submission to the Court was set out in the following terms:

> "Peru requests the Court to determine the course of the boundary between the maritime zones of the two States in accordance with international law, as indicated in Section IV above, and to adjudge and declare that Peru possesses exclusive sovereign rights in the maritime area situated within the limit of 200 nautical miles from its coast but outside Chile's exclusive economic zone or continental shelf."

The purpose of the present chapter is to briefly explain, in general terms, Peru's entitlements in this respect. The precise limits of this maritime area will be discussed and justified in the next chapters of this Memorial.

3.3 It will be apparent that because they arise by virtue of the applicable principles of the international Law of the Sea accepted by Chile (Section I of this chapter), Peru's entitlements to an exclusive maritime domain (Section II) have been recognized by Chile as a matter of principle (Section III), even if, concretely, Chile refuses to accept the consequences of such a recognition.

I. Applicable Principles

3.4 It is appropriate to begin with a brief discussion of the applicable law. Peru is not a Party to the 1982 Convention on the Law of the Sea. Chile is a Party to the Convention, having ratified it on 25 August 1997[72]. With respect to the sources of law applicable to the present dispute under Article 38 of the Statute of the International Court of Justice, therefore, the main source of law is customary international law as principally developed by the case-law of this Court, and by international arbitral tribunals. Also relevant are the provisions of the 1982 Convention on the Law of the Sea dealing with the definition of the various maritime areas on which coastal States have particular entitlements and with maritime delimitation, which, although not applicable as treaty law *per se*, largely reflect customary international law.

3.5 As recently recalled by the Court, "the 'land dominates the sea' in such a way that coastal projections in the seaward direction generate maritime claims (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969,* p. 51, para. 96)"[73].

3.6 As defined by Article 76 (1) of the 1982 Convention on the Law of the Sea:

> "The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land

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[72] Chile made the following declaration: "In accordance with article 298 of the Convention, Chile declares that it does not accept any of the procedures provided for in part XV, section 2, with respect to the disputes referred to in article 298, paragraph 1(a), (b) and (c) of the Convention." United Nations Division for Ocean Affairs and the Law of the Sea, *Law of the Sea Bulletin*, No. 35, p. 11.

[73] *Case Concerning Maritime Delimitation in the Black Sea, I.C.J. Judgment of 3 February 2009*, para. 99.

> territory to the outer edge of the continental margin, *or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance*" (emphasis added).

3.7 It must be noted in this respect that the coasts of both Chile and Peru plunge rapidly into the very deep Peru-Chile trench, with the consequence that both countries have in the area in dispute a reduced continental shelf in the geomorphological meaning of the expression. But this of course does not imply that they are not entitled to a 200- nautical-mile continental shelf in the legal sense.

3.8 The sovereign rights belonging to the coastal State over its continental shelf "for the purpose of exploring it and exploiting its natural resources" (Article 77 (1)) –

> "are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.
>
> 3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation" (Article 77 (2) and (3)).

3.9 This prompted the International Court of Justice to decide in its 1969 Judgment in the *North Sea Continental Shelf* cases that –

> "the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many

> States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised. To echo the language of the Geneva Convention, it is 'exclusive' in the sense that if the coastal State does not choose to explore or exploit the areas of shelf appertaining to it, that is its own affair, but no one else may do so without its express consent."[74]

3.10 With respect to the column of water, Peru has consistently claimed an exclusive maritime domain extending to a distance of 200 nautical miles from its baselines, which is in line with the geographical extension and the purpose of the institution of the EEZ as set forth in Article 56 of the 1982 Convention on the Law of the Sea[75].

II. Peru's Maritime Entitlements under General Principles of the Law of the Sea

3.11 As is well known, Peru (like Chile[76]) has been a pioneer in the policy of claims which have led to the general acceptance of maritime rights in favour of the coastal State extending up to a distance of 200 nautical miles from its coasts. Thus, as early as 1 August 1947 – and following a similar declaration by Chile made on 23 June 1947[77] – Peru's Supreme Decree No. 781[78] was

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[74] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 22, para. 19; see also p. 29, para. 39; and *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 36, para. 86.

[75] According to Article 56 (1)(a), "In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds".

[76] See below, paras. 3.24 *ff.* below.

[77] Declaration by Chile of 23 June 1947. Annex 27.

[78] According to the Peruvian legal system, the hierarchy regarding norms issued by the Executive and Legislative branches consists of three levels, which are, in decreasing order of authority: *(a)* Constitutional status, *(b)* Law status, and *(c)* Regulation status. Law status is accorded to laws, legislative resolutions by Congress, legislative decrees (laws issued by the Executive by delegation from Congress) and treaties. Regulation status is given to the ordinary acts under the competence of the Executive expressed usually as supreme decrees or supreme resolutions.

adopted. This important instrument stated "[t]hat the continental submerged shelf forms one entire morphological and geological unit with the continent"[79] – but asserted a claim of 200 miles, which meant that the geographical extension of maritime rights claimed by Peru bore no relation with the continental shelf in its geomorphological definition. The scope of that extension was detailed in Article 3 by which Peru declared –

> "that it will exercise the same control and protection on the seas adjacent to the Peruvian coast over the area covered between the coast and an imaginary parallel line to it at a distance of two hundred (200) nautical miles measured following the line of the geographical parallels."[80]

Spanish text reads as follows:

> "que ejercerá dicho control y protección sobre el mar adyacente a las costas del territorio peruano en una zona comprendida entre esas costas y una línea imaginaria paralela a ellas y trazada sobre el mar a una distancia de doscientas (200) millas marinas, medida siguiendo la línea de los paralelos geográficos."

3.12 A few years later, the Peruvian Petroleum Law No. 11780 of 12 March 1952 declared in Article 14 (4):

> "Continental Shelf. This shall be the zone lying between the western limit of the coastal zone and an imaginary line drawn seaward at a constant distance of 200 miles from the low-water line along the continental coast."[81]

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[79] Preamble of Peru's Supreme Decree No. 781 in Annex 6. (Spanish text: "[q]ue la plataforma submarina o zócalo continental forma con el continente una sola unidad morfológica y geológica").

[80] Annex 6.

[81] Annex 8.

Spanish text reads as follows:

> "Zona Zócalo Continental.- Es la zona comprendida entre el límite occidental de la Zona de la Costa y una línea imaginaria trazada mar afuera a una distancia constante de 200 millas de la línea [de] baja marea del litoral continental."

3.13 The Petroleum Law preceded by five months the 1952 Declaration of Santiago, by which Ecuador, Peru and Chile jointly reiterated their claims to have rights "over the sea along the coasts of their respective countries to a minimum distance of 200 nautical miles from these coasts."[82] For the present purpose, the importance of the 1952 Declaration is twofold in that *first*, it marks a shift away from unilateral acts to multilateral instruments; and *second*, as will be shown in more detail in the next section of this chapter, the Declaration evidences the recognition by Chile of the validity of Peru's claim to exclusive maritime rights to a distance of not less than 200 nautical miles from the coast.

3.14 In 1958, Mr. Enrique García Sayán, delegate of Peru to the First United Nations Conference on the Law of the Sea, stated that the Peruvian Supreme Decree No. 781 of 1 August 1947 (which he had signed as Minister of Foreign Affairs) and the 1952 Declaration of Santiago "proclaimed that national sovereignty and jurisdiction extended to the continental shelf and its superjacent waters and to the adjacent sea to a distance of 200 nautical miles, for the purpose of conserving and utilizing all the resources in or below that area."[83] He added that "[i]t was the absence of any international rules for the utilization of the sea as a source of riches that had led to the unilateral adoption of measures of self-defence."[84]

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[82] Para. II of the 1952 Declaration of Santiago. Annex 47. See paras. 3.29-3.30 below. The 1952 Declaration of Santiago will be further examined in para. 4.62 *ff.* below. (Spanish text: "sobre el mar que baña las costas de sus respectivos países, hasta una distancia mínima de 200 millas marinas desde las referidas costas.").

[83] Statement by Peruvian Delegate, Mr. Enrique García Sayán, at the First United Nations Conference on the Law of the Sea, 13 March 1958, para 33. Annex 101.

[84] *Ibid.*, para. 34.

3.15 The 1952 Declaration of Santiago was followed by a great number of laws and regulations based on the 200-nautical-mile zone over which Peru claimed exclusive rights. They dealt with a broad range of activities, including those of an economic nature and the protection of living resources. Those laws and regulations included:

- Supreme Resolution No. 23 of 12 January 1955 (Article 1)[85];
- Law No. 15720 of 11 November 1965 on Civil Aeronautics (Article 2)[86];
- General Law on Waters, issued by virtue of Decree Law No. 17752 of 24 July 1969 (Article 4 (a))[87];
- Decree Law No. 18225 of 14 April 1970, providing for the adoption of the General Mining Law (Article 2)[88];
- General Fisheries Laws, issued by virtue of Law Decrees No. 18810 of 25 March 1971 (Article 1)[89], and No. 25977 of 7 December 1992 (Article 7)[90];
- Law No. 26620 of 30 May 1996 on the Control and Supervision of Maritime, Fluvial and Lacustrine Activities (Article 2 (a))[91];
- Law No. 27261 of 9 May 2000 on Civil Aeronautics (Article 3)[92]; and
- Supreme Decree No. 028-DE/MGP of 25 May 2001 on Regulation of the Law on the Control and Surpervision of Maritime, Fluvial and Lacustrine Activities (Preliminary Section, Scope of Application, paragraph (a))[93].

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85 Annex 9.

86 Annex 12.

87 Annex 13.

88 Annex 15.

89 Annex 16.

90 Annex 18.

91 Annex 20.

92 Annex 21.

93 Annex 22.

3.16 At the highest legal level, Article 98 of the Peruvian Political Constitution of 1979 stated that:

> "The maritime domain of the State comprises the sea adjacent to its coasts, as well as its seabed and subsoil up to a distance of two hundred nautical miles measured from the baselines established by law. In its maritime domain, Peru exercises sovereignty and jurisdiction, without prejudice to the freedom of international communications, pursuant to the law and the treaties ratified by the Republic."[94]

Spanish text reads as follows:

> "El dominio marítimo del Estado comprende el mar adyacente a sus costas, así como su lecho y subsuelo, hasta la distancia de doscientas millas marinas medidas desde las líneas que establece la ley. En su dominio marítimo, el Perú ejerce soberanía y jurisdicción, sin perjuicio de las libertades de comunicación internacional, de acuerdo con la ley y los convenios internacionales ratificados por la República."

3.17 The same principle can be found in Article 54 of the Political Constitution of 1993 according to which:

> "The maritime domain of the State comprises the sea adjacent to its coasts, as well as its seabed and subsoil up to a distance of two hundred nautical miles measured from the baselines established by law.
>
> In its maritime domain, the State exercises sovereignty and jurisdiction, without prejudice to the freedom of international communications, pursuant to the law and the treaties ratified by the State.
>
> The State exercises sovereignty and jurisdiction over the airspace above its territory and adjacent sea up to the limit of two hundred nautical miles, without prejudice to the freedom of international

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[94] Annex 17.

> communications, pursuant to the law and the treaties ratified by the State."[95]

Spanish text reads as follows:

> "El dominio marítimo del Estado comprende el mar adyacente a sus costas, así como su lecho y subsuelo, hasta la distancia de doscientas millas marinas medidas desde las líneas de base que establece la ley.
>
> En su dominio marítimo, el Estado ejerce soberanía y jurisdicción, sin perjuicio de las libertades de comunicación internacional, de acuerdo con la ley y con los tratados ratificados por el Estado.
>
> El Estado ejerce soberanía y jurisdicción sobre el espacio aéreo que cubre su territorio y el mar adyacente hasta el límite de las doscientas millas, sin perjuicio de las libertades de comunicación internacional, de conformidad con la ley y con los tratados ratificados por el Estado."

3.18 In the words of the Preamble of the Peruvian Supreme Decree No. 047-2007-RE of 11 August 2007 approving the Chart of the Outer Limit – Southern Sector – of the Maritime Domain of Peru:

> "Article 54 of the Peruvian Political Constitution establishes that the maritime domain of the State comprises the sea adjacent to its coasts, as well as its seabed and subsoil, up to a distance of two hundred nautical miles measured from the baselines established by law;
>
> In compliance with the above mentioned Constitution and pursuant to international law, Law No. 28621 – Peruvian Maritime Domain Baselines Law was issued on 3 November 2005, from which the width of the maritime domain of the State is measured up to a distance of two hundred nautical miles;

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[95] Art. 54, paras. 2-4 of the 1993 Political Constitution of Peru is included as Annex 6 to the Application. It is joined anew for the convenience of the Court as Annex 19.

> Article 4 of said law provides that the outer limit of the maritime domain of Peru is traced in such a way that each point of the above mentioned outer limit is at a distance of 200 nautical miles from the nearest point of the baselines, in application of the delimitation criteria established by international law"[96].

Spanish text reads as follows:

> "Que, el artículo 54° de la Constitución Política del Perú establece que el dominio marítimo del Estado comprende el mar adyacente a sus costas, así como su lecho y subsuelo, hasta la distancia de doscientas millas marinas medidas desde las líneas de base que establece la ley;
>
> Que, en cumplimiento del citado dispositivo constitucional y de conformidad con el derecho internacional, se expidió la Ley N° 28621 – Ley de Líneas de Base del Dominio Marítimo del Perú, el 3 de noviembre del 2005, a partir de las cuales se mide la anchura del dominio marítimo del Estado hasta la distancia de doscientas millas marinas;
>
> Que, el artículo 4° de la citada ley dispone que el límite exterior del dominio marítimo del Perú es trazado de modo que cada punto del citado límite exterior se encuentre a doscientas millas marinas del punto más próximo de las líneas de base, en aplicación de los criterios de delimitación establecidos por el derecho internacional".

3.19 The map annexed to the 2007 Decree illustrates the maritime domain of Peru thus described. It is reproduced in **Figure 2.4** of this Memorial. It goes without saying that the fact it has indicated on this map the existence of an "area in dispute" (*área en controversia*) reflecting Chile's claim does not prevent Peru from claiming a maritime domain extending up to a distance of 200 nautical miles from its coasts.

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[96] Supreme Decree No. 047-2007-RE of 11 August 2007. Annex 24; Peru's Baselines Law No. 28621. Annex 23.

3.20 Subject to the application of the rules relating to the delimitation of maritime areas between States with adjacent coasts, which will be further examined in Chapter VI below, Peru's maritime entitlements are simply a consequence of the existence – by virtue of the generally accepted principles of contemporary international law, as briefly described above in Section I – of exclusive sovereign rights of coastal States over maritime areas extending at least up to 200 nautical miles from the coast, independently of their geomorphology.

3.21 While fully conscious that Peru's claim to a 200-nautical-mile zone related to "aspects still undefined in international law, which are yet at a developing stage"[97], even in the 1950s the Peruvian authorities did not confine themselves to simply claiming rights over that area, they also enforced them. One of the most well known and publicized episodes of Peru's intention to have its sovereign rights respected in that zone was the seizure on June 1954 by the Peruvian Navy of whalers belonging to the *Olympic Whaling Company*, which was owned by Aristotle Onassis[98].

3.22 Admittedly, the various texts proclaiming the rights of Peru over a "maritime domain" extending up to 200 nautical miles did not use the expression "exclusive economic zone". Nevertheless, it remains the case that those acts and declarations clearly attest to the will of the Peruvian Government to exercise its exclusive sovereign rights to protect its economic interests and the environment within that zone. As was aptly explained by former President

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[97] Ministerio de Relaciones Exteriores: *Memoria del Ministro de Relaciones Exteriores (28 de Julio de 1954 - 28 de Julio de 1955)*. Lima, Talleres Gráficos P.L. Villanueva, 1955, p. 279. Annex 98. (Spanish text: "aspectos aún no definidos del Derecho Internacional que se hallan en etapa de desarrollo."). See also the Agreement between Ecuador, Peru and Chile for a Joint Response to the United States and Great Britain on their Observations to the "Declaration of Santiago", Lima, 12 April 1955. Annex 58; or the Peruvian Notes of 12 April 1955 to the United States (Note No. (M): 6/3/29). Annex 66; or to the United Kingdom (Note No. (N): 6/17/14 of 12 April 1955). Annex 65.

[98] On this episode, see paras. 4.83-4.85 below.

of Peru José Luis Bustamante y Rivero, who later became President of the International Court of Justice:

> "The Peruvian proclamation of sovereignty over the waters of the new territorial sea or coastal strand of two-hundred miles in the decree of 1947, does not imply a purpose for the absolute appropriation of that zone, nor for the creation of an exclusive, and excluding, domain over it. The decree itself establishes that its dispositions do not affect the right to free navigation of ships of all flags. It implicitly conveys the idea … that the acts of sovereignty that the Peruvian State performs over the area will be limited to the sole purposes of the proclamation, namely, the protection, preservation and defence of the natural resources therein, and hence, to the surveillance and regulation of those national economic interests."[99]

Spanish text reads as follows:

> "La proclamación de la soberanía peruana sobre las aguas del nuevo mar territorial o faja costera de las doscientas millas en el decreto de 1947, no implica un propósito de apropiación absoluta de esa zona ni la creación de un dominio exclusivo y excluyente sobre ella. Ya el propio decreto se encarga de dejar establecido que sus disposiciones no afectan el derecho de libre navegación de los barcos de todas las naciones. E implícitamente deja entender, ... que los actos de soberanía que el Estado Peruano realice sobre la zona estarán limitados a los solos fines de la proclamación, esto es, a la protección, conservación y defensa de los recursos naturales allí existentes y, consiguientemente, a la vigilancia y reglamentación de esos intereses económicos nacionales."

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[99] Bustamante y Rivero, José Luis: *Las Nuevas Concepciones Jurídicas Sobre el Alcance del Mar Territorial (Exposición de Motivos del Decreto Supremo Expedido por el Gobierno del Perú el 1° de agosto de 1947)*, Lima, 1955, pp. 6-7. See also: Report of Foreign Affairs Committee of the Congress of the Republic of Peru of 4 May 1955, on the agreements and conventions signed by Peru, Chile and Ecuador in Santiago, on 18 August 1952; and in Lima, on 4 December 1954, passim but in particular, p. 2, para. 2. Annex 96; and Statement by Representative of Peru, Alberto Ulloa Sotomayor, United Nations, *Official Documents* A/CONF.13/39, Vol. III, Fifth Meeting, pp. 6-7.

3.23 There can therefore be no doubt that Peru is entitled to an exclusive maritime domain extending to a distance of 200 nautical miles from its baselines (as defined by Peru's Baselines Law[100]) in conformity with the most basic principles of the contemporary Law of the Sea.

III. Chile Has Recognised as a Matter of Principle Peru's Maritime Entitlements to a Distance of 200 Nautical Miles from Its Coast

3.24 There is some irony in the fact that, while Chile too has been a pioneer in claiming for itself an exclusive maritime domain to a distance of 200 nautical miles from its coast and has vigorously maintained its own right to such a zone, and while it has formally paid lip service to Peru's similar entitlement to such a zone, Chile in fact refuses to accept the consequences of such an entitlement that should be drawn in favour of Peru.

3.25 Chile adopted as early as 23 June 1947 a Declaration by which it proclaimed –

> "1° … its national sovereignty over all the continental shelf adjacent to the continental and island coasts of its national territory, whatever may be their depth below the sea, and claims by consequence all the natural riches which exist on the said shelf, both in and under it, known or to be discovered.
> [and]
>
> 2° … over the seas adjacent to its coasts whatever may be their depths, and within those limits necessary in order to reserve, protect, preserve and exploit the natural resources of whatever nature found on, within and below the said seas, placing within the control of the government especially all fisheries and whaling activities with the object of preventing the exploitation of natural riches of this kind to the detriment of the inhabitants of Chile and to prevent the spoiling or destruction of the said riches to the detriment of the country and the American continent.
>
> 3° … Protection and control is hereby declared immediately over all the seas contained within the perimeter formed by the

[100] Annex 23.

> coast and the mathematical parallel projected into the sea at a distance of 200 nautical miles from the coasts of Chilean territory." [101]

Spanish text reads as follows:

> "1º El Gobierno de Chile confirma y proclama la soberanía nacional sobre todo el zócalo continental adyacente a las costas continentales e insulares del territorio nacional, cualquiera que sea la profundidad en que se encuentre, reivindicando, por consiguiente, todas las riquezas naturales que existen sobre dicho zócalo, en él y bajo él, conocidas o por descubrirse.
>
> 2º El Gobierno de Chile confirma y proclama la soberanía nacional sobre los mares adyacentes a sus costas, cualquiera que sea su profundidad, en toda la extensión necesaria para reservar, proteger, conservar y aprovechar los recursos y riquezas naturales de cualquier naturaleza que sobre dichos mares, en ellos y bajo ellos se encuentren, sometiendo a la vigilancia del Gobierno especialmente las faenas de pesca y caza marítimas, con el objeto de impedir que las riquezas de este orden sean explotadas en perjuicio de los habitantes de Chile y mermadas o destruidas en detrimento del país y del Continente americano.
>
> 3º …declarándose … dicha protección y control sobre todo el mar comprendido dentro del perímetro formado por la costa con una paralela matemática proyectada en el mar a doscientas millas marinas de distancia de las costas continentales chilenas."

3.26 Noting "[t]hat international consensus of opinion recognizes the right of every country to consider as its national territory any adjacent extension of the epicontinental sea and the continental shelf"[102], the Declaration further stated that Chile –

> "does not disregard the similar legitimate rights of other States on a basis of reciprocity, nor does it affect the rights of free navigation on the high seas."[103]

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[101] Annex 27.

[102] *Ibid.*, para. 4 of the Preamble. (Spanish text: "Que el consenso internacional reconoce a cada país el derecho a considerar como territorio nacional toda la extensión del mar epicontinental y el zócalo continental adyacentes.").

[103] *Ibid.*, para. 4 of the operative provisions.

Spanish text reads as follows:

> "no desconoce legítimos derechos similares de otros Estados sobre la base de reciprocidad, ni afecta a los derechos de libre navegación sobre la alta mar."

3.27 Chile clearly accepts that all other States possess the same rights as those it claims off its coasts. In so doing, it accepted in advance that Peru is entitled to those very same rights.

3.28 The idea of a maritime zone extending up to a distance of 200 nautical miles from the coasts is present in many subsequent legal instruments enacted by Chile, *e.g.*:

- Decree No. 332 of 4 June 1963, issued by the Ministry of Agriculture Appointing the Authority which Grants Fishing Permits to Foreign Flag Vessels (Article 2)[104];
- Decree No. 453 of 18 July 1963, issued by the Ministry of Agriculture on the Regulation of Permits for the Exploitation by Factory Ships (Articles 1 and 3)[105];
- Law No. 18.565 of 13 October 1986 amending Article 596 of the Civil Code, regarding maritime spaces[106].

To give another example, in the "Salta Declaration" of 24 July 1971, Presidents Alejandro Lanusse of Argentina and Salvador Allende of Chile:

> "Reaffirm the right of both countries to set, as they have done, their jurisdictions over the sea adjacent to their coasts up to a distance of 200 nautical miles, primarily taking into account the preservation and exploitation of the resources of the sea to the benefit of their peoples."[107]

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[104] Annex 31.

[105] Annex 32.

[106] Annex 36.

[107] Annex 104. It should be noted that this was stated at a time when maritime delimitation between Chile and Argentina was still outstanding. See paras. 5.5-5.8 below.

Spanish text reads as follows:

> "Reafirman el derecho de ambos países de fijar, como lo han hecho, sus jurisdicciones sobre el mar frente a sus costas hasta las 200 millas marinas, teniendo en cuenta primordialmente la preservación y explotación en beneficio de sus pueblos de los recursos del mar."

3.29 Very consistently, the Chilean Government formally took the same position as regards the rights of Peru. The most striking example of a reciprocal recognition of the mutual entitlement to an exclusive maritime domain out to a distance of – at the time "not less than" – 200 nautical miles from their respective coasts is the 1952 Declaration of Santiago[108], in Article II of which –

> "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."[109]

Spanish text reads as follows:

> "los Gobiernos de Chile, Ecuador y Perú proclaman como norma de su política internacional marítima, la soberanía y jurisdicción exclusivas que a cada uno de ellos corresponde sobre el mar que baña las costas de sus respectivos países, hasta una distancia mínima de 200 millas marinas desde las referidas costas."

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[108] The instruments adopted by the Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific held in Santiago de Chile in 1952 comprise the 1952 Declaration of Santiago and the Joint Declaration concerning fishing problems in the South Pacific, in addition to the Agreement between Chile, Ecuador and Peru relating to the Organization of the Permanent Commission of the Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific and the Regulations for Maritime Hunting Operations in the Waters of the South Pacific.

[109] Annex 47.

3.30 The 1952 Declaration of Santiago was a clear, joint, continuation of the policy inaugurated by the Chilean and Peruvian instruments of 1947, which, although different in their details, had been adopted in the same spirit. This is strikingly apparent in the "Instructions given by the Minister of Foreign Affairs Mr. Manuel C. Gallagher to the Chairman of the Delegation of Peru, Dr. A. Ulloa, for the Signing of the 'Declaration of Santiago'":

> "We know that the declaration of sovereignty over an extension of two hundred miles over the open sea is objected by the major powers who will not be able to use the same arguments in order to challenge a regulation and control measures which, without implying full exercise of sovereignty, will be agreed jointly by the three coastal States, for the purpose of protecting the resources of their sea that they have always used and that are now at risk of disappearing owing to uncontrolled or intensive fishing which has recently been started by foreigners whose new fishing methods may easily lead to the reduction of these natural resources, with obvious damage for the coastal States."[110]

Spanish text reads as follows:

> "Sabemos que la declaración de soberanía sobre una extensión de doscientas millas sobre el mar libre es objetada por las grandes potencias que no podrán usar los mismos argumentos para oponerse a una reglamentación y control, que, sin implicar pleno ejercicio de soberanía, acordaran en común los tres Estados ribereños, a fin de defender la riqueza de su mar que siempre han utilizado y que, ahora, está expuesta a desaparecer por la pesca incontrolada o intensiva que se ha empezado a llevar a cabo recientemente por extranjeros cuyos nuevos métodos de pesca pueden llevar facilmente a la merma de esos recursos naturales, con daño evidente para los Estados ribereños."

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[110] "Instructions given by the Minister of Foreign Affairs Mr. Manuel C. Gallagher to the Chairman of the Delegation of Peru, Dr. A. Ulloa, for the Signing of the 'Declaration of Santiago'", Lima, July 1952. Annex 91; also reproduced in Bákula, Juan Miguel: *El Dominio Marítimo del Perú*, Lima, Fundación M.J. Bustamante de la Fuente, 1985, pp. 89-90.

3.31 Again, in the Complementary Convention to the Declaration of Sovereignty on the Two-Hundred-Mile Maritime Zone adopted in Lima on 4 December 1954[111] (hereinafter "the 1954 Complementary Convention"), the three countries, recalling that they –

> "have proclaimed their Sovereignty over the sea along the coasts of their respective countries, up to a minimum distance of two hundred nautical miles, from the said coasts, including the corresponding soil and subsoil of said Maritime Zone",

Spanish text reads as follows:

> "han proclamado su Soberanía sobre el mar que baña las costas de sus respectivos países, hasta una distancia mínima de 200 millas marinas, desde las referidas costas, incluyéndose el suelo y subsuelo que a esa Zona Marítima corresponde",

agreed that:

> "Chile, Ecuador and Peru shall proceed by common accord in the legal defence of the principle of Sovereignty over the Maritime Zone up to a minimum distance of 200 nautical miles, including the soil and subsoil thereof."[112]

Spanish text reads as follows:

> "Chile, Ecuador y Perú, procederán de común acuerdo en la defensa jurídica del principio de la Soberanía sobre la Zona Marítima hasta una distancia mínima de 200 millas marinas, incluyéndose el suelo y subsuelo respectivos."

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[111] Again, this Complementary Convention to the 1952 Declaration of Santiago adopted by the Lima Conference in December 1954 is only part of a complex pattern of legal instruments adopted jointly, comprising the Convention on the System of Sanctions; the Convention on Measures on the Surveillance and Control of the Maritime Zones of the Signatory Countries; the Convention on the Granting of Permits for the Exploitation of the Resources of the South Pacific; the Convention on the Ordinary Annual Meeting of the Permanent Commission for the South Pacific (for Whaling Activities); and the 1954 Agreement on a Special Zone.

[112] 1954 Complementary Convention, *Preamble*, Art. 1. Annex 51.

3.32 Thus, Chile not only reiterated its recognition of Peru's rights over a maritime domain of 200 nautical miles, but it also expressed its will to co-operate with Ecuador and Peru for the defence of this zone.

3.33 Chile and Peru again took the same position on a bilateral basis in a Joint Declaration of 3 September 1971, drafted on the model of the Salta Declaration, in which Presidents Salvador Allende of Chile and Juan Velasco Alvarado of Peru reaffirmed –

> "as an inalienable objective of their maritime policies the defence of the inherent right of a coastal State to the full exercise of its exclusive sovereignty and jurisdiction up to a distance of 200 miles, in order to regulate the conservation and use of natural resources of the sea adjacent to their coasts, and the soil and subsoil thereof, as well as the right within its respective jurisdiction to adopt the necessary measures for the preservation of the marine environment and the management of scientific research activities, in order to protect the interests and promote the development and well-being of its peoples.
>
> They renew their support to the 1952 Declaration of Santiago on Maritime Zone …
>
> They agree to strengthen the System of the South Pacific and its legal, scientific and technical works, consolidate the solidarity among the countries that have adopted the 200-mile limit, and actively promote the establishment of a Latin American regional system that ensures the respect for their rights and a closer collaboration on this area of vital interest to their peoples."[113]

Spanish text reads as follows:

> "como objetivo irrenunciable de sus políticas marítimas la defensa del derecho inherente del Estado ribereño al pleno ejercicio de su soberanía y jurisdicción exclusivas hasta la distancia de 200 millas, para regular la conservación y

[113] Annex 105. See also the Joint Declaration of 16 June 1978 adopted by the Ministers of Foreign Affairs of both countries. Annex 106.

> aprovechamiento de los recursos naturales del mar adyacente a sus costas, y del suelo y subsuelo del mismo mar, así como el derecho dentro de su respectiva jurisdicción a adoptar las medidas necesarias para la preservación del medio ambiente marino y la conducción de las actividades de investigación científica, con el fin de proteger los intereses y promover el desarrollo y el bienestar de sus pueblos.
>
> Renuevan su respaldo a la Declaración de Santiago de 1952 sobre Zona Marítima …
>
> Acuerdan fortalecer el Sistema del Pacífico Sur y sus trabajos jurídicos, científicos y técnicos, consolidar la solidaridad entre los países que han adoptado el límite de 200 millas, y promover activamente el establecimiento de un sistema regional latinoamericano que asegure el respeto de sus derechos y una más estrecha colaboración en este campo de vital interés para sus pueblos."

3.34 It is also worth noting that on 14 August 2002, on the occasion of the fiftieth anniversary of the 1952 Declaration of Santiago, the representatives of Chile, Colombia, Ecuador and Peru, adopted a new Declaration in which it was said that they:

> "1. Express their satisfaction and pride in celebrating the fiftieth anniversary of the Declaration of Santiago which sanctioned the principle of two hundred nautical miles, which has generalised in the practice of States, as an essential part of the Law of the Sea.
>
> 2. They pay tribute to the developers of the principles contained in the 1952 'Declaration of Santiago', who proclaimed for the first time a two hundred-mile maritime jurisdictional zone, based on economic and conservation grounds, and who were tasked with defending the recognition of said zone in multiple international forums up to its sanction in the new Law of the Sea.
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> …
>
> 5. They reaffirm, in this sense, the legal authority of their States to exercise their sovereign rights in the 200-mile jurisdictional

> zone, and to issue the necessary measures for the exploration, exploitation, conservation and administration of the resources found therein, in conformity with the universally accepted instruments and practices, with special reference to the United Nations Convention on the Law of the Sea. Likewise, they reiterate their sovereign rights over their ports and the preferential rights they are entitled to, where appropriate, in the high seas."[114]

Spanish text reads as follows:

> "1. Expresan su satisfacción y orgullo al celebrar cincuenta años de la Declaración de Santiago que consagró el principio de las doscientas millas marinas, el que se ha universalizado en la práctica de los Estados, como parte esencial del Derecho del Mar.
>
> 2. Rinden un sentido homenaje a los forjadores de los principios contenidos en la 'Declaración de Santiago' de 1952, quienes proclamaron por primera vez una zona marítima jurisdiccional de doscientas millas, con fundamentos económicos y de conservación y, a quienes les correspondió defender su reconocimiento en múltiples foros internacionales hasta llegar a su consagración en el Nuevo Derecho del Mar.
>
> ...
>
> 5. Reafirman en tal sentido la potestad de sus Estados en la zona jurisdiccional de 200 millas de ejercer derechos soberanos en ella y dictar las medidas necesarias para la exploración, explotación, conservación y administración de los recursos que en ella se encuentran, de conformidad con los instrumentos y prácticas universalmente aceptados, con especial referencia a la Convención de las Naciones Unidas sobre el Derecho del Mar. Asimismo reiteran su derecho soberano sobre sus puertos y los derechos preferenciales que les corresponden, en su caso, en la alta mar."

3.35 In contrast to these constant proclamations that all States – including Peru – enjoy sovereign and exclusive rights over a 200-nautical-mile zone, Chile now denies such rights to Peru by trying to whittle away the geographical

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[114] Annex 112.

extent of the area over which Peru possesses such rights. Chile's position results not only in excessive Chilean claims in respect to the delimitation of its lateral maritime boundary with Peru, but also in the denial by Chile of the rights of Peru over an area which lies less than 200 nautical miles from the Peruvian coasts but more than 200 nautical miles from the Chilean coasts, this is to say, over a zone that, in any case, lies outside the area claimed by Chile as its EEZ. Thus, on 12 September 2007, the Chilean Government issued a statement by which it expressed its disagreement with the abovementioned Peruvian Supreme Decree No. 047-2007-RE of 12 August 2007 and with the map attached to it[115], and protested against the alleged "intent" of these instruments "to attribute to Peru a maritime area, which is fully subject to the sovereignty and sovereign rights of Chile, as well as an adjacent area of the High Seas."[116]

3.36 In any case, the very expression "*exclusive* economic zone" implies that only the coastal State may claim the "sovereign rights" defined in Article 56 (1) of the 1982 Convention on the Law of the Sea, to the "exclusion" of all other States – and this in an area which, in the absence of any competing claim, extends to a distance of "200 nautical miles from the baselines from which the breadth of the territorial sea is measured" (Article 57). As a consequence, even if no formal proclamation of an EEZ is made, the entitlement to an EEZ operates at least negatively in that no other State than the coastal State can claim such a zone for its own benefit, up to the distance of 200 nautical miles from the coast (except when the claims of two or more coastal States overlap within this limit – a circumstance in which the general rules of delimitation then apply (see Chapter VI below)).

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[115] See **Figure 2.4** in Chapter II of this Memorial.

[116] Annex 114.

CHAPTER IV

LACK OF AN AGREEMENT ON MARITIME DELIMITATION

I. Introduction

4.1 The Parties differ fundamentally on the question of the existence of a maritime boundary between them. Peru's position is solidly based on the absence of any kind of agreement on maritime boundary delimitation with Chile. Chile's position, on the other hand, has been spelled out clearly in recent years and is based on the proposition that the 1952 Declaration of Santiago and the 1954 Agreement on a Special Zone settled the maritime delimitation.

4.2 For example, in Note No. 76 of 13 September 2005, the Ministry of Foreign Affairs of Chile affirmed that –

> "the 1954 Agreement relating to a Special Maritime Frontier Zone, adopted in the framework of the South Pacific System, is precisely a binding instrument between Peru and Chile which refers to the existing maritime boundary and its full enforcement cannot be put into question"[117].

Spanish text reads as follows:

> "el Convenio sobre Zona Especial Fronteriza Marítima de 1954, adoptado en el ámbito del Sistema del Pacífico Sur, es

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[117] Note No. 76 of 13 September 2005, from the Ministry of Foreign Affairs of Chile to the Embassy of Peru. Annex 84.

> precisamente un instrumento vinculante entre el Perú y Chile que se refiere al límite marítimo existente y su plena aplicación no puede ser puesta en duda".

4.3 And in Note No. 18934 of 28 November 2005, the Government of Chile stated that –

> "the 1952 Declaration of Santiago and the 1954 Agreement relating to a Special Maritime Frontier Zone – both of which are in force – settle the maritime delimitation between Chile and Peru at the geographical parallel"[118].

Spanish text reads as follows:

> "la Declaración de Santiago de 1952, y el Convenio sobre Zona Especial Fronteriza Marítima de 1954, ambos en vigor, establecen la delimitación marítima entre Chile y Perú en el paralelo geográfico".

4.4 It is Peru's case that the 1952 and 1954 instruments show nothing of the kind. Neither the 1952 Declaration of Santiago nor the 1954 Agreement on a Special Zone fixed a maritime boundary between Peru and Chile. No other agreement does so. A provisional line has long been used to delimit Peruvian and Chilean waters for policing purposes, particularly in relation to fisheries; but that line was not intended to have and does not have the character of an international maritime boundary. It was a policing limit established in what was then the territorial sea and an adjacent area of high seas within which the States Parties to the 1954 Agreement on a Special Zone claimed a limited functional jurisdiction in respect of fisheries. The boundary between the maritime zones of Peru and Chile remains to be settled, and that is the task now before the Court.

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[118] Note No. 18934 of 28 November 2005, from the Minister of Foreign Affairs of Chile to the Ambassador of Peru. Annex 85.

4.5 The existence of this dispute has long been evident. It was brought to the fore in 1986 when Peru approached Chile and proposed the making of an agreement on the maritime boundary[119]. It has also been the subject of many exchanges since then. For instance, in September 2000 Chile deposited charts with the Secretary-General of the United Nations which purported to identify a maritime boundary with Peru[120]. On 9 January 2001 Peru wrote to the Secretary-General in protest, stating that:

> "To date Peru and Chile have not concluded a specific maritime delimitation treaty pursuant to the relevant rules of international law. The mention of parallel 18°21'00" as the maritime boundary between the two States is, therefore, without legal basis."[121]

4.6 In order to demonstrate Chile's mischaracterization of the provisional policing line, and to make clear the precise juridical nature of the various instruments and practical arrangements that have been adopted by the two States over the years in respect of the waters in the general area of the starting-point of their land boundary, it is necessary to explain the relevant legal history in some detail. Accordingly, this chapter sets out that history and explains its significance in the context of the present dispute.

4.7 It is also necessary to offer a word of caution at this stage. There is a risk that the natural tendency to reinterpret the past in the light of the present may distort the evaluation of the historical record. For example, it is often overlooked that the making of maritime boundary agreements is a relatively recent phenomenon: more than 95% of maritime boundary treaties were concluded after the First United Nations Conference on the Law of the Sea

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[119] See paras. 4.132-4.133 below.

[120] See **Figure 2.6** in Vol. IV. See also the list of geographical co-ordinates deposited by Chile with the Secretary-General of the United Nations, in Annex 110.

[121] Note No. 7-1-SG/005 of 9 January 2001, from the Permanent Mission of Peru to the Secretary-General of the United Nations. "Statement by the Government of Peru concerning parallel 18°21'00", referred to by the Government of Chile as the maritime boundary between Chile and Peru". Annex 78.

in 1958[122]. It was very rare for States to make such agreements in the 1940s and 1950s (or earlier). So, no matter how commonplace such agreements may appear today it would have been unusual and remarkable if the two States had made an agreement on the maritime boundary in the 1950s. Similarly, there is a danger that the well-established 200-mile zones of the present day may be assumed to have sprung, fully-formed, into existence in the late 1940s. That, too, would be a fundamental historical error. For much of that period – prior, that is, to the clinching of the 'package-deal' that was the 1982 Convention on the Law of the Sea – the 200-nautical-mile claims of the American South Pacific States were vigorously opposed by States outside the region, and the main concern was to secure the survival of the claims. Questions of intra-regional boundaries were not of immediate concern.

4.8 This chapter accordingly adopts a chronological approach, explaining developments in the context in which they actually occurred. It describes the dealings by the Parties in so far as they are relevant to the question of the maritime boundary. Those dealings were all reactions to the pressure of immediate events, foremost among which was the refusal of certain States whose vessels fished off the coasts of the American South Pacific States to recognize the validity of the 200-mile claims made by those American States.

4.9 The key characteristics of those dealings that are relevant in this context are –

(a) that the primary focus of the Parties was not upon the establishment of separate national zones but upon the defence of an American South Pacific maritime zone against opposition from third States at a time when the

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[122] D. M. Johnston: *The Theory and History of Ocean Boundary-Making*. Kingston, McGill-Queen's University Press. 1988, p. 213: "Prior to the Second World War relatively few delimitation agreements were concluded: most sources refer to only two territorial sea boundary agreements – between Denmark and Sweden … and between Italy and Turkey, both concluded in 1932. Significantly, the first "early modern" ocean boundary treaty, concluded ten years later by Venezuela and the United Kingdom (for Trinidad and Tobago), concerned the delimitation of the continental shelf. In the following twenty-two years only six more ocean boundary agreements were negotiated."

Law of the Sea had not yet developed firm and universally-accepted rules on the extent of a coastal State's maritime rights beyond the territorial sea;

(b) that the arrangements made between the Parties were provisional;

(c) that the arrangements made between the Parties were intended only to regulate certain specific functions and not to divide up areas of ocean space;

(d) that their purpose and effect was confined to a range of very specific fisheries matters, and in particular to the prevention of incursions into the fishing grounds off the coasts of Peru and Chile by foreign fishing vessels, and into their maritime zones more generally; and

(e) that the arrangements were exclusively concerned with areas in the vicinity of the coast.

4.10 The main point made here is that while both Peru and Chile made various provisional maritime claims and arrangements for very specific purposes, there has as yet been no agreement between Peru and Chile fixing the boundary between their maritime zones. The maritime boundary remains to be determined by the Court in accordance with the applicable principles of international law.

II. The Maritime Claims

4.11 The maritime claims of Peru and Chile fall into three natural periods. The first is the period up to 1945, before the expanded claims made in and following the Truman Proclamations of 1945. The second is the period from 1945 up to 1980, during which time 200-mile claims remained contentious and had not gained general acceptance among traditional "maritime States" such as the United States, the Soviet Union, and many European States. The third is the period after 1980, when developments at UNCLOS III indicated that the 200-nautical-mile zone was practically certain to be a central element of the new legal regime then being negotiated at the Conference.

A. Phase 1: Maritime Claims prior to 1945

4.12 Prior to 1945, the maritime claims of Peru and Chile were modest, and varied in their geographical extent according to the purpose for which they were established.

1. Peru's Maritime Claims

4.13 As was the common practice, Peru did not draw a crude distinction between a single unified zone of sovereignty over coastal waters and the high seas beyond. Peru's territorial sea was not a single integrated zone which determined the limits of Peruvian jurisdiction for all purposes. There were other zones which coexisted with Peru's territorial sea. Peru exercised its right to legislate over coastal waters from time to time and within various distances from the shore, as particular maritime interests appeared to require.

4.14 For example, the question of the limits of criminal law jurisdiction at sea was addressed by the First South American Congress on Private International Law held in Montevideo in 1888-89. The Congress adopted the 1889 Treaty on International Penal Law and this was enacted into law in Peru by virtue of the legislative approval of 4 November 1889. Article 12 of the 1889 Treaty on International Penal Law stipulated that:

> "For purposes of jurisdiction, territorial waters are declared to be those comprised in a belt five miles wide running along the coast, either of the mainland or of the islands which form part of the territory of each State."[123]

Spanish text reads as follows:

> "Se declaran aguas territoriales, a los efectos de la jurisdicción penal, las comprendidas en la extensión de cinco millas desde la costa de tierra firme e islas que forman parte del territorio de cada Estado."

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[123] Annex 44.

Thus, Peru had a five-mile territorial sea for the purposes of criminal law jurisdiction.

4.15 In contrast, Peru's Supreme Decree of 13 November 1934, Regulation on Visits and Stay of Warships and Military Aircraft in Peruvian Ports and Peruvian Territorial Waters in Times of Peace, established in paragraph 9.1 that:

> "The territorial waters of Peru extend up to three miles from the coasts and islands, starting from the low tide lines".[124]

Spanish text reads as follows:

> "Las aguas territoriales del Perú, se extienden hasta tres millas de las Costas e Islas, contadas a partir del límite de las más bajas mareas."

4.16 Similarly, the Regulation of Captaincies and National Merchant Navy (General Order of the Navy No. 10), dated 9 April 1940, stated in Article 4 that:

> "The territorial sea of Peru extends up to three miles from the coast and islands, measured from the lowest tide lines."[125]

Spanish text reads as follows:

> "El mar territorial del Perú, se extiende hasta 3 millas de la costa e islas, contadas a partir de las más bajas mareas."

4.17 Peru's claim to control maritime airspace was different yet again. Supreme Decree of 15 November 1921 asserted in its Preamble that:

> "The State has, theoretically, absolute right of ownership on the air space over its territory, and that, in practice, it is essential for the State to exert sovereignty over its use, at least, up to where its rights of self-preservation and security demand".[126]

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[124] Annex 4.

[125] Annex 5.

[126] Annex 3.

Spanish text reads as follows:

> "Que el Estado tiene, teóricamente, derecho absoluto de propiedad sobre el espacio aéreo que domina su territorio, y que, en la práctica es indispensable que ejerza la soberanía de su empleo, por lo menos, hasta donde sus derechos de conservación y seguridad lo exijan".

The Supreme Decree proceeded to stipulate in Article 1 that:

> "Air navigation in balloons, airships or airplanes, of public or private property, arriving from other countries, is forbidden in less than three thousand metres over any part of the national territory and over the protection zone, constituted by a belt of twelve thousand metres [6.5 nautical miles approximately] from its coasts or from its defence installations built on its maritime shores or river banks."[127]

Spanish text reads as follows:

> "La navegación aérea, en globos, dirigibles, o aviones de propiedad pública o particular, procedente, de otro país, queda prohibida a menos de tres mil metros sobre cualquiera de las partes del territorio nacional y sobre la zona de protección, constituída por una faja de doce mil metros a contar de sus costas, o de las obras de defensa instaladas sobre sus riberas marítimas o fluviales."

4.18 It will readily be seen that, through into the 1940s, Peru maintained a number of claims to maritime jurisdiction, out to distances which varied according to the interest protected by the particular claim in question.

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[127] *Ibid.*

2. Claims of Other States

4.19 Peru was by no means exceptional in this respect. Chile, for instance, adopted the same approach. Thus, Article 593 of the 1855 Chilean Civil Code[128], stipulated that:

> "The adjacent sea, up to a distance of one marine league [three nautical miles], measured from the low-water mark, constitutes the territorial sea and belongs to the public domain; save that the right of policing, with respect to matters concerning the security of the country and the observance of fiscal laws, extends up to a distance of four marine leagues [12 nautical miles], measured in the same manner."[129]

Spanish text reads as follows:

> "El mar adyacente, hasta la distancia de una legua marina, medida desde la línea de más baja marea, es mar territorial y de dominio nacional; pero el derecho de policía, para objetos concernientes a la seguridad del país y a la observancia de las leyes fiscales, se extiende hasta la distancia de cuatro leguas marinas medidas de la misma manera."

A similar provision, setting a three-mile territorial sea and a 12-mile limit for national security purposes, was included in Chile's Supreme Decree (M) No. 1.340, of 14 June 1941[130]. Article 3 of Law No. 8.944, Chilean Water Code of 1948, on the other hand, provided that:

> "The adjacent sea, up to a distance of 50 kilometres, measured from the lowest water line, is territorial sea of national domain; however, the right of policing for purposes regarding national security and the compliance of fiscal laws shall extend up to the distance of one hundred kilometres measured in the same manner."[131]

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[128] The 1855 Chilean Civil Code entered into force in 1857. Annex 25.

[129] This Article was amended by Law No. 18.565 of 13 October 1986 (Art. 1). Annex 36.

[130] Annex 26.

[131] Annex 28.

Spanish text reads as follows:

> "El mar adyacente, hasta la distancia de 50 kilómetros, medida desde la línea de más baja marea, es mar territorial y de dominio nacional; pero el derecho de policía, para objetos concernientes a la seguridad del país y a la observancia de las leyes fiscales, se extiende hasta la distancia de cien kilómetros medidos de la misma manera."

In 1953, Chile adopted a 12-mile limit for the competence of the Directorate General of Maritime Territory and Merchant Marine, which had responsibility for navigational safety and the protection of human life at sea, as well as policing Chilean waters[132].

4.20 It was also a common practice among other Latin American States in the first stage of the twentieth century to establish different maritime zones for specific purposes. Among the better-known examples are the following[133]:

(a) Brazil: In 1914 issued a Circular Note No. 43 sanctioning a three-mile neutrality zone equivalent to the provisional extent of the territorial sea. According to Law Decree No. 794 of 1938, (Fishing Code), Brazil considered a 12-mile zone for fishery purposes.

(b) Colombia: According to Law No. 14 of 1923, "territorial sea" as referred to in Law No. 120 of 1919, Law on Hydrocarbons, and Law No. 96 of 1922, Conferring Powers upon the Government to Regulate Fishing in the Waters of the Republic, shall be understood to extend up to 12 nautical miles. Customs Law No. 79 of 1931[134], however, established a 20-kilometre jurisdiction zone.

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[132] Decree with Force of Law No. 292 of 25 July 1953, Fundamental Law of the Directorate General of Maritime Territory and Merchant Marine. Annex 29.

[133] The information was obtained from the United Nations Legislative Series. *Laws and Regulations on the Regime of the Territorial Sea*, UN Pub. Sale No. 1957 Vol. 2. (ST/LEG/SER. B/6). When other sources were used, individual references are made.

[134] Law No. 79, Organic Customs Law of Colombia of 19 June 1931 <http://www.lexbasecolombia.com/lexbase/normas/leyes/1931/L0079de1931.htm> accessed 24 November 2008.

(c) Costa Rica: By virtue of Law Decree No. 116 of 1948, Costa Rica asserted its rights and interests over the seas adjacent to its territory up to the breadth required for the protection, preservation and rational exploitation of its natural resources. According with Law Decree No. 803 of 1949, demarcation was to be traced as far as 200 miles offshore[135].

(d) Cuba: The Code for Social Defence of 1936 determined that for all crimes and infringements committed in the national territory, territorial waters should be considered to extend up to a distance of three nautical miles from shore. The Organic Law of the Army and Navy, approved by Law Decree No. 7 of 1942, claimed a three-mile territorial sea, but a zone extending as far as 12 miles offshore for customs purposes.

(e) Dominican Republic: According to Law No. 3342 of 1952, the territorial sea extended for three miles offshore, but with an additional zone reaching as far as 12 nautical miles for the purposes of security, customs, fishery and sanitary regulations.

(f) Ecuador[136]: The 1857 Civil Code established a one maritime league (three miles) territorial sea. It also set a patrolling zone of up to four maritime leagues (12 miles). In 1934, by virtue of Executive Decree No. 607, Ecuador established a 15 mile zone as "territorial waters for fishery zones". This norm was reasserted through Supreme Decree No. 80 of 1938. By virtue of Supreme Decree No. 53 of 1939, Ecuador established a "Maritime Safety Zone Adjacent to the Ecuadorean Territory" of 250 to 300 miles, while Supreme Decree No. 138 of 1940 and Executive Decree No. 1693 of 1946 established a 15-mile territorial sea for general fishery purposes.

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[135] Law Decrees No. 116 of 27 July 1948 and No. 803 of 2 November 1949. United Nations Legislative Series. *Laws and Regulations on the Regime of the High Seas*. UN Pub. 1951 (ST/ LEG/SER. B/1), pp. 9-10.

[136] Comisión Permanente del Pacífico Sur, Secretaría General: *Legislación Marítima y Pesquera vigente y otros documentos referentes al Derecho del Mar – Ecuador*. Santiago, December 1974, pp. 117-118, 127-130.

(g) El Salvador: In accordance with the Navigation and Maritime Act of 1933, the national domain included a maritime zone of one maritime league (three nautical miles). That Act also established police, fiscal and security rights up to a distance of four maritime leagues (12 nautical miles).

(h) Guatemala: Law of 10 June 1934 claimed a 12-mile territorial sea. Decree No. 2393 of 1940 established that no belligerent submarine could enter territorial waters, with these extending up to 12 miles.

(i) Mexico: According to the General Law of National Patrimony of 1941 the territorial sea extended for 16,668 metres (nine miles) offshore. The same law established that Mexico could exert the police or defensive measures it would deem appropriate in a zone adjacent to the territorial sea, reaching as far as the distance fixed by special laws[137].

4.21 The overall picture was well summarized by Judge Alvarez in his Individual Opinion in the Anglo-Norwegian Fisheries case in 1951. He said:

> "5. States may fix a greater or lesser area beyond their territorial sea over which they may reserve for themselves certain rights: customs, police rights, etc.
>
> 6. The rights indicated above are of great weight if established by a group of States, and especially by all the States of a continent.
>
> The countries of Latin America have, individually or collectively, reserved wide areas of their coastal waters for specific purposes: the maintenance of neutrality, customs' services, etc., and, lastly, for the exploitation of the wealth of the continental shelf."[138]

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[137] García Robles, Alfonso: *La Conferencia de Ginebra y la Anchura del Mar Territorial*. Mexico, 1959, p. 407.

[138] *Fisheries case, Individual opinion of Judge Alvarez, I.C.J. Reports 1951*, p. 150.

B. Phase 2: Maritime Claims 1945-1980

1. The Background to the Claims of 1947

4.22 States often make maritime claims. The *Law of the Sea Bulletin*, published by the United Nations Division for Ocean Affairs and the Law of the Sea, now records many such claims each year. But the claims made by Chile and Peru in 1947 were of a very different nature from most of the claims now being recorded in the *Law of the Sea Bulletin.*

4.23 The crucial difference is that the claims being made by States around the world now are, almost without exception, exercises by States of rights that are clearly recognized in the 1982 Convention on the Law of the Sea. It provides a comprehensive and authoritative account of the maritime zones to which States are entitled under the Convention and, indeed, under customary international law. Current claims are uncontroversial implementations at national level of rights the entitlement to which is well recognized in international law.

4.24 The 200-mile claims made prior to 1980 were quite different, in three respects. *First*, they were made against a legal background which was still in the making. It is now well established that maritime claims are divided into zones of sovereignty (the territorial sea), and zones of limited functional jurisdiction or sovereign rights exercisable for certain purposes specified by international law (the contiguous zone, the continental shelf, and the EEZ). That is, however, a position that has been reached only in recent years. In 1945 there were, as was explained in the preceding paragraphs in relation to Peru and Chile[139], many claims that did not fit within this simple classification. Rather than establish a rigid distinction between a territorial sea and a contiguous zone, for instance, many States claimed just so much maritime jurisdiction

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[139] Paras. 4.12-4.21 above.

as they needed for practical purposes, leading to a situation in which various zones of different breadths were established for different purposes[140]. The 200-mile claims were a further, pragmatic, addition to these bundles of maritime competences claimed by States, rather than a monolithic extension of the State's maritime 'territory'.

4.25 *Second*, the 200-mile claims were radically innovative, in as much as they extended for distances far beyond the very widest claims to maritime jurisdiction previously existing, and were resisted by some of the major 'maritime' States, such as the United States, the Soviet Union and several European States.

4.26 *Third,* the modern Law of the Sea, developing from the Truman Proclamations, included a new element which provided the impulse for the extension of maritime claims beyond their previously accepted limits: the socio-economic factor. This was evident in the 1947 200-mile claims of Chile and Peru and the 1952 Declaration of Santiago. The Chilean Proclamation referred to "the object of preventing the exploitation of natural riches of this kind to the detriment of the inhabitants of Chile"[141]; and the Peruvian Supreme Decree stated that "the shelf contains certain natural resources which must be proclaimed as our national heritage" and that –

> "in defence of national economic interests it is the obligation of the State to determine in an irrefutable manner the maritime domain of the Nation, within which should be exerted the protection, conservation and vigilance of the aforesaid resources"[142].

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[140] This is evident from the responses of States to the League of Nations codification efforts in relation to the Law of the Sea. See García Robles, Alfonso, op. cit., p. 64. See also Lowe, A.V.: "The Development of the Concept of the Contiguous Zone". (*British Yearbook of International Law*, Vol. 52, 1981, pp. 109-169).

[141] Annex 27. (Spanish text: "con el objeto de impedir que las riquezas de este orden sean explotadas en perjuicio de los habitantes de Chile").

[142] Annex 6.

Spanish text reads as follows:

> "en resguardo de los intereses económicos nacionales, es obligación del Estado fijar de una manera inconfundible el dominio marítimo de la Nación, dentro del cual deben ser ejercitadas la protección, conservación y vigilancia de las riquezas naturales antes aludidas".

The Declaration of Santiago was even more explicit, stating:

> "1. Governments have the obligation to ensure for their peoples the necessary conditions of subsistence, and to provide them with the resources for their economic development.
>
> 2. Consequently, they are responsible for the conservation and protection of their natural resources and for the regulation of the development of these resources in order to secure the best possible advantages for their respective countries.
>
> 3. Thus, it is also their duty to prevent any exploitation of these resources, beyond the scope of their jurisdiction, which endangers the existence, integrity and conservation of these resources to the detriment of the peoples who, because of their geographical situation, possess irreplaceable means of subsistence and vital economic resources in their seas."[143]

Spanish text reads as follows:

> 1. Los Gobiernos tienen la obligación de asegurar a sus pueblos las necesarias condiciones de subsistencia, y de procurarles los medios para su desarrollo económico.
>
> 2. En consecuencia, es su deber cuidar de la conservación y protección de sus recursos naturales y reglamentar el aprovechamiento de ellos a fin de obtener las mejores ventajas para sus respectivos países.

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[143] Annex 47.

> 3. Por lo tanto, es también su deber impedir que una explotación de dichos bienes, fuera del alcance de su jurisdicción, ponga en peligro la existencia, integridad y conservación de esas riquezas en perjuicio de los pueblos que, por su posición geográfica, poseen en sus mares fuentes insubstituibles de subsistencia y de recursos económicos que les son vitales.

4.27 For these reasons, the 200-mile claims must be seen not as simple extensions of the maritime domain of States within limits already clearly permitted by international law, but as particular extensions of functional jurisdiction which had to be maintained and defended in the face of hostility from some parts of the international community. It is important that this be understood. Had the 200-mile claims of Peru and Chile been straightforward and uncontroversial extensions of maritime territory, or even of universally-recognized continental shelf or EEZ rights, one might have expected the question of the precise boundaries of those claims, including the boundaries with neighbouring States, to be a question of considerable importance. Such a view would, however, rewrite history according to the template of the present, and it would be incorrect.

4.28 The focus of the attention of the Parties was not upon the relationship between the parts of the American South Pacific 200-mile zone that each of them claimed, but upon the increasing threat which both of them faced from the distant water fishing fleets belonging to third States that were exploiting the resources of the waters adjacent to Peru and Chile. The reaction to that threat was coloured by the example of the United States in unilaterally asserting its own rights over important marine resources adjacent to its coasts, as against third States which might otherwise have sought to exploit those resources. The account of this period must, therefore, begin with the Truman Proclamations of 1945.

2. The Truman Proclamations

4.29 The trigger for the maritime claims made by Peru and Chile in 1947 was the Proclamation concerning fisheries made by the President of the United States, Harry S. Truman on 28 September 1945[144]. This Proclamation, and the Proclamation on the Continental Shelf adopted on the same day, are very familiar to international lawyers; but it is important to read them in full in order to see the remarkable similarity between the concerns and solutions adopted by the United States and those adopted shortly afterwards by Chile and Peru. The material parts of the Fisheries Proclamation read as follows:

> "Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas
>
> WHEREAS for some years the Government of the United States of America has viewed with concern the inadequacy of present arrangements for the protection and perpetuation of the fishery resources contiguous to its coasts, and in view of the potentially disturbing effect of this situation, has carefully studied the possibility of improving the jurisdictional basis for conservation measures and international co-operation in this field, and
>
> WHEREAS such fishery resources have a special importance to coastal communities as a source of livelihood and to the nation as a food and industrial resource; and
>
> WHEREAS the progressive development of new methods and techniques contributes to intensified fishing over wide sea areas and in certain cases seriously threatens fisheries with depletion, and
>
> WHEREAS there is an urgent need to protect coastal fishery resources from destructive exploitation, having due regard to conditions peculiar to each region and situation and to the special

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[144] Proclamation No. 2668, Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas, 28 September 1945. The Proclamation was accompanied by Executive Order No. 9634, Providing for the Establishment of Fishery Conservation Zones, 28 September 1945. Annex 88.

rights and equities of the coastal State and of any other State which may have established a legitimate interest therein;

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to coastal fisheries in certain areas of the high seas:

In view of the pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale. Where such activities have been or shall hereafter be developed and maintained by its nationals alone the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States. Where such activities have been or shall hereafter be legitimately developed and maintained jointly by nationals of the United States and nationals of other States, explicitly bounded conservation zones may be established under agreements between the United States and such other States; and all fishing activities in such zones shall be subject to regulation and control as provided in such agreements. The right of any State to establish conservation zones off its shores in accordance with the above principles is conceded, provided that corresponding recognition is given to any fishing interests of nationals of the United States which may exist in such areas. The character as high seas of the areas in which such conservation zones are established and the right to their free and unimpeded navigation are in no way thus affected."

4.30 The Fisheries Proclamation thus rested control over coastal fisheries partly upon agreement with other interested States. That was, however, emphatically not the case with the United States' 1945 Continental Shelf Proclamation[145],

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[145] Proclamation No. 2667, Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 28 September 1945. The Proclamation was accompanied by Executive Order No. 9633, Reserving and Placing Certain resources of the Continental Shelf under the Control and Jurisdiction of the Secretary of the Interior, 28 September 1945. Annex 88.

which accompanied the Fisheries Proclamation on 28 September 1945. The Continental Shelf Proclamation and Executive Order constituted an explicit and unilateral assertion of exclusive United States rights over the resources of the continental shelf. The Proclamation read as follows:

> "Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf
>
> WHEREAS the Government of the United States of America, aware of the long range world-wide need for new sources of petroleum and other minerals, holds the view that efforts to discover and make available new supplies of these resources should be encouraged; and
>
> WHEREAS its competent experts are of the opinion that such resources underlie many parts of the continental shelf off the coasts of the United States of America, and that with modern technological progress their utilisation is already practicable or will become so at any early date; and
>
> WHEREAS recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilisation when and as development is undertaken; and
>
> WHEREAS it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilise or conserve these resources would be contingent upon cooperation and protection from the shore, since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of their nature necessary for utilisation of these resources;
>
> NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and sea bed of the continental shelf.

> Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected."

4.31 There are two points to be made about the Truman Proclamations of 1945. The first is that neither Proclamation was expressed as a claim to jurisdiction over the seas within a specified distance of the shore[146]. Both Proclamations were assertions of the right of the United States to exercise jurisdiction over undefined adjacent marine areas for specific purposes; and both, plainly, were motivated by the need to assert the jurisdiction necessary to protect an identified interest of the United States in those adjacent marine areas.

4.32 Thus, the Truman Proclamations were essentially *functional* rather than *zonal* in nature. They aimed not at the creation of precisely delimited zones, but at the assertion of a competence to exercise jurisdiction over undefined areas of the sea and sea-bed and subsoil adjacent to the coast for specified purposes.

4.33 The second point is that the Continental Shelf Proclamation, unlike the Fisheries Proclamation, asserted *exclusive* United States rights over valuable marine resources adjacent to its coasts. In essence, the United States identified the major source of wealth in the waters adjacent to its coasts, and asserted

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[146] The press release accompanying the Proclamations did, however, state that "Generally, submerged land which is contiguous to the continent and which is covered by no more than 100 fathoms (600 feet) of water is considered as the continental shelf" <http://www.presidency.ucsb.edu/ws/index.php?pid=12332> accessed 21 November 2008.

ownership of it. As the United States claims were presented not as exceptional measures in breach of international law[147] but as measures consonant with the development of international law, it followed that other States could (in the eyes of those who accepted the validity of the Truman Proclamations) make similar claims themselves. For Peru and Chile, the major maritime resources were at the time fish and whales, not petroleum. For them, fish and whales were as much a strategic resource as petroleum, and it was natural that they should emulate the United States in asserting rights over the fisheries off their coasts.

4.34 The natural and the intended effect of the Truman Fisheries Proclamation was that many of the fishing vessels that had previously been fishing off the United States coasts would be forced to look for fish beyond the new United States fishing zones. Inevitably, much of that effort was diverted southwards, to the fisheries off the coasts of Latin America. Thus, the result of a unilateral measure by a powerful State claiming exclusive rights over the most valuable marine resources (hydrocarbons) off its own coasts was to reduce Peru and Chile's share of the one marine resource (fisheries) which benefited the Pacific States of Latin America. It was in the face of this very large, long-term, increase in the pressure on their coastal fish stocks that Peru and Chile (and Ecuador) took steps to extend their maritime jurisdiction, precisely in order to offer some possibility of controlling access to their coastal fisheries, thus protecting both the fisheries and the States' own interests in them[148].

4.35 In these ways the Truman Proclamations simultaneously provided a precedent for the unilateral assertion of exclusive rights by States over valuable marine resources in the seas adjacent to their coasts, put increased pressure upon

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[147] In contrast to, for example, the UK action in bombing the stricken Liberian tanker, the *Torrey Canyon*, in 1967, which was presented as a necessary action uninhibited by international law. See the UK *House of Commons Debates*, 4 April 1967, Vol. 744, at columns 38-54.

[148] See, for example, Auguste, Barry B.L.: *The Continental Shelf: The practice and policy of the Latin American States with special reference to Chile, Ecuador and Peru*, Paris, Librairie Minard and Geneva, Librairie E. Droz, 1960, pp. 155-165; Scully, Michael: "Peru goes fishing". (Américas, Vol. 3, No. 7, 1951, July, pp. 7-9, 42).

the fish stocks that were already under commercial exploitation in the high seas off the Pacific coast of South America, and created a situation in which it became a matter of urgent necessity that the Latin American claims to extended fisheries jurisdiction be made.

3. The Mexican and Argentinean Claims of 1945-1946

4.36 As will be seen, the Chilean[149] and the Peruvian[150] claims of 1947 were explicitly based upon the Truman Proclamations and upon the claims made by Mexico and Argentina in 1945 and 1946. The Mexican Presidential Declaration of 29 October 1945, asserted that –

> "the Government of the Republic lays claim to the whole of the continental platform or shelf adjoining its coast line and to each and all of the natural resources existing there, whether known or unknown, and is taking steps to supervise, utilize and control the closed fishing zones necessary for the conservation of this source of well-being."[151]

4.37 On 9 October 1946 Argentina adopted a Declaration Proclaiming Sovereignty over the Epicontinental Sea and the Continental Shelf[152]. The Declaration recalled the United States and Mexican claims and stated that:

> "In the international sphere conditional recognition is accorded to the right of every nation to consider as national territory the entire extent of its epicontinental sea and of the adjacent continental shelf"[153].

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[149] See paras. 4.45-4.46 below.

[150] See paras. 4.50-4.51 below.

[151] Declaration of the President of Mexico on the Continental Shelf, 29 October 1945. Annex 89.

[152] The Declaration was formulated on 11 October 1946 by Decree No. 14.708/46.

[153] Decree No. 14.708/46 of 11 October 1946. Annex 90.

There was no indication in this 1946 Declaration of the seaward extent of the epicontinental sea or the continental shelf claim, or of the manner in which the boundaries between Argentina's zones and those of neighbouring States might be drawn.

4.38 Both the Mexican and the Argentinean claims, like the Truman Proclamations before them, were plainly concerned to assert the principle of national control over the resources of the adjacent seas, and not to fix the lateral or the seaward limits of the new maritime zone.

4. South-East Pacific Fisheries in the 1940s

4.39 The practice of Peru and Chile must be understood against the background of their concern with their offshore fisheries. Fisheries in the South-East Pacific have long attracted fishing vessels from outside the region. The coastal States have, correspondingly, long sought to preserve such fisheries for the benefit of their citizens. In 1833, for example, Peru adopted a decree which provided that only Peruvian citizens could fish or hunt whales and amphibians on Peruvian shores and islands, and established a system of licences for fishing by Peruvian nationals[154]. A similar regulation was enacted in 1840[155].

4.40 The importance of the Peruvian fishing industry increased greatly from the 1940s onwards. For example, in 1939 there was only one fishing company registered in Peru, but by 1945 there were 12; and by 1964 Peru accounted for 18% of the world's fishing activities and produced around 40% of the world's fishmeal[156]. Peru's commitment to the fishing industry was evidenced by the establishment in 1954 of the *Consejo de Investigaciones*

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[154] Supreme Decree of 6 September 1833. Annex 1.

[155] Supreme Decree of 5 August 1840. Annex 2.

[156] Thorp, Rosemary and Bertram, Geoffrey: *1890-1977. Crecimiento y políticas en una economía abierta*, Lima, Mosca Azul, Fundación Friedrich Ebert and Universidad del Pacífico, 1985, pp. 369-371.

Hidrobiológicas, which conducted studies of anchovy and other species, and in 1959 of the *Instituto de Investigaciones de Recursos Marinos* (IREMAR) which worked on FAO studies: the two bodies were merged into the *Instituto del Mar del Perú* (IMARPE) in 1964[157].

4.41 In the 1940s and 1950s, the nascent Peruvian fishing industry faced pressure from two sides. On the one hand foreign fishing vessels, displaced from their traditional fishing grounds in the North Pacific by declining catches resulting from over-fishing and by United States conservation measures, were looking to the fish stocks off the west coast of Latin America[158]. On the other hand, the United States was considering moves to impose taxes on imports of tuna from third States, including Peru[159]. These pressures led to requests from Peruvian businesses that the Peruvian Government take action to protect Peruvian interests and specifically to protect effectively the resources within the 200-mile zone[160].

4.42 The situation facing the whaling industry in the 1940s was perhaps the most important factor in the background to the 1947 maritime claims. Peru had an important whaling industry at this time. The Chilean whaling industry had expanded during the years of the Second World War, when European whaling around Antarctica was suspended. European and Japanese whaling in those waters had resumed by 1947, and in the words of Dr. Ann Hollick, a distinguished commentator and former United States

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[157] *Instituto del Mar del Perú* <http://190.81.184.108/imarpe/historia.php> accessed 1 December 2008.

[158] See Declaration of the Head of the Chilean Delegation contained in the Act of the Closing Ceremony of the Conference on the Exploitation and Conservation of Marine Resources of the South Pacific, 19 August 1952, Santiago. Annex 97.

[159] Fishermen's Protective Acts of 1954 and 1967, amendments of 12 August 1968 and 23 December 1971. See United States Code, Title 22: Foreign Relations and Intercourse, Chap. 25: Protection of Vessels on the High Seas and in Territorial Waters of Foreign Countries. <http://uscode.house.gov> accessed 1 December 2008.

[160] Note No. (SM)-6-3/64 of 11 May 1952, from the Minister of Foreign Affairs of Peru to the Ambassador of the United States of America. Annex 63.

Government employee, in her paper published in the 1977 *American Journal of International Law*:

> "By 1947 Chile's infant whaling industry found itself threatened by ever increasing levels of competition with efficient distant water whaling fleets. There was also the prospect that the Chilean Government might become a party to international agreements which would limit the access of Chilean companies to the offshore whaling resource." [161]

4.43 In December 1946 the International Convention for the Regulation of Whaling had been adopted at the Washington Conference. Both Peru and Chile had attended the Conference, and both signed the Convention; but they quickly came to the view that the Convention favoured the larger whaling powers to the detriment of States such as Peru and Chile, and they decided not to ratify it[162]. They decided instead to pursue their own approach to the whaling problem. Despite the strategic differences between these two States in respect of the Pacific, 1947 was a year in which the interests of Peru and Chile in maritime matters converged.

4.44 It was against the background of the threat to South-East Pacific fisheries, and the adoption of the Truman Proclamations, that the Chilean and Peruvian claims were made in 1947.

5. Chile's 1947 Claim

4.45 Chile proclaimed its 200-mile zone on 23 June 1947[163] in order to protect its whaling industry by asserting the right to exclude foreign whaling and fishing vessels from its coastal waters. Chile's Proclamation, which was

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[161] Hollick, Ann L.: "The Origins of 200-Mile Offshore Zones". (The *American Journal of International Law*, Vol. 71, No. 3, 1977, July, pp. 497-498).

[162] See Rivera Marfán, Jaime: *La Declaración sobre la Zona Marítima de 1952*. Santiago, Editorial Jurídica de Chile, 1968, p. 37.

[163] Presidential Declaration Concerning Continental Shelf of 23 June 1947. Annex 27.

published on 29 June 1947 in the daily newspaper *El Mercurio*, recalled the Truman Proclamation and the Presidential Declarations made by Mexico in 1945 and Argentina in 1946, and stated that "it is manifestly convenient … to issue a similar proclamation of sovereignty"[164], noting that "international consensus of opinion recognizes the right of every country to consider as its national territory any adjacent extension of the epicontinental sea and the continental shelf"[165].

4.46 The Chilean Proclamation did not specify the sea area to which it applied. It read, in part, as follows:

> "Considering:
>
> 1. That the Governments of the United States of America, of Mexico and of the Argentine Republic, by presidential declarations made on 28 September 1945, 29 October 1945, and 11 October 1946, respectively, have categorically proclaimed the sovereignty of their respective States over the land surface or continental shelf adjacent to their coasts, and over the adjacent seas within the limits necessary to preserve for the said States the natural riches belonging to them, both known and to be discovered in the future;
>
> …
>
> The President of the Republic hereby declares:
>
> …
>
> 2. The Government of Chile confirms and proclaims its national sovereignty over the seas adjacent to its coasts whatever may be their depths, and within those limits necessary in order to reserve, protect, preserve and exploit the natural resources of whatever nature found on, within and below the said seas,

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[164] *Ibid.*, Preamble, para. 3. (Spanish text: "hay manifiesta conveniencia en efectuar una proclamación de soberanía análoga").

[165] *Ibid.*, Preamble, para. 4. (Spanish text: "el consenso internacional reconoce a cada país el derecho a considerar como territorio nacional toda la extensión del mar epicontinental y el zócalo continental adyacentes.").

placing within the control of the government especially all fisheries and whaling activities with the object of preventing the exploitation of natural riches of this kind to the detriment of the inhabitants of Chile and to prevent the spoiling or destruction of the said riches to the detriment of the country and the American continent.

3. The demarcation of the protection zones for whaling and deep sea fishery in the continental and island seas under the control of the Government of Chile will be made in virtue of this declaration of sovereignty at any moment which the Government may consider convenient, such demarcation to be ratified, amplified, or modified in any way to conform with the knowledge, discoveries, studies and interests of Chile as required in the future. Protection and control is hereby declared immediately over all the seas contained within the perimeter formed by the coast and the mathematical parallel projected into the sea at a distance of 200 nautical miles from the coasts of Chilean territory. This demarcation will be calculated to include the Chilean islands, indicating a maritime zone contiguous to the coasts of the said islands, projected parallel to these islands at a distance of 200 nautical miles around their coasts.

4. The present declaration of sovereignty does not disregard the similar legitimate rights of other States on a basis of reciprocity, nor does it affect the rights of free navigation on the high seas."[166]

Spanish text reads as follows:

"Considerando:

1. Que los Gobiernos de los Estados Unidos de América, de México y de la República Argentina, por declaraciones presidenciales efectuadas el 28 de septiembre de 1945, el 29 de octubre de 1945 y el 11 de octubre de 1946, respectivamente, han proclamado de modo categórico la soberanía de dichos Estados sobre la planicie continental o zócalo continental

[166] *Ibid.*, Preamble, para. 1 and operative provisions.

adyacente a sus costas, y sobre el mar adyacente en toda la extensión necesaria a fin de conservar para tales Estados la propiedad de las riquezas naturales conocidas o que en el futuro se descubran.

...

El Presidente de la República declara:

...

2. El Gobierno de Chile confirma y proclama la soberanía nacional sobre los mares adyacentes a sus costas, cualquiera que sea su profundidad, en toda la extensión necesaria para reservar, proteger, conservar y aprovechar los recursos y riquezas naturales de cualquier naturaleza que sobre dichos mares, en ellos y bajo ellos se encuentren, sometiendo a la vigilancia del Gobierno especialmente las faenas de pesca y caza marítimas, con el objeto de impedir que las riquezas de este orden sean explotadas en perjuicio de los habitantes de Chile y mermadas o destruídas en detrimento del país y del Continente americano.

3. La demarcación de las zonas de protección de caza y pesca marítimas en los mares continentales e insulares que queden bajo el control del Gobierno de Chile, será hecha en virtud de esta declaración de soberanía, cada vez que el Gobierno lo crea conveniente, sea ratificando, ampliando o de cualquier manera modificando dichas demarcaciones, conforme a los conocimientos, descubrimientos, estudios e intereses de Chile que sean advertidos en el futuro, declarándose desde luego dicha protección y control sobre todo el mar comprendido dentro del perímetro formado por la costa con una paralela matemática proyectada en el mar a doscientas millas marinas de distancia de las costas continentales chilenas. Esta demarcación se medirá respecto de las islas chilenas, señalándose una zona de mar contigua a las costas de las mismas, proyectada paralelamente a éstas a doscientas millas marinas por todo su contorno.

4. La presente declaración de soberanía no desconoce legítimos derechos similares de otros Estados sobre la base de reciprocidad, ni afecta a los derechos de libre navegación sobre la alta mar."

4.47 There are two points to make about this Proclamation. *First*, it will be noted that the Proclamation is a tentative, initial step. The Proclamation asserts Chile's initial and (most significantly) *alterable* claim to jurisdiction over adjacent waters, but it does not actually instantiate that claim by the promulgation of precise laws applicable in the zone. The actual *exercise* of Chile's jurisdiction was to take place via adoption of further measures, including the 'demarcations' referred to in its operative provision 3.

4.48 *Second*, there is no sign that this Proclamation was intended to address the question of the location of lateral maritime boundaries with neighbouring States. The Proclamation is concerned with the seaward extension of Chilean jurisdiction. It is simply said, in express but vague terms, that the "declaration of sovereignty does not disregard the similar legitimate rights of other States on a basis of reciprocity".

4.49 These features of Chile's 1947 Proclamation (which are, as is explained below, also features of Peru's slightly later measure) are unsurprising. The Proclamation was a tentative, innovative step at a time when there was no general acceptance in international law of any claims to maritime jurisdiction beyond the narrow limits of territorial seas and contiguous zones. Even the nascent doctrine of the continental shelf was not then accepted in international law: four years later, in 1951, the arbitrator in the case of *Petroleum Development Ltd v. Sheikh of Abu Dhabi* held that the doctrine of the continental shelf could not claim to have "assumed hitherto the hard lineaments or the definitive status of an established rule of international law."[167]

6. Peru's 1947 Claim

4.50 Peru's aim in extending its maritime jurisdiction in 1947, as is evident from the Preamble to its Supreme Decree No. 781, enacted on 1 August 1947,

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[167] 18 ILR 144, at 155.

was to protect its coastal fisheries from the detrimental effects of exploitation by third States. The relevant passages in the Preamble read as follows:

> "Considering:
>
> That the continental submerged shelf forms one entire morphological and geological unit with the continent;
>
> That the shelf contains certain natural resources which must be proclaimed as our national heritage;
>
> That it is deemed equally necessary that the State protect, maintain and establish a control of fisheries and other natural resources found in the continental waters which cover the submerged shelf and the adjacent continental seas in order that these resources which are so essential to our national life may continue to be exploited now and in the future in such a way as to cause no detriment to the country's economy or to its food production;
>
> That the value of the fertilizer left by the guano birds on islands off the Peruvian coast also requires for its safeguard the protection, maintenance and establishment of a control of the fisheries which serve to nourish these birds;
>
> That the right to proclaim sovereignty and national jurisdiction over the entire extension of the submerged shelf as well as over the continental waters which cover it and the adjacent seas in the area required for the maintenance and vigilance of the resources therein contained, has been claimed by other countries and practically admitted in international law (Declaration of the President of the United States of 28 September 1945; Declaration of the President of Mexico of 29 October 1945; Decree of the President of the Argentine Nation of 11 October 1946; Declaration of the President of Chile of 23 June 1947);
>
> That article 37 of the Constitution establishes that all mines, lands, forests, waters and in general all sources of natural wealth pertain to the State, with the exception of rights legally acquired;

That in fulfilment of its sovereignty and in defence of national economic interests it is the obligation of the State to determine in an irrefutable manner the maritime domain of the Nation, within which should be exerted the protection, conservation and vigilance of the aforesaid resources"[168].

Spanish text reads as follows:

"Considerando:

Que la plataforma submarina o zócalo continental forma con el continente una sola unidad morfológica y geológica;

Que en dicha plataforma continental existen riquezas naturales cuya pertenencia al patrimonio nacional es indispensable proclamar;

Que es igualmente necesario que el Estado proteja, conserve y reglamente el uso de los recursos pesqueros y otras riquezas naturales que se encuentren en las aguas epicontinentales que cubren la plataforma submarina y en los mares continentales adyacentes a élla, a fin de que tales riquezas, esenciales para la vida nacional, continúen explotándose o se exploten en lo futuro en forma que no cause detrimento a la economía del país ni a su producción alimenticia;

Que la riqueza fertilizante que depositan las aves guaneras en las islas del litoral peruano requiere también para su salvaguardia la protección, conservación y reglamentación del uso de los recursos pesqueros que sirven de sustento a dichas aves;

Que el derecho a proclamar la soberanía del Estado y la jurisdicción nacional sobre toda la extensión de la plataforma o zócalo submarino, así como sobre las aguas epicontinentales que lo cubren y sobre las del mar adyacentes a éllas, en toda la extensión necesaria para la conservación y vigilancia de las riquezas allí contenidas, ha sido declarado por otros Estados y admitido prácticamente en el orden internacional (Declaración

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[168] Supreme Decree No. 781 of 1 August 1947, Preamble. Annex 6.

del Presidente de los Estados Unidos de América del 28 de septiembre de 1945; Declaración del Presidente de México del 29 de octubre de 1945; Decreto del Presidente de la Nación Argentina del 11 de octubre de 1946; Declaración del Presidente de Chile del 23 de junio de 1947);

Que el articulo 37 de la Constitución del Estado establece que las minas, tierras, bosques, aguas y, en general todas las fuentes naturales de riqueza pertenecen al Estado, salvo los derechos legalmente adquiridos;

Que en ejercicio de la soberanía y en resguardo de los intereses económicos nacionales, es obligación del Estado fijar de una manera inconfundible el dominio marítimo de la Nación, dentro del cual deben ser ejercitadas la protección, conservación y vigilancia de las riquezas naturales antes aludidas".

4.51 The operative provisions of Supreme Decree No. 781 read as follows:

"1. To declare that national sovereignty and jurisdiction are extended to the submerged continental or insular shelf adjacent to the continental or insular shores of national territory, whatever the depth and extension of this shelf may be.

2. National sovereignty and jurisdiction are exercised as well over the sea adjoining the shores of national territory whatever its depth and in the extension necessary to reserve, protect, maintain and utilize natural resources and wealth of any kind which may be found in or below those waters.

3. As a result of previous declarations the State reserves the right to establish the limits of the zones of control and protection of natural resources in continental or insular seas which are controlled by the Peruvian Government and to modify such limits in accordance with supervining circumstances which may originate as a result of further discoveries, studies or national interests which may become apparent in the future and at the same time declares that it will exercise the same control and protection on the seas adjacent to the Peruvian coast over the area covered between the coast and an imaginary parallel line to it at a distance of two hundred (200) nautical miles measured following the line of the geographical parallels.

> As regards islands pertaining to the Nation, this demarcation will be traced to include the sea area adjacent to the shores of these islands to a distance of two hundred (200) nautical miles, measured from all points on the contour of these islands.
>
> 4. The present declaration does not affect the right to free navigation of ships of all nations according to international law."[169]

Spanish text reads as follows:

> "1. Declárase que la soberanía y la jurisdicción nacionales se extienden a la plataforma submarina o zócalo continental e insular adyacente a las costas continentales e insulares del territorio nacional, cualesquiera que sean la profundidad y la extensión que abarque dicho zócalo.
>
> 2. La soberanía y la jurisdicción nacionales se ejercen también sobre el mar adyacente a las costas del territorio nacional, cualquiera que sea su profundidad y en la extensión necesaria para reservar, proteger, conservar y utilizar los recursos y riquezas naturales de toda clase que en o debajo de dicho mar se encuentren.
>
> 3. Como consecuencia de las declaraciones anteriores, el Estado se reserva el derecho de establecer la demarcación de las zonas de control y protección de las riquezas nacionales en los mares continentales e insulares que quedan bajo el control del Gobierno del Perú, y de modificar dicha demarcación de acuerdo con las circunstancias sobrevinientes por razón de los nuevos descubrimientos, estudios, o intereses nacionales que fueren advertidos en el futuro; y, desde luego, declara que ejercerá dicho control y protección sobre el mar adyacente a las costas del territorio peruano en una zona comprendida entre esas costas y una línea imaginaria paralela a ellas y trazada sobre el mar a una distancia de doscientas (200) millas marinas, medida siguiendo la línea de los paralelos geográficos. Respecto de las islas nacionales esta demarcación se trazará señalándose

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[169] *Ibid.*, operative provisions.

> una zona de mar contigua a las costas de dichas islas, hasta una distancia de doscientas (200) millas marinas medida desde cada uno de los puntos del contorno de éllas.
>
> 4. La presente declaración no afecta el derecho de libre navegación de naves de todas las naciones, conforme el derecho internacional."

4.52 It is paragraph 3 that is of primary importance; and its provisions are similar to those of the Chilean Proclamation which was its immediate precursor.

4.53 Paragraph 3 of the 1947 Peruvian Decree asserted the *right* of Peru to establish maritime zones off its coasts:

> "[Peru] reserves the right to establish the limits of the zones of control and protection of natural resources in continental or insular seas which are controlled by the Peruvian Government and to modify such limits in accordance with supervining circumstances which may originate as a result of further discoveries, studies or national interests which may become apparent in the future"[170].

Spanish text reads as follows:

> "[El Perú] se reserva el derecho de establecer la demarcación de las zonas de control y protección de las riquezas nacionales en los mares continentales e insulares que quedan bajo el control del Gobierno del Perú, y de modificar dicha demarcación de acuerdo con las circunstancias sobrevinientes por razón de los nuevos descubrimientos, estudios, o intereses nacionales que fueren advertidos en el futuro".

As in the case of the earlier Chilean Proclamation, this Peruvian Decree did not aim or purport to fix the definitive limits of the jurisdiction of the coastal State. It was an assertion in general terms of jurisdictional competence over adjacent waters; and the limits of that competence were explicitly said to be

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[170] *Ibid.* para. 3 of the operative provisions.

subject to modification "in accordance with supervining circumstances which may originate as a result of further discoveries, studies or national interests which may become apparent in the future".

4.54 Thus, and again like the Chilean Proclamation of 1947, the 1947 Peruvian Decree described only the initial zone within which Peru intended to begin the exercise of its jurisdiction rights:

> "[Peru] declares that it will exercise the same control and protection on the seas adjacent to the Peruvian coast over the area covered between the coast and an imaginary parallel line to it at a distance of two hundred (200) nautical miles measured following the line of the geographical parallels." [171]

Spanish text reads as follows:

> "[El Perú] declara que ejercerá dicho control y protección sobre el mar adyacente a las costas del territorio peruano en una zona comprendida entre esas costas y una línea imaginaria paralela a ellas y trazada sobre el mar a una distancia de doscientas (200) millas marinas, medida siguiendo la línea de los paralelos geográficos."

That was a jurisdictional claim asserted in general terms, to be implemented by later measures[172].

4.55 The character of the zone as a jurisdictional claim deserves emphasis. The zone was not envisaged as an extension of national *territory* but only of limited jurisdictional competences.

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[171] *Ibid.*

[172] For example, Supreme Decree No. 21 of 31 October 1951 approving Peru's Regulation of Captaincies and National Merchant Navy, placed the maritime domain under the jurisdiction of the Captaincies, which had the duty to police it and protect its resources. Annex 7. In 1969, as a consequence of the increase in maritime activities, Peru created by Law Decree No. 17824 a separate Corps of Captaincies and Coastguard with the responsibility for controlling and protecting the natural resources of the zone established by Supreme Decree No. 781 of 1947. Annex 14.

4.56 Similarly, as was the case with the Chilean measure, the Peruvian Decree did not purport to deal with the question of lateral boundaries with neighbouring States.

4.57 Again like the Chilean Proclamation, the Peruvian Decree asserted a general claim to a 200-mile zone off both the continental and the insular coasts of the State. In the case of islands the 200-mile zone is said, explicitly and mirroring the language of the Chilean Proclamation, to be measured from all points on the contour of these islands.

4.58 The reference in the Peruvian decree to the measurement of the 200 miles "following the line of the geographical parallels" points to the manner in which the seaward limit of the initial zone would be delimited cartographically. The intention was to depict a situation in which at each point on the coast a line 200-mile long would be drawn seaward along the geographical line of latitude, so that there would be a "mirror" coastline parallel to the real coastline – the real coastline would in effect be transposed 200 miles offshore and form the outer edge of the 200-mile zone. There is no sign that the 1947 Decree was intended to set any lateral boundaries with neighbouring States.

4.59 While the Chilean and Peruvian instruments were adopted independently, they had, therefore, a similar approach and purpose. That purpose was to assert control over an area of sea out to at least 200 miles from the shore. It was not their concern to set lateral boundaries.

4.60 On 12 March 1952 Peru enacted Petroleum Law No. 11780, which established "an imaginary line drawn seaward at a constant distance of 200 miles" as the limit of its jurisdiction[173]. The technical method of constructing the seaward limit of that zone was different from that in the 1947 Decree. Instead of

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[173] Annex 8. (Spanish text: "una línea imaginaria trazada mar afuera a una distancia constante de 200 millas").

projecting a "parallel coast" shifted 200 nautical miles seaward, the Petroleum Law in effect used what is the "arcs of circles" method, defining the zone as including in principle[174] all areas within 200 nautical miles of any point on the Peruvian coast. Nonetheless, while the methods of constructing the zone were different, the 1952 Petroleum Law reflects a similar intention to lay claim to an entire area lying within 200 nautical miles of the Peruvian coast. There was no Chilean protest against this Petroleum Law.

4.61 The difference which would have arisen between the effect of the two methods (1947, 1952) of constructing the seaward limit of Peru's zone is illustrated in **Figure 4.1**. It will be seen that the '1952 method' gives a smoother, and larger, zone that does the method contemplated in 1947. This reflects the evolution in thinking at this time about the manner in which the outer limits of the coastal State entitlements were to be established – an issue that was remarked upon by the International Court of Justice in the *Anglo-Norwegian Fisheries case*[175].

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[174] Because, plainly, there is a need for delimitation with adjacent States.

[175] In the Anglo-Norwegian *Fisheries case (Judgment, I.C.J. Reports 1951*, pp. 128-129) the Court observed that various methods have been contemplated to effect the application of the low-water mark rule. In the Court's words: "The simplest would appear to be the method of the *tracé parallèle*, which consists of drawing the outer limit of the belt of territorial waters by following the coast in all its sinuosities. This method may be applied without difficulty to an ordinary coast, which is not too broken. ...

…the experts of the Second Sub-Committee of the Second Committee of the 1930 Conference for the codification of international law formulated the low-water mark rule somewhat strictly ('following all the sinuosities of the coast'). But they were at the same time obliged to admit many exceptions relating to bays, islands near the coast, groups of islands. In the present case this method of the *tracé parallèle*, which was invoked against Norway in the Memorial, was abandoned in the written Reply, and later in the oral argument of the Agent of the United Kingdom Government. Consequently, it is no longer relevant to the case. 'On the other hand', it is said in the Reply, the *courbe tangente* – or, in English, 'envelopes of arcs of circles' – method is the method which the United Kingdom considers to be the correct one'". See also Gidel, Gilbert: Le droit international public de la mer. Le temps de paix. Vol. III (La mer territoriale et la zone contiguë). Paris, Recueil Sirey, 1934, pp. 504-505; Boggs, S. Whittemore: "Delimitation of the Territorial Sea: The Method of Delimitation Proposed by the Delegation of the United States at The Hague Conference for the Codification of International Law". (The *American Journal of International Law*, Vol. 24, No. 3, 1930, July, pp. 541-555).

7. The 1952 Declaration of Santiago

4.62 Pressure on American South Pacific fisheries continued. The effects of that pressure were, moreover, not confined to those immediately involved in whaling and fishing. In 1951 and early 1952, for example, the manager of the Peruvian *Compañía Administradora del Guano* wrote to the Peruvian Government urging action to prevent unlawful fishing in Peruvian waters, and pointed out the complex biological links between different species of life and the consequent disruption if any species were fished to near-extinction[176].

4.63 The next significant legal development was the 1952 Declaration of Santiago[177]. Chile invited the Governments of Peru and Ecuador to participate in a conference in 1952 "to conclude agreements regarding the problems caused by whaling in the waters of the South Pacific and the industrialization of whale products."[178]

4.64 The focus on whaling is significant. Whaling is a 'hunting', rather than a 'farming' activity, and the need was for the three States collectively to address the problem of foreign whaling fleets. It was necessary that between them they policed the zone effectively. The three coastal States were certainly conscious of the importance of protecting the fish stocks within the 200-mile zone[179]. This was the purpose of the 1952 Declaration of Santiago; the purpose was *not* to divide up fishing grounds between the three coastal States.

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[176] Letters dated 20 November 1951 and 4 January 1952 from Carlos Llosa Belaúnde, Manager of the Managing Company of Guano to the Director General of the Exchequer. In: Compañía Administradora del Guano: *El Guano y la Pesca de Anchoveta*. Lima, 1954, pp. 118-119 and 130-133.

[177] 1952 Declaration of Santiago, 18 August 1952. Annex 47.

[178] Note No. 86 of 10 July 1952 from the Ambassador of Chile to the Minister of Foreign Affairs of Peru. Annex 64. (Spanish text: "tomar acuerdos sobre los problemas que está originando la caza de la ballena en aguas del Pacífico Meridional y la industrialización de sus productos.").

[179] See, *e.g.*, "Instructions given by the Minister of Foreign Affairs Mr. Manuel C. Gallagher to the chairman of the delegation of Peru, Dr. A. Ulloa, for the signing of the 'Declaration of Santiago'", Lima, July 1952. Annex 91.


200 MILE LIMIT USING THE
'ARCS OF CIRCLES' APPROACH
Mercator Projection
Datum: WGS-84
(Scale accurate at 7.0°S)
0 50 100 150 200 250 300
Nautical Miles
0 100 200 300 400 500
Kilometers
Coastal configuration is based on Peruvian nautical charts 100, 200, & 300, and Chilean nautical chart 1000.
Prepared by: International Mapping
80°W
75°W
70°W
5°S
10°S
15°S
20°S
COLOMBIA
BRAZIL
PERU
CHILE
PACIFIC OCEAN
Punta Pariñas
Talara
Paita
Punta Falsa
Reventazón
San José
Malabrigo
Punta Malabrigo
Vegueta
Lima
Punta Lobos
Pisco
Punta San Fernando
San Juan
Tanaca
Atico
Punta Atico
Ocoña
Arequipa
Mollendo
Ilo
Punta Coles
Tacna
Arica
Pisagua
Iquique
Punta Lobos
Punta Arenas
200 nm limit following the geographic parallel
Peru's 200 nm limit using the 'Arcs of Circles' approach
Area of overlap with Chile
Chile's 200 nm limit using the 'Arcs of Circles' approach

Figure 4.1

4.65 Like the handful of maritime claims that preceded it in the late 1940s, the Declaration of Santiago was a bold and innovative instrument which marked a radical shift in the conception of the limits of national jurisdiction. Like those earlier unilateral claims, it was concerned not with lateral boundaries between neighbouring States but with the seaward extension of national jurisdiction and the exclusion of third-State vessels from, in particular, national fishing or whaling grounds. On the other hand, unlike the unilateral claims that preceded it, this plurilateral instrument established a regional regime in the South-East Pacific in order to establish a maritime zone 200 miles wide and to develop among the States Parties co-operative means to defend that zone and the natural resources within it.

4.66 In all these respects the zone established by the 1952 Declaration of Santiago bore marked similarities in its conception with the immense pan-American neutrality or security zone which had been established by the 1939 Declaration of Panama[180] on the outbreak of World War II. The zone established by the 1939 Declaration of Panama[181], which reached southwards from the Canada-United States border to enclose the entire continent, and extended much further than 200 miles from the coast, made no reference whatsoever to the lateral maritime boundaries between various States over whose waters it extended.

4.67 The focus of the 1952 Declaration of Santiago was primarily economic and for the development of a co-operative policy to consolidate the extension of national jurisdiction of the three States Parties participating in the regime (Peru, Chile, and Ecuador). It was also intended to assert regional solidarity in respect of the new maritime zones in the face of threats from third States. This solidarity was necessary because of the hostility of certain States to the 1947 claims. For example, on 6 February 1948 the United Kingdom wrote to Peru stating that it did not recognize the claim to sovereignty beyond the

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[180] Organization of American States. Final Act of the Meeting of the Ministers of Foreign Affairs of the American Republics for Consultation under the Inter-American Agreements of Buenos Aires and Lima. Panama, 23 September 1939 – 3 October 1939 <http://www.oas.org/consejo/MEETINGS%20OF%20CONSULTATION/Actas/Acta%201.pdf> accessed 24 November 2008.

[181] See **Figure 4.2** in Vol. IV.

three-mile limit[182]. Similarly, the United States protested against the Peruvian Decree in a Note dated 2 July 1948[183]. It was also required by the growing threat to fisheries and whale stocks in the South-East Pacific from distant-water fishing fleets. As a Chilean delegate to the First United Nations Conference on the Law of the Sea said:

> "Chile, Ecuador and Peru had only taken individual action, and subsequently signed the Declaration of Santiago of 1952, in order to protect the living resources in the maritime zone off their coasts against excessive exploitation by fishing fleets from distant parts."[184]

4.68 The zone was conceived as a single biological unit, and this was reflected in the structures established to manage it. The 1952 Conference created a regional system for the common purpose of the conservation of fisheries and of whale stocks, and for the joint defence by the States Parties of their extended maritime jurisdiction. Among these instruments was the Convention that established the Permanent Commission for the South Pacific, which is an international organization that continues to be very active to this day[185].

4.69 In the 1952 Declaration of Santiago "the Governments of Chile, Ecuador and Peru, determined to conserve and safeguard for their respective peoples the natural resources of the maritime zones adjacent to their coasts", asserted that:

> "I. … the former extension of the territorial sea and the contiguous zone are inadequate for the purposes of the conservation, development and exploitation of these resources, to which the coastal countries are entitled.

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[182] Note No. 11 (152/8/48) of 6 February 1948, from the Ambassador of the United Kingdom to the Minister of Foreign Affairs of Peru. Annex 61.

[183] Note No. 1030 of 2 July 1948, from the chargé d'affaires a.i. of the United States to the Minister of Foreign Affairs of Peru. Annex 62.

[184] United Nations publications. *Official Documents. United Nations Conference on the Law of the Sea, Geneva, 1958, Vol. III, Act corresponding to the 12th session of March 12 1958*, p. 33.

[185] See Permanent Commission for the South Pacific <http://www.cpps-int.org/init.htm> accessed 4 December 2008.

> II. 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."[186]

Spanish text reads as follows:

> "I. … la antigua extensión del mar territorial y de la zona contigua sean insuficientes para la conservación, desarrollo y aprovechamiento de esas riquezas, a que tienen derecho los países costeros.
> II. Como consecuencia de estos hechos, los Gobiernos de Chile, Ecuador y Perú proclaman como norma de su política internacional marítima, la soberanía y jurisdicción exclusivas que a cada uno de ellos corresponde sobre el mar que baña las cosas de sus respectivos países, hasta una distancia mínima de 200 millas marinas desde las referidas costas."

4.70 The Declaration was conceived, as it explicitly stated, not as a treaty but as a proclamation of the international maritime policy of the three States. Its 'declarative' character was clearly recognized. However, not long after the adoption of the Declaration, and in the wake of challenges to the zone from foreign whaling fleets[187], the three States submitted the Declaration to their respective Congresses for approval, in order to give it greater weight[188]. On ratification by Congress, it acquired the status of a treaty, and was subsequently registered with the United Nations. The official letter in which the Peruvian Government submitted the Declaration to its Congress stated that:

> "The declaration on the maritime zone, the basic document of Santiago, on account of its simply declarative character, goes no further than proclaiming 'the extension of their sovereignty

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[186] Annex 47.

[187] See paras. 4.83-4.85 below.

[188] See Chile: Supreme Decree No. 432 of 23 September 1954. Annex 30; Ecuador: Executive Decree No. 275 of 7 February 1955, Official Record No. 1029 of 24 January 1956; and Peru: Legislative Resolution No. 12305 of 6 May 1955, to be executed by Supreme Decree of 10 May 1955 <http://www.cpps-int.org/spanish/nosotros/declaracionsantiago.htm> accessed 4 December 2008.

> and jurisdiction over the sea' by all three countries as a norm of their international maritime policy.
>
> ....
>
> The Government believes the time has come to back the proclamation of Decree No. 781 of 1 August 1947, and its ulterior international action in its execution, with the legislative approval of its policy for the affirmation of sovereignty of Peru over its Maritime Zone of 200 miles, by the ratification both of the Santiago Agreements of 1952 as well as of the Lima Conventions of 1954."[189]

Spanish text reads as follows:

> "La declaración sobre zona marítima, el documento básico de Santiago, por su carácter simplemente declarativo, no va mas allá de proclamar por los tres países como norma de su política internacional marítima 'la extensión de su soberanía y jurisdicción sobre el mar'
>
> ...
>
> Cree el Gobierno que ha llegado el momento de respaldar la proclamación del Decreto No. 781, de 1° de agosto de 1947 y la acción internacional posterior del Gobierno en su ejecución, con la aprobación legislativa de su política de afirmación de la soberanía del Perú sobre su Zona Marítima de 200 millas por la ratificación tanto de los acuerdos de Santiago de 1952 como de los Convenios de Lima de 1954."

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[189] Official Letter No. (M)-3-O-A/3 of 7 February 1955, from the Ministry of Foreign Affairs, pp. 2, 4. Annex 95. This declarative character was also referred to in several official documents from Peru and Chile. See: Report of the Foreign Affairs Committee of the Congress of Peru on the Agreements and Conventions signed by Peru, Chile and Ecuador in Santiago, 18 August 1952, and in Lima, 4 December 1954, p. 8. Annex 96; Message from the Chilean Executive to the Congress for the Approval of the 1952 Agreements of 26 July 1954. Sessions Diary of the Chilean Senate 1954, p. 893. Annex 92; Report of the Foreign Affairs Committee of the Chilean Senate. Sessions Diary from the Chilean Senate 1954, pp. 1390-1391. Annex 93; Report No. 41 of the Foreign Affairs Committee of the Chilean Deputies Chamber. Sessions Diary from the Chilean Deputies Chamber 1954, pp. 2960-2962. Annex 94.

4.71 It will also be noted that the 1952 Declaration of Santiago, like the 1947 claims by Chile and Peru, was explicitly provisional in nature. It proclaimed the *policy* of asserting maritime sovereignty and jurisdiction[190] for the specifically economic purposes of controlling the conservation and exploitation of fisheries and other natural resources, out to a point that was not actually stipulated in the Declaration but which was "a *minimum* distance of 200 nautical miles from these coasts" (emphasis added). It was thus made clear that the States might claim more than 200 nautical miles. Again, the concern was only with the seaward extension of the zone: there was no concern with the question of lateral boundaries between the participating States.

4.72 It will be noted, too, that in the 1952 Declaration of Santiago the three States asserted the existence of "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". It was essentially an announcement addressed to the rest of the world by the three States that there was a 200-mile American South Pacific maritime zone adjacent to the west coast of the continent. It was primarily an exercise in regional solidarity.

4.73 The regional nature of the 1952 Declaration of Santiago is underlined by the terms of another instrument adopted at the same time – the Regulations for Maritime Hunting Operations in the Waters of the South Pacific. Article 4 of that instrument reads as follows:

> "Pelagic whaling may be carried out in the maritime zone within the jurisdiction or sovereignty of the signatory countries only

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[190] As the Chairman of the Chilean delegation to the First United Nations Conference on the Law of the Sea, Luis Melo Lecaros noted, the Declaration "[d]oes not express that the three countries declare sovereignty over a 200-mile sea, but it establishes that the three countries proclaim it [the sovereignty] as a norm of their international maritime policy". (Spanish text: "No expresa ese Convenio que los tres países declaran la soberanía sobre 200 millas del mar, sino que establece que los tres países la proclaman como norma de su política internacional marítima."). See Melo Lecaros, Luis: "El Derecho del Mar" (*Revista de Derecho de la Universidad de Concepción*, Year XXVII, No. 110, 1959, October-December, p. 425).

> with the prior authorization of the Permanent Commission[191], which shall lay down the conditions to which such authorization shall be subject. This authorization must be granted with the unanimous agreement of the Commission."[192]

Spanish text reads as follows:

> "La caza pelágica de ballenas sólo podrá realizarse en la zona marítima de jurisdicción o soberanía de los países signatarios, previo permiso concedido por la Comisión Permanente, la que fijará las condiciones a que quedará subordinado dicho permiso. Este permiso deberá ser concedido por acuerdo unánime de la Comisión."

Thus, the regulation of whaling within the American South Pacific 200-mile zone was treated as a communal matter for the three States acting together, rather than as a matter for each State to address individually. The waters within the 200-mile zone were treated as a single unit.

4.74 As far as the *continental* coasts of the three States Parties were concerned, nothing in the text of the 1952 Declaration of Santiago suggests that the States intended anything other than a simple claim to a maritime zone "along the coasts of their respective countries to a minimum distance of 200 nautical miles from these coasts". The 1952 Declaration of Santiago – in the same way as the 1952 Peruvian Petroleum Law adopted some months before, but unlike the 1947 Decree – asserts a claim to a zone whose seaward limit is measured at a minimum distance of 200 nautical miles from the coast (and not on the geographic parallels), while it did not address lateral boundaries at all. That is, in the words of the 1952 Peruvian Petroleum Law, following

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[191] *I.e.,* the Provisional Permanent Commission established by the Parties. The Permanent Commission of the Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific was established by the three States Parties under the *Agreement relating to the Organization of the Permanent Commission of the Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific*, Santiago, 18 August 1952. Annex 48.

[192] Regulations for Maritime Hunting Operations in the Waters of the South Pacific, 18 August 1952. Annex 49.

"an imaginary line drawn seaward at a constant distance of 200 miles from the low-water line along the continental coast"[193].

4.75 The same principle was applied to the *island* coasts of the three States. Paragraph IV of the 1952 Declaration of Santiago provided:

> "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."

Spanish text reads as follows:

> "En el caso de territorio insular, la zona de 200 millas marinas se aplicará en todo el contorno de la isla o grupo de islas."

4.76 Having established that in principle islands fall within the general rule and have an entitlement to a 200-mile zone, an exception was made at the initiative of Ecuador[194]. Paragraph IV continued:

> "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

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[193] Law No. 11780, Petroleum Law of 12 March 1952, article 14 (4). Annex 8. (Spanish text: "una línea imaginaria trazada mar afuera a una distancia constante de 200 millas de la línea [de] baja marea del litoral continental").

[194] At the beginning of the 1952 Conference of Santiago Chile submitted a proposal stating that the 200-mile zone would be applied to the entire coast of the island or group of islands, except "if an island or group of islands belonging to one of the countries making the declaration is situated less than 200 nautical miles from the general maritime zone belonging to another of those countries, according to what has been established in the first paragraph of this article, the maritime zone of the said island or group of islands shall be limited, in the corresponding part, to the distance that separates it from the maritime zone of the other State or country". (Spanish text: "Si una isla o grupo de islas perteneciente a uno de los países declarantes estuviera a menos de 200 millas marinas de la zona marítima general que corresponda a otro de ellos, según lo establecido en el primer inciso de este artículo la zona marítima de dicha isla o grupo de islas quedará limitada, en la parte que corresponde, a la distancia que la separa de la zona marítima del otro estado o país."). It was the delegate of Ecuador who proposed to include the reference to the parallel of the point at which the land boundary of the respective States reaches the sea, in order to avoid any misinterpretation regarding the "interference zone in the case of islands." (Spanish text: "la zona de interferencia en el caso de islas"). *Cf.* Act of the First Session of the Juridical Affairs Commission of the First Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific, held in Santiago de Chile on 11 August 1952. Annex 56.

> countries, the maritime zone of the island or group of islands shall be limited by the parallel at the point at which the land frontier of the States concerned reaches the sea."[195]

Spanish text reads as follows:

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

4.77 This provision in the second sentence of Paragraph IV applied only to those islands and groups of islands that are situated less than 200 nautical miles from the general (*sc*., the continental) maritime zone of another State Party and only in the segment in which the maritime zone of such islands would overlap with the general maritime zone of the neighbouring State. It thus limited only the entitlements generated by certain islands, not the entitlements generated by the continental coast. Indeed, had the Declaration applied the 'parallel' as the limit of continental claims, this provision in Paragraph IV would have been redundant. It was, moreover, a matter of concern only in the context of an Ecuador-Peru border, there being no islands near the Peru-Chile land border which could encroach upon the maritime rights of another State.

4.78 The position adopted in the Declaration was, therefore, that the States Parties have rights over all waters lying in front of their continental and insular coasts, initially out to a distance of at least 200 miles but extendable thereafter, except in the case of certain islands and groups of islands, whose maritime zones would be limited by a parallel of latitude.

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[195] Annex 47.

4.79 Paragraph IV, second sentence, should be highlighted because it adopts, without remarking on the fact, a solution very different from the approaches to maritime delimitation which were then current. For example, Schücking, the rapporteur on the Law of the Sea for the League of Nations Codification Conference, reflecting the absence of any agreed approach to maritime delimitation, had suggested two alternative approaches to the drawing of lateral limits in the territorial sea: *(a)* the tracing of a line in the sea following the general direction of the border line on land, and *(b)* a perpendicular (90°) line drawn seawards from the coast at the point where the land border reaches the sea[196]. Similarly, Article 12 of the 1958 Territorial Sea Convention later prescribed the use of the median/equidistance line for maritime boundaries in the absence of agreement or special circumstances. It is evident that Paragraph IV, second sentence, of the 1952 Declaration of Santiago was a specific, pragmatic solution to a specific problem, and not an application of a settled legal principle[197].

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[196] The final text put forward to States in the Bases of Discussion contained no provision specifying how the maritime boundary was to be drawn. League of Nations, Committee of Experts for the Progressive Codification of International Law, *Report to the Council of the League of Nations on the questions which appear ripe for International Regulation*. Third Session, March-April 1927, Geneva, 1927, p. 42.

[197] The practice of adopting specific solutions to particular problems rather than focusing upon all-purpose maritime boundaries is not uncommon. For example, the zone for which Peru is responsible under the 1979 International Convention on Maritime Search and Rescue (SAR) also departs from those rules. Indeed, the SAR Convention notes that the definition of search and rescue zones "has no bearing on the determination of boundaries among the States, nor shall it prejudge this." (Chap. 2.1.7). Peru adhered to the Agreement by means of Legislative Resolution No. 24820 of 25 May 1988, published in the Official Gazette *El Peruano* on 26 May 1988. Likewise, concerning NAVAREA zones, established for the purpose of coordinating the transmission of radio navigational warnings, it is said that: "The delimitation of such areas is not related to and shall not prejudice the delimitation of any boundaries between States." (Section 2.1.3. of the ILO/IHO Guidance Document on the World-Wide Navigational Warning Service adopted by means of Resolution A.706 at the 17th period of sessions of the IMO Assembly). In the same way, the establishment of an ICAO Flight Information Region (FIR) – an area of airspace of defined dimensions within which flight information and alerting services are provided – does not imply the establishment of international political boundaries. The Lima FIR, for example, for many years ran south at an angle of about 25° to the parallel of latitude.

4.80 Apart from the second part of Paragraph IV, which deals with the limit of the maritime zones of certain islands and groups of islands, nothing in the text of the 1952 Declaration of Santiago suggests that the Declaration was intended to have any bearing upon the lateral boundaries between the maritime zones of the three States measured from their continental coasts. The Declaration was focused upon the *seaward* extension of those zones. It was a provisional extension of claims to waters lying in front of the coasts of the Parties, variable in accordance with their national interest, and – aside from the second part of Paragraph IV – not at all concerned with lateral boundaries or geographical parallels. The question of maritime delimitation was left open.

4.81 The 1952 Declaration of Santiago was, furthermore, quite unsuited to the settlement of international boundary questions. It was initially conceived as a soft law instrument, a joint declaration of major importance setting out the main principles of the international maritime policy adopted by the three States. It does not have the format of a boundary treaty. It does not say that it defines a boundary. It does not give the co-ordinates of any boundary. There is no map illustrating any boundary. There is no requirement for ratification; and while it is always open to States not to require ratification of agreements they enter into, it is very unusual for them to do so in the case of an agreement establishing their maritime boundaries. When reference was made to the Declaration in the Congresses of Peru and Chile in the 1950s there was no mention of it being a boundary agreement[198]. It has, in short, none of the characteristics which one expects of a boundary treaty[199]. It is true that, when international developments made it desirable to add to the legal weight of the Declaration, the three States Parties subsequently decided to put it through the domestic procedures for ratification (Chile in 1954,

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[198] See footnote 189 above.

[199] Similarly, Colombia regarded it as a 'Declaration' and did not treat it as a treaty or try to become a 'Party' to it. Rather, Colombia accepted the principles of the Declaration in 1980. Colombian Law No. 7 of 4 February 1980, <http://ideam.gov.co:8080/legal/normatividad.shtml?AA_SL_Session=f585ec5fef7fed2d5f67c664cbdb41c3&x=1590> accessed 4 December 2008.

Ecuador in 1955, and Peru in 1955); but that cannot affect the question of its original aim, purpose and nature[200]. The manner in which the Parties handled the 1952 Declaration of Santiago accordingly strongly reinforces the conclusion that it was not the purpose or effect of the Declaration to fix the international maritime boundary between Peru and Chile.

8. The Reaction to the 1952 Declaration of Santiago

4.82 The 1952 Declaration of Santiago was quickly challenged. Denmark, the United States, Great Britain, the Netherlands, Norway and Sweden sent notes reserving their position in respect of the assertion of jurisdiction that had been made in the Declaration[201]. None of the protests made any reference to the question of lateral boundaries within the zone.

4.83 A more direct challenge occurred in 1954, when two large whaling fleets prepared to undertake expeditions off the western coast of Peru. One was the Olympic fleet owned by Aristotle Onassis, sailing under Panamanian flag. It included 12 hunting craft and one 18,000-ton factory ship, the *Olympic Challenger*. The other was the *Spermacet Whaling Company* fleet, made up of eight Norwegian-owned ships sailing under French flag. The representatives of both companies made inquiries in Lima regarding the conditions imposed on whaling in Peruvian waters, and were informed – as well as duly warned – by the Ministry of the Navy of the existing Peruvian legislation and the prohibitions on hunting, together with the sanctions to which they would expose themselves if they decided to proceed with their operations in the 200-mile zone. The *Spermacet* fleet respected the requirements, but the Onassis *Olympic Challenger* fleet made a well-publicised decision to challenge the Peruvian measures. Despite having been warned by the Peruvian Consulate, it was known that the Onassis fleet eventually departed from the Port of

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[200] See para. 4.70 above.

[201] Ministerio de Relaciones Exteriores (1955), *op. cit.*, p. 24. Annex 98.

Hamburg in defiance of the Peruvian warnings. Dr. David Aguilar Cornejo, the Peruvian Minister of Foreign Affairs, recorded the next steps:

> "As soon as the Ministry of Foreign Affairs became aware that most of the Onassis fleet was sailing under Panamanian flag, precise instructions were imparted to the [Peruvian] Ambassador to Panama, in order for him to request the Minister of Foreign Affairs of that country that his Government forbid craft under Panamanian flag to hunt and fish in our Maritime Zone without prior authorization by the Peruvian Government.
>
> This determination was effectively backed by the Chilean Ambassador to Panama who, in compliance with instructions from his Government, made a similar request."[202]

Spanish text reads as follows:

> "Enterada la Cancillería que la mayor parte de los barcos de Onassis enarbolaban bandera panameña, impartió precisas instrucciones al Embajador de la República en Panamá a fin de que solicitase al Ministro de Relaciones Exteriores de ese país que su Gobierno prohibiese a los buques de su bandera el ejercicio de actividades de caza y pesca en nuestra Zona Marítima sin autorización del Gobierno del Perú.
>
> Dicha acción fué apoyada eficazmente por el Embajador de Chile en Panamá quien, en cumplimiento de instrucciones de su Gobierno, hizo gestión similar."

4.84 The Government of Panama agreed verbally, through the Peruvian Embassy and its Ambassador in Lima, to request a written permit from Peru for its ships, so that, the Onassis fleet should be allowed to hunt between 15 and 100 miles off the Peruvian coast. This did not, however, resolve the matter:

> "This proposal was really unacceptable for the Peruvian Ministry of Foreign Affairs, because it applied only to itself and not to Chile and Ecuador equally"[203].

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[202] *Ibid.*, p. 15.

[203] *Ibid.*

Spanish text reads as follows:

> "Esta propuesta era realmente inaceptable para la Cancillería peruana porque se le hacía sólo a ella sin considerar a Chile y Ecuador".

This episode underlines the regional nature of the 200-mile zones declared in 1947[204].

4.85 Vessels belonging to the Onassis fleet were found hunting whales and processing oil 126 miles off the Peruvian coast. The vessels were subsequently arrested and charged with violations of the 1947 Supreme Decree No. 781 and other Peruvian regulations. Fines were imposed and paid, and the ships were then released. The incident had, in the meantime, attracted a further intervention by Great Britain, acting to protect the interests of the British insurers[205] with whom Onassis had insured his vessels specifically against the risk of arrest[206]. When Peru rejected a United Kingdom protest against the seizures of the Onassis vessels, the Chilean Foreign Minister sent a congratulatory letter to the Peruvian Foreign Minister[207] – an indication of the regional solidarity which the zone embodied.

4.86 There were further difficulties arising from operations of United States flag tuna fishing vessels within the 200-mile zone shortly afterwards, which continued through the latter part of 1954 and early 1955[208].

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[204] Panama subsequently suggested that it might negotiate with Chile, Ecuador and Peru access and profit-sharing agreements for its fishing vessels, and accept inspection of its vessels: *Ibid.*, p. 16. The profit sharing element of that proposal might have required a clear delimitation of the maritime zones of the three States; but the initiative was not pursued and the delimitation did not occur.

[205] *Ibid.*, p. 17. Annex 98.

[206] Rivera Marfán, Jaime, *op.cit.*, p. 130.

[207] Ministerio de Relaciones Exteriores (1955), *op. cit.*, p. 19. Annex 98.

[208] Rivera Marfán, Jaime, *op.cit.*, pp. 131-132. See also García Sayán, Enrique: *Notas sobre la Soberanía Marítima del Perú*. Lima, 1955, pp. 35-37.

4.87 These events formed the background to a Chilean initiative in 1954 to summon the Permanent Commission established at the 1952 Santiago meeting, in order to address the urgent problems arising from the non-recognition by certain States of the Declaration of Santiago and their persistent exploitation of the marine resources of the area, and to reaffirm the principles of the Declaration of Santiago. El Salvador, Colombia, Costa Rica and Cuba were invited to the 1954 session as observers[209].

9. The Second Conference on Exploitation and Conservation of the Marine Resources of the South Pacific, 1954

4.88 As was noted in Chapter III[210], six further agreements were signed by the three States, (Chile, Ecuador and Peru) at the Second Conference on Exploitation and Conservation of the Marine Resources of the South Pacific, which took place in Lima in December 1954. All the instruments adopted in 1954 were made in the context of regional solidarity vis-à-vis third States, and they were essentially an integral part of the agreements and resolutions adopted in 1952. It was expressly specified that they were in no way to derogate from the 1952 instruments[211]. Here, again, the focus was clearly upon the need to defend the seaward limit of the 200-mile zone against threats from third States: there was no interest in or concern for the delimitation of lateral maritime boundaries between the three States.

4.89 Two of the instruments adopted at the 1954 Conference were the 1954 Complementary Convention and the 1954 Agreement on a Special Zone. These aimed to reinforce regional solidarity vis-à-vis third countries and to establish provisional procedures to deal with specific and concrete situations which could generate friction and affect regional solidarity.

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[209] Ministerio de Relaciones Exteriores (1955), *op. cit.*, p. 19. Annex 98.

[210] See footnote 111.

[211] See Article 4 of the 1954 Agreement on a Special Zone. Annex 50.

10. The 1954 Complementary Convention

4.90 In the 1954 Complementary Convention to the Declaration of Sovereignty on the Two-Hundred-Mile Maritime Zone, which was the first of the agreements signed on 4 December 1954, the 1952 Declaration of Santiago was recalled, and it was agreed by the three States that:

> "FIRST: Chile, Ecuador and Peru shall proceed by common accord in the legal defence of the principle of Sovereignty over the Maritime Zone up to a minimum distance of 200 nautical miles".

Spanish text reads as follows:

> "PRIMERO: Chile, Ecuador y Perú, procederán de común acuerdo en la defensa jurídica del principio de la Soberanía sobre la Zona Marítima hasta una distancia mínima de 200 millas marinas".

4.91 The 1954 Complementary Convention went on to stipulate that:

> "SECOND: If any of the parties were to receive claims or protests, or if jurisdictional or arbitral demands were to be brought against them, the signatory countries bind themselves to consult each other regarding the grounds of their defence and oblige themselves to lend each other the largest co-operation for a common defence.
>
> THIRD: In the event of a de facto violation of the said Maritime Zone, the State affected shall immediately report the event to the other Parties, in order to agree the measures that should be taken for the safeguard of the affected sovereignty."[212]

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[212] Annex 51.

Spanish text reads as follows:

> "SEGUNDO. Si alguna de las partes recibiere reclamaciones o protestas, o bien se formularen en su contra demandas ante Tribunales de Derecho o Arbitrales, generales o especiales, los países pactantes se comprometen a consultarse acerca de las bases de la defensa y se obligan, asimismo, a prestarse la más amplia cooperación para una defensa común.
>
> TERCERO: En el caso de violación por vías de hecho de la Zona Marítima indicada, el Estado afectado dará cuenta inmediata a los otros pactantes para acordar las medidas que convenga tomar en resguardo de la Soberanía afectada."

4.92 The preliminary and innovative character of the initial 200-mile proclamation, and the focus upon regional solidarity, could not be more clearly illustrated. The 1954 Complementary Convention was a commitment by the three States to solidarity in the defence of their 200-mile (or wider) claims, in the face both of pressure to abandon those claims and of threats from distant-water fishing vessels to the fisheries that were protected by the zones[213].

4.93 The 1954 Complementary Convention was signed by representatives of all three States, but was never ratified by Chile[214]. All of the 1952 and 1954 instruments were approved by the Peruvian Congress by means of Legislative Resolution No. 12305, issued on 6 May 1955 and enacted by means of a Decree of the President of the Republic dated 10 May 1955[215].

4.94 Concerted action was taken, as envisaged, under this agreement. On 12 April 1955, after a long and detailed analysis and exchange of points of view, a text was approved by Chile, Ecuador and Peru to respond to the challenges

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[213] For an example of the implementation of this aspect of the 1954 Complementary Convention see Note 6-4/8 of 7 February 1967, from the Ministry of Foreign Affairs of Peru to the Ambassador of Chile. Annex 70.

[214] A fact which would be odd if the Convention had indeed been regarded as a boundary agreement.

[215] Legislative Resolution No. 12305 of 6 May 1955. Annex 10.

to the 200-mile zone that had been presented by Denmark, the United States, Great Britain, the Netherlands, Norway and Sweden[216]. Similarly, at around the same time and at the initiative of Ecuador, it was agreed that the three States would co-ordinate their positions in response to a United States proposal to submit differences concerning maritime claims to the International Court of Justice[217].

11. The 1954 Agreement on a Special Zone

4.95 The 1954 Agreement on a Special Zone had a very specific, and temporary, purpose. This was spelled out in the Preamble which read (in full) as follows:

> "Considering that:
>
> Experience has shown that innocent and inadvertent violations of the maritime frontier between adjacent States occur frequently because small vessels manned by crews with insufficient knowledge of navigation or not equipped with the necessary instruments have difficulty in determining accurately their position on the high seas;
>
> The application of penalties in such cases always produces ill-feeling in the fishermen and friction between the countries concerned, which may affect adversely the spirit of co-operation and unity which should at all times prevail among the countries signatories to the instruments signed at Santiago; and
>
> It is desirable to avoid the occurrence of such unintentional infringements, the consequences of which affect principally the fishermen"[218].

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[216] Ministerio de Relaciones Exteriores (1955), *op. cit.*, pp. 24-25. Annex 98.

[217] *Ibid.*, p. 27.

[218] Annex 50.

Spanish text reads as follows:

> "Considerando:
>
> Que la experiencia ha demostrado que debido a las dificultades que encuentran las embarcaciones de poco porte tripuladas por gente de mar con escasos conocimientos de náutica o que carecen de los instrumentos necesarios para determinar con exactitud su posición en alta mar, se producen con frecuencia, de modo inocente y accidental, violaciones de la frontera marítima entre los Estados vecinos;
>
> Que la aplicación de sanciones en estos casos produce siempre resentimientos entre los pescadores y fricciones entre los países que pueden afectar al espíritu de colaboración y de unidad que en todo momento debe animar a los países signatarios de los acuerdos de Santiago; y
>
> Que es conveniente evitar la posibilidad de estas involuntarias infracciones cuyas consecuencias sufren principalmente los pescadores".

4.96 In its judgment in the *Case Concerning Maritime Delimitation in the Black Sea* the Court drew attention to the need to determine the specific purpose for which an agreement between the parties to a dispute was made, before drawing inferences as to its possible relevance in a delimitation dispute[219]. That is important in particular in circumstances where one party argues that an agreement concluded many years before had the effect of "an implied prospective renunciation" of maritime rights[220]. That injunction is apposite in the present case. The purpose of this 1954 Agreement was to avert disputes between fishermen on small fishing boats. In contrast to large, deep-water fishing vessels, small fishing boats normally fish relatively close to the shore.

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[219] *Case Concerning Maritime Delimitation in the Black Sea, I.C.J. Judgment of 3 February 2009*, paras. 69-76.

[220] *Ibid.*, para. 71.

The aim was to reduce friction between near-shore fishermen, in circumstances where one fishing boat might be thought by those on board another boat to have intruded upon the 'national' fishing grounds. The purpose was, however, *not* to regulate fishing within the territorial sea. That is evident from the reference in the Preamble to "small vessels … on the high seas", and from the operative clauses of the Agreement.

4.97 The operative paragraphs of that Agreement provided that the three States agreed:

> "1. A special zone is hereby established, at a distance of 12 nautical miles from the coast, extending to a breadth of 10 nautical miles on either side of the parallel which constitutes a maritime boundary between the two countries.
>
> 2. The accidental presence in the said zone of a vessel of either of the adjacent countries, which is a vessel of the nature described in the paragraph beginning with the words 'Experience has shown' in the preamble hereto, shall not be considered to be a violation of the waters of the maritime zone, though this provision shall not be construed as recognizing any right to engage, with deliberate intent, in hunting or fishing in the said special zone.
>
> 3. Fishing or hunting within the zone of 12 nautical miles from the coast shall be reserved exclusively to the nationals of each country.
>
> 4. All the provisions of this Agreement shall be deemed to be an integral and supplementary part of, and not in any way to abrogate, the resolutions and decisions adopted at the Conference on the Exploitation and Conservation of the Maritime Resources of the South Pacific, held in Santiago de Chile in August 1952."[221]

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[221] Annex 50.

Spanish text reads as follows:

> "PRIMERO: Establécese una Zona Especial, a partir de las 12 millas marinas de la costa, de 10 millas marinas de ancho a cada lado del paralelo que constituye el límite marítimo entre los dos países.
>
> SEGUNDO: La presencia accidental en la referida zona de las embarcaciones de cualquiera de los países limítrofes, aludidas en el primer considerando, no será considerada como violación de las aguas de la zona marítima, sin que esto signifique reconocimiento de derecho alguno para ejercer faenas de pesca o caza con propósito preconcebido en dicha Zona Especial.
>
> TERCERO: La pesca o caza dentro de la zona de 12 millas marinas a partir de la costa está reservada exclusivamente a los nacionales de cada país.
>
> CUARTO: Todo lo establecido en el presente Convenio se entenderá ser parte integrante, complementaria y que no deroga las resoluciones y acuerdos adoptados en la Conferencia sobre Explotación y Conservación de las Riquezas Marítimas del Pacífico Sur, celebrada en Santiago de Chile, en Agosto de 1952."

4.98 The aim of this Agreement was thus clear, and it was narrow and specific. The Agreement was intended to establish a 'zone of tolerance', 20 nautical miles wide, within which minor accidental encroachments on another State's maritime zone by small and ill-equipped fishing vessels would be excused. In that way, the imposition of punishments and fines that might cause resentment and friction between fishermen would be avoided. That zone was, however, a zone established "at a distance of 12 nautical miles from the coast". It was not a zone established within the coastal 12-mile belt.

4.99 By the 1950s both Peru and Chile claimed three-mile territorial seas, with additional police or security jurisdiction out to 12 miles from the coast[222]. Ecuador claimed, by a Decree of the Congress dated 21 February 1951 relating

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[222] See paras. 4.12-4.19 above.

to territorial waters[223], a 12-mile territorial sea. In 1953, article 6 of the Chilean Law of the Directorate General for the Maritime Territory and Merchant Marine set the limit of the Directorate's jurisdiction as "twelve miles (four nautical leagues) measured from the lowest waterline, or the extent of the territorial sea established by the international agreements adhered to by the Government of Chile, if that is greater…"[224].

4.100 The 1954 zone of tolerance was, therefore, established in an area that was, in the terms of traditional international law, an area of high seas within which the States Parties to the 1954 Agreement on a Special Zone claimed a limited functional jurisdiction in respect of fisheries. The question of fishing activity closer to the coast was addressed only later, in the latter half of the 1960s[225]. The 1954 zone of tolerance was a practical device for avoiding friction and the imposition of fines, not an international boundary. It was not to be expected that an international maritime boundary would be established in the waters beyond the territorial sea: that was not a part of the conceptual structure of international law in the early 1950s. The Agreement did not purport to establish a zone of tolerance in the waters closer to the shore.

4.101 The 'zone of tolerance' was defined by reference to a parallel of latitude. This is a natural approach to the problem of ensuring that small boats can easily determine whether or not they are infringing the zone. Seafarers fix their position at sea using the co-ordinates of latitude and longitude. As is well known, it is also much easier to determine latitude than longitude at sea, particularly for those with "insufficient knowledge of navigation or not equipped with the necessary instruments" that consequently "have difficulty

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[223] Decree of the Congress of the Republic of Ecuador of 21 February 1951. *United Nations Legislative Series* ST/LEG/SER.B/6, p. 13.

[224] Decree with Force of Law No. 292 of 25 July 1953, Fundamental Law of the Directorate General of Maritime Territory and Merchant Marine. Annex 29. (Spanish text: "doce millas (cuatro leguas marinas) medidas desde la línea de la más baja marea, o la extensión de mar territorial que se fije en acuerdos internacionales a los que se adhiera el Gobierno de Chile si es superior …").

[225] See paras. 4.118 *ff.* below.

in determining accurately their position on the high seas" (to use the words of the Preamble to the Agreement). It is not surprising that the expedient of a reference to parallels of latitude was adopted in the 1954 Agreement on a Special Zone.

4.102 The 1954 Agreement on a Special Zone had no larger purpose such as establishing a comprehensive regime for the exploitation of fisheries, or adding to the content of the 200-nautical-mile zones, or setting out an agreed definition of their limits and borders. And it had nothing whatever to do with the sea-bed, or any other maritime resources apart from fish. Moreover, it was explicitly said of this Agreement that it was "an integral and suplementary part of, and not in any way to abrogate", the resolutions and agreements adopted at the 1952 Santiago Conference[226]. It was a subordinate instrument. The 1954 Agreement on a Special Zone was plainly not an international boundary treaty.

4.103 The 1954 Agreement on a Special Zone did not specify the geographical co-ordinates of this special maritime frontier zone. It referred simply to a zone "on either side of the parallel which constitutes a maritime boundary between the two countries."[227] That rather opaque formula, introduced at the instance of Ecuador[228], referred only to *one* parallel between *two* countries (despite the fact that the 1954 Agreement on a Special Zone had *three* States Parties). That, too, is readily understandable in the context of the 1952 Declaration of Santiago, which it complemented.

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[226] 1954 Agreement on a Special Zone, Art. 4. Annex 50. (Spanish text: "parte integrante, complementaria y que no deroga las resoluciones y acuerdos adoptados en la Conferencia sobre Explotación y Conservación de las Riquezas Marítimas del Pacífico Sur, celebrada en Santiago de Chile, en Agosto de 1952.").

[227] *Ibid.*, Art. 1. (Spanish text: "a cada lado del paralelo que constituye el límite marítimo entre los dos países.").

[228] Act of the Second Session of Commission I of the Second Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific, 3 December 1954, p. 5. Annex 57.

4.104 As was noted above[229], the only express reference in the 1952 Declaration of Santiago to the use of a parallel of latitude occurs in Paragraph IV which, it will be recalled, used a parallel to limit the maritime zone of an island or group of islands in situations where that island or group of islands was situated less than 200 miles from the general maritime zone of another State. That was a matter of concern only in the context of Ecuador and Peru, where the 200-mile zones around certain islands near the starting-point of the land border between Ecuador and Peru overlap with the zones generated by the mainland. Its irrelevance to the situation between Peru and Chile is underlined by the fact that Chile did not ratify this Agreement until 1967, 13 years after its conclusion.

4.105 While the 1954 zone of tolerance was understood to apply to the waters between Peru and Ecuador, an informal practice, which was not set out in any international instrument, had arisen in the south. Peruvian fishermen fished in the waters to the north, and Chilean fishermen in waters to the south of the Point Concordia on the seashore.

4.106 Peru has implemented the 1954 special maritime zone in good faith, and continues to do so pending the settlement of the question of the maritime boundary. It continues, for example, to instruct Peruvian fishing vessels to respect the provisional 1954 line. But it does so on the basis that it is implementing a practical arrangement of a provisional nature in order to avoid conflicts between fishing vessels, not that it is observing an agreed international boundary.

12. Developments between 1954 and 1968

4.107 After the adoption of the 1952 and 1954 instruments, the three Latin American countries of the South Pacific continued to act together in the defence of their 200-mile zone against the maritime powers that opposed it. The United

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[229] See para. 4.76 above.

States was active in trying to negotiate a solution to the dispute concerning jurisdiction over United States flag fishing vessels beyond the three-mile limit to which the United States adhered; but no such agreement was possible[230].

4.108 Answering the reservations made by the United States, Great Britain and other European countries, in 1955 representatives of Chile, Ecuador and Peru sent identical diplomatic notes to the United States, Great Britain and other States rejecting the proposition that as a matter of international law coastal States had no jurisdiction beyond the three-mile limit. With reference to the 1952 Declaration of Santiago they said:

> "In the Declaration of the Maritime Zone, Peru, Chile and Ecuador not only have safeguarded the legitimate interest that other States could have for navigation and trade, but have also contemplated the issuance of fishing and hunting permits in the said zone to nationals and companies of other countries, as long as they submit to the regulations established to protect the species … Thus the Maritime Zone established in the Declaration of Santiago does not have the characteristics that the Government of (United States, Great Britain) seems to assign to it, but on the contrary, it is inspired, in a defined and precise way, by the conservation and prudent use of natural resources."[231]

Spanish text reads as follows:

> "En la Declaración sobre Zona Marítima, el Perú, Chile y Ecuador no sólo han resguardado el interés legítimo que pudieran tener otros Estados por la navegación y el comercio, sino que han contemplado el otorgamiento en dicha zona de permisos de pesca y caza a nacionales y empresas de otros países, siempre que se sometan a las reglamentaciones establecidas en salvaguarda de las especies, … No tiene, pues, la Zona Marítima

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[230] Ministerio de Relaciones Exteriores: *Memoria del Ministro de Relaciones Exteriores (28 de Julio de 1955 – 28 de Julio de 1956)*. Lima, Talleres Gráficos P.L. Villanueva, 1956, pp. 12-18. Annex 99.

[231] Agreement Between Ecuador, Peru and Chile for a Joint Response to the United States and Great Britain on their Observations to the "Declaration of Santiago", Lima, 12 April 1955, p. 2, para. d). Annex 58.

> establecida en la Declaración de Santiago, los caracteres que parece atribuirle el Gobierno de (Estados Unidos, Gran Bretaña), sino por el contrario, de modo definido y preciso, se inspira en la conservación y prudente utilización de los recursos naturales."

4.109 On 6 October 1955 a further step was taken to consolidate the regional position on the 200-mile zone. Plenipotentiaries from Peru, Chile and Ecuador signed the Protocol of Accession to the 1952 Declaration of Santiago. This Protocol opened up the 1952 Declaration of Santiago to accession by other Latin American States. In it the three Governments reiterated that adherence to the Declaration in no way affected the right of each State to determine the extension and limits of its maritime zone[232]. This is further confirmation that the said Declaration did not settle the question of maritime boundaries between the States Parties.

4.110 Thus, during the 1950s it remained the case that Chile and Peru were not concerned with their lateral maritime boundaries. Their focus was upon the imperative need to secure the recognition by third States of their 200-mile maritime zone, in an international context in which the traditional Law of the Sea admitted only very much narrower belts of coastal State jurisdiction.

4.111 During the decade and a half following the conclusion of the two 1954 agreements, the 200-mile claim remained under a series of specific and serious threats from States which refused to accept its legality. There were several episodes in which foreign fishing vessels were arrested within the zone. For example, in addition to the incidents in the 1950s noted above, Peru arrested 71 United States fishing vessels between 1954 and 1973[233]. Chile took action against unlawful fishing activity in 1957 and 1958, as did Ecuador in 1955 and 1963. The United States' Senate threatened, in 1963 and again in 1965, to bar United States foreign aid to any States which seized United States

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[232] Protocol of Accession to the Declaration on "Maritime Zone" of Santiago, 6 October 1955, p. 2. Annex 52.

[233] Ferrero Costa, Eduardo: *El Nuevo Derecho del Mar. El Perú y las 200 Millas*. Lima, Fondo Editorial de la Pontificia Universidad Católica del Perú, 1979, pp. 350-351.

fishing vessels on what the United States regarded as the high seas[234], and the United States Congress later adopted measures to strengthen opposition to maritime zones not recognized by the United States[235]. It was plain that there remained a need to continue the co-ordinated regional defence of the 200-mile zone against external threats.

4.112 There was less in the way of internal legal development on the part of Peru or Chile. Peru enacted a further measure, Supreme Resolution No. 23, dated 12 January 1955 (hereinafter: "the 1955 Supreme Resolution")[236]. That measure in effect reasserted the jurisdictional claim established by Supreme Decree No. 781 of 1947 and the 1952 Declaration of Santiago, and stipulated that the 200-mile zone proclaimed by Peru is an area limited by "a line parallel to the Peruvian coast and at a constant distance of 200 nautical miles from it". By virtue of this interpretation the 1955 Supreme Resolution applied not the parallels but the "arcs of circles" method, already established in Peruvian Petroleum Law of 1952, to the construction of the Peruvian zone.

4.113 The 1955 Supreme Resolution, "[i]n accordance with clause IV of the Declaration of Santiago", limited the drawing of the outer limit of the maritime domain of Peru to the parallel referred to in that provision – *i.e.*, the geographical parallel which limited the maritime claims where zones generated by islands or groups of islands overlapped with those generated by continental coastlines. As was explained above, that provision applied to the Peru-Ecuador border[237].

4.114 A little later, on 6 May 1955, Peru implemented the 1954 Agreement on a Special Zone by Legislative Resolution No. 12305[238]. It was not until 1967 that Chile ratified that Agreement[239]. Moreover, it was only after Peru's request for negotiations on maritime delimitation that Chile registered the 1954

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234 Rivera Marfán, Jaime, *op.cit.*, pp. 135-136.

235 See footnote 159 above.

236 Annex 9.

237 See paras. 4.76-4.78 above.

238 Annex 10.

239 Chilean Decree No. 519 of 16 August 1967. Annex 33.

Agreement on a Special Zone with the United Nations Treaty Section, in 2004[240], again without notice to Peru, to Ecuador, or to the Permanent Commission for the South Pacific. Chile did so, moreover, contrary to the procedures of the Permanent Commission, according to which it is up to the Secretary General to request "the registration of the international treaties or agreements celebrated by the organs of the South Pacific system and the States in it"[241]. That half-century delay in registration is a powerful indication that Chile did not even regard the 1954 Agreement on a Special Zone as an agreement of major importance, let alone as a treaty establishing a maritime boundary with its neighbour.

4.115 The lack of urgency in ratifying and registering the 1954 Agreement on a Special Zone reflects the fact that the Agreement had little formal significance, being essentially an *ad hoc* arrangement for dealing with problems that might arise concerning small fishing boats[242]. There is not the slightest hint in the internal legal procedures pursued by Peru or by Chile that the 1952 or 1954

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[240] The Agreement was registered by Chile on 24 August 2004. See: The 1954 Agreement on a Special Zone, 4 December 1954, UNTS 40521. Annex 50.

[241] See Article 24, l) of the Regulation of the Permanent Commission for the South Pacific, in force since 1 February 2002. In: Permanent Commission for the South Pacific: *Conventions, Agreements, Protocols, Declarations, Statute and Regulation of the CPPS*, Chile-Colombia-Ecuador-Peru, General Secretariat, 3rd edition. Guayaquil, 2007, p. 227. This provision essentially repeats Article 6 d) of the Statute of the General Secretariat of the Permanent Commission for the South Pacific, approved in Quito, on 30 May 1967. In: Permanent Commission for the South Pacific: *Agreements, Bylaws, Regulations, Meetings and International Personnel*. Chile-Ecuador-Peru, General Secretariat, Santiago, 1975, p.57.

[242] *Cf.*, the description of the 1954 Agreement on a Special Zone in the 1986 Peruvian Memorandum attached to Note No. 5-4-M/147 addressed to Chile: "the existence of a special zone –established by the Agreement relating to a Maritime Frontier Zone' – referred to the line of the parallel of the point reached by the land border, must be considered as a *formula* which, although it fulfilled and fulfils the express objective of avoiding incidents with seafarers with scant knowledge of navigation', is not adequate to satisfy the requirements of safety nor for the better attention to the administration of marine resources" (emphasis added). Annex 76. (Spanish text: "la existencia de una zona especial – establecida por la 'Convención sobre Zona Marítima Fronteriza' – referida a la línea del paralelo del punto al que llega la frontera terrestre, debe considerarse como una *fórmula* que, si bien cumplió y cumple el objetivo expreso de evitar incidentes con 'gentes de mar con escasos conocimientos de náutica', no resulta adecuada para satisfacer las exigencias de la seguridad ni para la mejor atención de la administración de los recursos marinos" (emphasis added)).

instruments had effected anything of such great legal and constitutional significance to the two States as the determination of an international boundary between them.

4.116 In 1958 the four Geneva Conventions on the Law of the Sea were adopted; but neither Peru nor Chile (nor Ecuador) ratified any of them, and they did not provoke any significant development in the treatment of the maritime zones of the three States. Peru had reasserted its position on the 200-mile zone during the Conference. The Head of the Peruvian delegation, Dr. Alberto Ulloa, stated:

> "It would be an abuse for non-coastal States to claim the right to fish indiscriminately to the detriment of coastal States. The Declaration of Santiago, issued by three South American countries of the Pacific, was aimed at preventing such an abuse. The Declaration was of a defensive character, and its sole object was the conservation of the living resources of the sea for the benefit of the populations of those countries. It was not, as had been asserted, an arbitrary or aggressive instrument. The principles embodied in the Declaration of Santiago had been endorsed by the Tenth International Conference of American States held at Caracas in 1954. In the Principles of Mexico City, proclaimed in 1956 by the Inter-American Council of Jurists, the right of a coastal State to adopt conservation measures, and to exercise certain exclusive rights of exploitation were clearly recognized."[243]

And at the end of the 1958 Conference the Joint Declaration signed by the Heads of the Delegations of Chile, Ecuador and Peru emphasized that:

> "In the absence of international agreement on sufficiently comprehensive and just provisions recognizing and creating a reasonable balance among all the rights and interests, and also in view of the results of this Conference, the regional system

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[243] Declaration by the Head of the Peruvian Delegation, Dr. Alberto Ulloa, at the First United Nations Conference on the Law of the Sea, 5 March 1958. Annex 100.

> applied in the southern Pacific, which stands for the protection of situations vital to the countries of the region, remains in full force so long as just and humane solutions are not worked out."[244]

4.117 The Second United Nations Conference on the Law of the Sea, held in Geneva in 1960, also had no effect upon the position of the 200-mile zone. Indeed, as the Peruvian delegate noted, the Conference failed to produce any results at all[245].

4.118 Local developments off the coasts of the American South Pacific States had more impact. The omission in 1954 to establish measures to avoid friction regarding fishing activities close to the coast gave rise to some bilateral difficulties between Peru and Chile a little later, in the mid-1960s. Just over a decade after the agreement on the arrangements set out in the 1954 Agreements there were diplomatic exchanges between Peru and Chile concerning alleged illegal fishing by Chilean fishing boats in waters close to the Peruvian coast.

4.119 There were violations of Peruvian territorial waters by Chilean vessels in 1965[246], in the wake of which on 26 May 1965 Peru made its proposal –

> "that each country build, on its corresponding seashore, a lighthouse placed no further than five kilometres from the frontier line."[247]

Spanish text reads as follows:

> "que ambos países construyan, en la zona ribereña que les corresponde, un faro cada uno, a no más de cinco kilómetros de la línea fronteriza."

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[244] Declaration by the Chairmen of the Delegations of Chile, Ecuador and Peru, at the First United Nations Conference on the Law of the Sea, 27 April 1958. Annex 102.

[245] Declaration by the Peruvian Delegation, at the Second United Nations Conference on the Law of the Sea, 27 April 1960. Annex 103.

[246] The Peruvian Memorandum of 26 May 1965 refers to further trespasses on 27 April 1965 by five Chilean vessels. Annex 67.

[247] *Ibid.*

4.120 There were further incursions by Chilean fishing vessels later in 1965, which were protested by Peru[248]. On the other hand, Chile complained of incursions by Peruvian vessels into Chilean waters, and protested against them in a Memorandum dated 6 October 1965[249].

13. The Coastal Lights

4.121 Early in 1968, taking advantage of their presence in Lima for a subregional meeting in relation to the South Pacific Agreements, Peruvian officials held a meeting with their counterparts from the Chilean Ministry of Foreign Affairs, for an informal discussion of the questions relating to friction arising from the activities of coastal fishing vessels. After that meeting Peru wrote to Chile on 6 February 1968 saying that Peru considered it –

> "convenient, for both countries, to proceed to build posts or signs of considerable dimensions and visible at a great distance, at the point at which the common border reaches the sea, near boundary marker number one."[250]

Spanish text reads as follows:

> "conveniente que se proceda a construir por ambos países, postes o señales de apreciables proporciones y visibles a gran distancia, en el punto en que la frontera común llega al mar, cerca del hito número uno."

On 8 March 1968, Chile accepted this proposal[251] and this was the agreement reached by the Parties. Thus the purpose was to address the problems concerning Peruvian and Chilean fishermen operating close to the coast by erecting beacons to identify the location of the land boundary near the shore.

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[248] Memorandum of the Embassy of Peru in Chile of 3 December 1965. Annex 69.

[249] Memorandum of the Ministry of Foreign Affairs of Chile of 6 October 1965. Annex 68.

[250] Note No. (J) 6-4/9 of 6 February 1968, from the Ministry of Foreign Affairs of Peru to the chargé d'affaires *a.i.* of Chile. Annex 71.

[251] Note No. 81 of 8 March 1968, from the chargé d'affaires *a.i.* of Chile to the Minister of Foreign Affairs (in charge). Annex 72.

4.122 A meeting of the Peruvian and Chilean delegations was held on 25 April 1968 in Arica[252]. The delegations inspected the relevant ground locations and made "a view … from the sea."[253] On the following day a document was signed by the two sides recording their agreed proposal to their respective governments for the installation of –

> "two leading marks with daylight and night signalling; the front mark would be placed in the surroundings of Boundary Marker No. 1, in Peruvian territory; the rear mark would be placed at approximately 1,800 metres away from the front mark, in the direction of the parallel of the maritime frontier, which would locate it south of Quebrada de Escritos, in Chilean territory."[254]

Spanish text reads as follows:

> "dos marcas de enfilación con señalización diurna y nocturna; la marca anterior quedaría situada en las inmediaciones del Hito No. 1, en territorio peruano; la marca posterior estaría ubicada a una distancia aproximada de 1,800 metros de la marca anterior, en la dirección del paralelo de la frontera marítima, lo que la situaría al lado sur de la Quebrada de Escritos, en territorio chileno."

The document stipulated that the 'Front Tower' would be a metal structure not less than 20 metres high, and the 'Rear Tower' not less than 30 metres above mean sea level, and that the beacons for night-time identification would have "approximately a 15-mile visibility and distance range". It is, therefore, apparent that the towers were intended to be of use to fishing vessels relatively near to the coast.

4.123 The beacons were evidently a pragmatic device intended to address the practical problems arising from the coastal fishing incidents in the 1960s. They were

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[252] Note No. (J) 6-4/19 of 28 March 1968, from the Secretary General of Foreign Affairs of Peru to the chargé d'affaires *a.i.* of Chile. Annex 73.

[253] Document of 26 April 1968. Annex 59. (Spanish text: "una apreciación … desde el mar").

[254] *Ibid.*

plainly *not* intended to establish a maritime boundary. Moreover, the beacons would not have been visible to ships more than 15 miles or so from the shore. This point deserves emphasis.

4.124 Twelve nautical miles was the distance prescribed by Chilean law "for security of the country and the observance of fiscal laws"; but it was also stipulated that Chilean territorial waters extend "up to a distance of one marine league [three nautical miles]"[255]. The beacons, with their 15-mile visibility, were intended to be visible to vessels within an area that did not correspond either to the Chilean territorial sea, or to the Chilean 200-nautical-mile fisheries zone[256]. The concern was solely with the problems of coastal fishing vessels. The beacons were not intended to be an element in the mapping out of a formal international maritime boundary: they were a pragmatic bilateral solution to the problems caused by near-shore fishermen encroaching on areas that were considered by fishing communities in the other State to belong to them.

4.125 Both Peru, on 5 August 1968[257], and Chile, on 29 August 1968[258], accepted the agreed proposal. The notes referred to the function of the 'leading marks' ('marcas de enfilamiento' – the towers) being 'to materialise the parallel of the maritime frontier' at the parallel of latitude on which Boundary Marker No. 1 stood[259]. The latitude and longitude co-ordinates of Boundary Marker No. 1 are mentioned in the 5 August 1930 Act[260]. The plain intention was to enable fishing vessels within about 15 miles of the coast to determine whether they were north or south of the parallel of latitude on which that 1930 land Boundary Marker stood.

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[255] See para. 4.19 above. The difference between the two prescribed distances – the three mile limit of territorial waters and the 12 mile limit for the 'security of the country and the observance of fiscal laws' is another clear indication of the essentially pragmatic approach to maritime matters. Annex 25.

[256] See **Figure 4.3**.

[257] Note No. (J)-6-4/43 of 5 August 1968, from the Secretary General of Foreign Affairs to the chargé d'affaires of Chile. Annex 74.

[258] Note No. 242 of 29 August 1968, from the Embassy of Chile to the Ministry of Foreign Affairs of Peru. Annex 75.

[259] *Ibid.*

[260] Act of 5 August 1930. Annex 55.


THE COASTAL LIGHTS ESTABLISHED BY THE 1969 JOINT COMMISSION
Mercator Projection
Datum: WGS-84
(Scale accurate at 18°S)
0 10 20 30
Nautical Miles
0 10 20 30 40 50 60
Kilometers
Coastal configuration based on Peruvian nautical chart 300, and Chilean nautical chart 1000.
Prepared by: International Mapping
71°W
Moquegua
Río Ilo
PERU
Ilo
Camiara
Punta Coles
Río Locumba
Tomasiri
Río Sama
Tacna
18°S
Punta Sama
12 nm Limit
Boca del Río
Peru's Beacon: Height 24 m, Range 9 nm
Arica
Chile's Beacon: Height 41 m, Range 14 nm
CHILE
Caleta Vitor
PACIFIC
OCEAN
Punta Argolla
Chaca
Note: the light beacon ranges are based on information published by the British Admiralty on BA Chart 4217.
71°W

Figure 4.3

4.126 The terms of the agreed proposal were repeated in the 'Act of the Peruvian-Chilean Joint Commission in Charge of Verifying the Position of Boundary Marker No. One and Indicating the Maritime Limit', signed by representatives of the two States and dated 22 August 1969. The Act of 22 August 1969 also set out in detail the procedure for determining the course of the parallel passing through Boundary Marker No. 1.

4.127 The coastal lights thus achieved the purpose of marking a line established in order to avoid near-shore fishing vessels crossing it, and thereby to avoid disputes among the fisherfolk of the two States that could arise from near-shore fishing activities. In taking these steps the two States were dealing with specific practical problems on a provisional basis.

4.128 Throughout this episode there is no indication whatever that the participants, or the two States, considered that they were engaged in the drawing of a definitive and permanent international boundary nor did any of the correspondence refer to any pre-existent delimitation agreement. Furthermore, it could not be implied that the starting-point of the land boundary established at Point Concordia by the 1929 Treaty of Lima was being modified by means of an Act. The focus was consistently, and exclusively, upon the practical task of keeping Peruvian and Chilean fishermen apart, and on avoiding incidents that might arise from each encroaching upon the fishing grounds that were considered to be the preserve of the other, and it is in this light that the reference to 'materializing the parallel' is to be read. This arrangement of a practical nature addressed the problem regarding small fisheries near the coast and represented a limited, and *ad hoc*, solution to a very specific problem within the 15-mile range of the lights. It was clearly not a maritime delimitation agreement. This was consistent with the approach to maritime claims that had been evident in Peruvian practice throughout the post-1945 period – and, indeed, before that time.

C. Phase 3: 1980 Onwards

4.129 The 1980s saw the beginnings of a new phase in the international Law of the Sea. The 1982 Convention on the Law of the Sea drafted by UNCLOS III – which was in session from 1973 until 1982 – set out the new international consensus and addressed not only questions of the maritime zones and jurisdiction that might be claimed by coastal States but also the question of international maritime boundaries. Peru and Chile were among the more active States in the Conference.

4.130 On the question of international maritime boundaries, Peru's position was clearly stated. On 27 August 1980 the Head of the Peruvian delegation to UNCLOS III, Ambassador Alfonso Arias-Schreiber stated:

> "Where a specific agreement on the delimitation of the territorial sea, exclusive economic zone and continental shelf between States with opposite or adjacent coasts did not exist or where there were no special circumstances or historic rights recognized by the parties, the median line should as a general rule be used, as suggested in the second revision, since it was the most likely method of achieving an equitable solution."[261]

4.131 Soon after the adoption of the 1982 Convention on the Law of the Sea, in 1986, Peru initiated discussion of the maritime boundary between Peruvian and Chilean waters. The legal environment was very different from that in the 1950s. Now, the right to establish 200-mile maritime zones was generally accepted and there was no need for common action among American South Pacific States to defend their zones against the hostility of States outside the region. More specifically, in the absence of any maritime boundary between Peru and Chile, the time was now ripe for the settlement of the lateral limits of their respective zones.

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[261] Declaration by the Head of the Peruvian Delegation, Ambassador Alfonso Arias-Schreiber, at UNCLOS III, 27 August 1980. Annex 107.

4.132 In 1986 there was a high-level diplomatic presentation on the question of the need for a maritime boundary, made by a Peruvian envoy, Ambassador Juan Miguel Bákula, to the Chilean Minister of Foreign Affairs in Santiago. A subsequent Peruvian Memorandum, sent by the Peruvian Embassy to Chile with diplomatic Note No. 5-4-M/147 dated 23 May 1986, referred to the events of the 1960s and emphasized the limited scope of the line implemented at that time. It made it plain that this fisheries arrangement not only fell far short of being an agreed maritime boundary between Peru and Chile, but even fell short of adequately dealing with the administration of marine resources. The Memorandum said:

> "One of the cases that merits immediate attention is the formal and definitive delimitation of the marine spaces, which complement the geographical vicinity of Peru and Chile and have served as scenario of a long and fruitful joint action.
>
> At the current time, the existence of a special zone – established by the 'Agreement relating to a Maritime Frontier Zone' – referred to the line of the parallel of the point reached by the land border, must be considered as a formula which, although it fulfilled and fulfils the express objective of avoiding incidents with 'seafarers with scant knowledge of navigation', is not adequate to satisfy the requirements of safety nor for the better attention to the administration of marine resources, with the aggravating circumstance that an extensive interpretation could generate a notorious situation of inequity and risk, to the detriment of the legitimate interests of Peru, that would come forth as seriously damaged."[262]

Spanish text reads as follows:

> "Uno de los casos que merece una inmediata atención, se refiere a la delimitación formal y definitiva de los espacios marinos, que complementan la vecindad geográfica entre el Perú y Chile, y que han servido de escenario a una larga y fructífera acción común.

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[262] Diplomatic Memorandum annexed to Note No. 5-4-M/147 of 23 May 1986, from the Embassy of Peru to the Ministry of Foreign Affairs of Chile. Annex 76.

> En la actualidad, la existencia de una zona especial – establecida por la 'Convención sobre Zona Marítima Fronteriza'– referida a la línea del paralelo del punto al que llega la frontera terrestre, debe considerarse como una fórmula que, si bien cumplió y cumple el objetivo expreso de evitar incidentes con 'gentes de mar con escasos conocimientos de náutica', no resulta adecuada para satisfacer las exigencias de la seguridad ni para la mejor atención de la administración de los recursos marinos, con el agravante de que una interpretación extensiva, podría generar una notoria situación inequitativa y de riesgo, en desmedro de los legítimos intereses del Perú, que aparecerían gravemente lesionados."

4.133 The Peruvian Memorandum dated 23 May 1986 drew attention to the problems flowing from the lack of an agreed maritime boundary between the two States. It did so explicitly and in detail:

> "The definition of new maritime spaces, as a consequence of the approval of the Convention on the Law of the Sea, which counted with the vote of Peru and Chile, and the incorporation of its principles into the domestic legislation of countries, adds a degree of urgency, as both States shall have to define the characteristics of their territorial sea, the contiguous zone and the exclusive economic zone, as well as the continental platform, *i.e.*, the soil and subsoil of the sea, also up to 200 miles, including the reference to the delimitation of the said spaces at international level.
>
> The current '200-mile maritime zone' – as defined at the Meeting of the Permanent Commission for the South Pacific in 1954 – is, without doubt, a space which is different from any of the abovementioned ones in respect of which domestic legislation is practically non-existent as regards international delimitation. The one exception might be, in the case of Peru, the Petroleum Law (No. 11780 of 12 March 1952), which established as an external limit for the exercise of the competences of the State over the continental shelf 'an imaginary line drawn seaward at a constant distance of 200 miles'. This law is in force and it should be noted that it was issued five months prior to the Declaration of Santiago.

> There is no need to underline the convenience of preventing the difficulties which would arise in the absence of an express and appropriate maritime demarcation, or as the result of some deficiency therein which could affect the amicable conduct of relations between Chile and Peru.
>
> Consideration of this problem is nothing new as there are express references to it in books such as that of Rear-Admiral Guillermo Faura; professor Eduardo Ferrero and Ambassador Juan Miguel Bákula. The Peruvian position was also summarized by Ambassador Alfonso Arias Schreiber, at the Conference on the Law of the Sea, when favouring the criteria incorporated in the draft Convention on the Law of the Sea, in relation to the delimitation of the territorial sea, the exclusive economic zone and the continental shelf (26 August 1980). However, this step constitutes the first presentation, via diplomatic channels, which the Government of Peru formulates before the Government of Chile based on the reasons and circumstances set out in the opening paragraphs of this memorandum."[263]

Spanish text reads as follows:

> "La definición de nuevos espacios marítimos, como consecuencia de la aprobación de la Convención sobre el Derecho del Mar, que contó con el voto del Perú y de Chile, y la incorporación de sus principios a la legislación interna de los países, agrega un nivel de urgencia, pues ambos Estados deberán definir las características de su mar territorial, de la zona contigua y de la zona económica exclusiva, así como de la plataforma continental, o sea el suelo y el subsuelo del mar, también hasta las 200 millas, incluyendo la referencia a la delimitación de dichos espacios en la vecindad internacional.
>
> La actual 'zona marítima de 200 millas' – como la definió la Reunión de la Comisión Permanente del Pacífico Sur en 1954 – es, sin duda, un espacio diferente de cualquiera de los anteriormente mencionados, respecto de los cuales la legislación interna es prácticamente inexistente en lo que se refiere a la

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[263] *Ibid.*

> delimitación internacional. Quizás, la excepción podría ser, en el caso del Perú, la Ley de Petróleo (Nº 11780 de 12 de marzo de 1952), que estableció como límite externo para el ejercicio de las competencias del Estado en el zócalo continental, 'una línea imaginaria trazada mar afuera a una distancia constante de 200 millas'. Esta ley está en vigencia y debe anotarse que fue expedida cinco meses antes de la Declaración de Santiago.
>
> No es necesario subrayar la conveniencia de prevenir las dificultades que se derivarían de la ausencia de una demarcación marítima expresa y apropiada, o de una deficiencia en la misma que podría afectar la amistosa conducción de las relaciones entre Chile y el Perú.
>
> La consideración de este problema no representa una novedad, pues hay expresas referencias a él en libros como el del Contralmirante Guillermo Faura; el profesor Eduardo Ferrero y el Embajador Juan Miguel Bákula. La posición peruana fue, asimismo, resumida por el Embajador Alfonso Arias Schreiber, en la Conferencia sobre el Derecho del Mar, al favorecer los criterios incorporados al proyecto de Convención sobre el Derecho del Mar, en relación con la delimitación del mar territorial, la zona económica exclusiva y la plataforma continental (26 de agosto de 1980). Sin embargo, esta gestión, constituye la primera presentación, por los canales diplomáticos, que el Gobierno del Perú formula ante el Gobierno de Chile, fundada en las razones y circunstancias que se han expresado en los primeros párrafos de este memorándum."

Chile did not reject this proposal, as might have been expected if it was confident of the existence of a maritime boundary with Peru. Its response was to make an official public declaration that said that "studies on this matter shall be carried out" [264].

4.134 The following year, in 1987, Chile adopted a measure that is difficult to reconcile with an open-minded study of the question. A Chilean measure, annexed to Supreme Decree No. 991, established the limits of the jurisdiction

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[264] Official Communiqué of the Ministry of Foreign Affairs of Chile, published in Chilean Journal *El Mercurio* of 13 June 1986. Annex 109.

of a Chilean harbour authority and referred to "the Chile-Peru international political limit on the North"[265]. There was no indication of what, in juridical terms, this "international political limit" was, or of the legal basis for it, or of where it was thought to be located. Moreover, it was only in 1994 that Chile began to modify its charts to depict any such limit, as will be shown in the next chapter, where Chile's mapping practice is discussed.

4.135 The view that there was no boundary between the maritime zones of Chile and Peru was confirmed again five years later. In 1998 Chile enacted Supreme Decree No. 210[266]. That Decree established a number of "benthonic resources management and exploitation areas" in the waters off the Chilean coast. The area closest to the Peru-Chile land boundary lies within the coordinates listed in Article 1 of the Decree. The boundary of that area runs in a southwest direction from a point with the co-ordinates 18°21'11,00" S, 70°22'30,00" W. The boundary of the Chilean benthonic area then proceeds seaward for approximately two kilometres in a direction that is approximately perpendicular to the general direction of the coast[267], which is quite different of any parallel of latitude. That is consistent with the position that Peru had adopted eighteen years earlier at UNCLOS III[268].

4.136 A little later, in 2000, Peru protested against a 1998 Chilean chart which appeared to treat the parallel of latitude passing through Boundary Marker No. 1 of the Peru-Chile land border as the 'maritime boundary'.[269]

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[265] Supreme Decree No. 991 of 26 October 1987. Annex 37. (Spanish text: "el límite político internacional Chile-Perú por el Norte").

[266] Supreme Decree No. 210 of 4 May 1998. Annex 40.

[267] See **Figure 4.4**.

[268] See para. 4.130 above.

[269] Note RE (GAB) No. 6-4/113 of 20 October 2000, from the Ministry of Foreign Affairs of Peru to the Embassy of Chile. Annex 77.

4.137 In July 2004 Peru again formally proposed to Chile that negotiations be started on the establishment of a maritime boundary between the two States[270]. Chile refused to enter into negotiations on the matter[271]. Both States reiterated their positions in later diplomatic exchanges.

4.138 On 4 November 2004 the Peruvian and Chilean Foreign Ministers confirmed what was already obvious and "reiterated that the subject of maritime delimitation between both countries, in respect of which we have different positions, is a question of juridical nature" [272].

III. Concluding Observations

4.139 Peru's legal submissions based on this record of dealings between the Parties are set out in the following chapters; but it is convenient here to summarize certain points.

4.140 The starting-point for the analysis is the axiomatic principle that Peru is entitled to a 200-mile maritime zone. It would need very clear evidence, supporting sound legal analysis, to deprive Peru of any part of that entitlement. There is no such evidence.

4.141 *First*, the fundamental fact in this case is that Peru and Chile have not reached agreement upon the delimitation of their international maritime boundary. Yet Chile asserts that it, and not Peru, has rights in an area in front of the Peruvian coast. The fundamental question in this case is, therefore, how could Peru have lost its rights over that area in front of its coast?

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[270] Note (GAB) No. 6/43 of 19 July 2004, from the Minister of Foreign Affairs of Peru to the Minister of Foreign Affairs of Chile. This document is Annex 1 to the Application. It is joined anew for the convenience of the Court as Annex 79.

[271] Note No. 16723 of 10 September 2004, from the Minister of Foreign Affairs of Chile to the Minister of Foreign Affairs of Peru. This document is Annex 2 to the Application. It is joined anew for the convenience of the Court as Annex 80.

[272] Joint Communiqué of the Ministers of Foreign Affairs of Peru and Chile, Rio de Janeiro, 4 November 2004. Annex 113. (Spanish text: "Los Cancilleres hemos reafirmado que el tema de la delimitación marítima entre ambos países, respecto del cual tenemos posiciones distintas, es una cuestión de naturaleza jurídica").

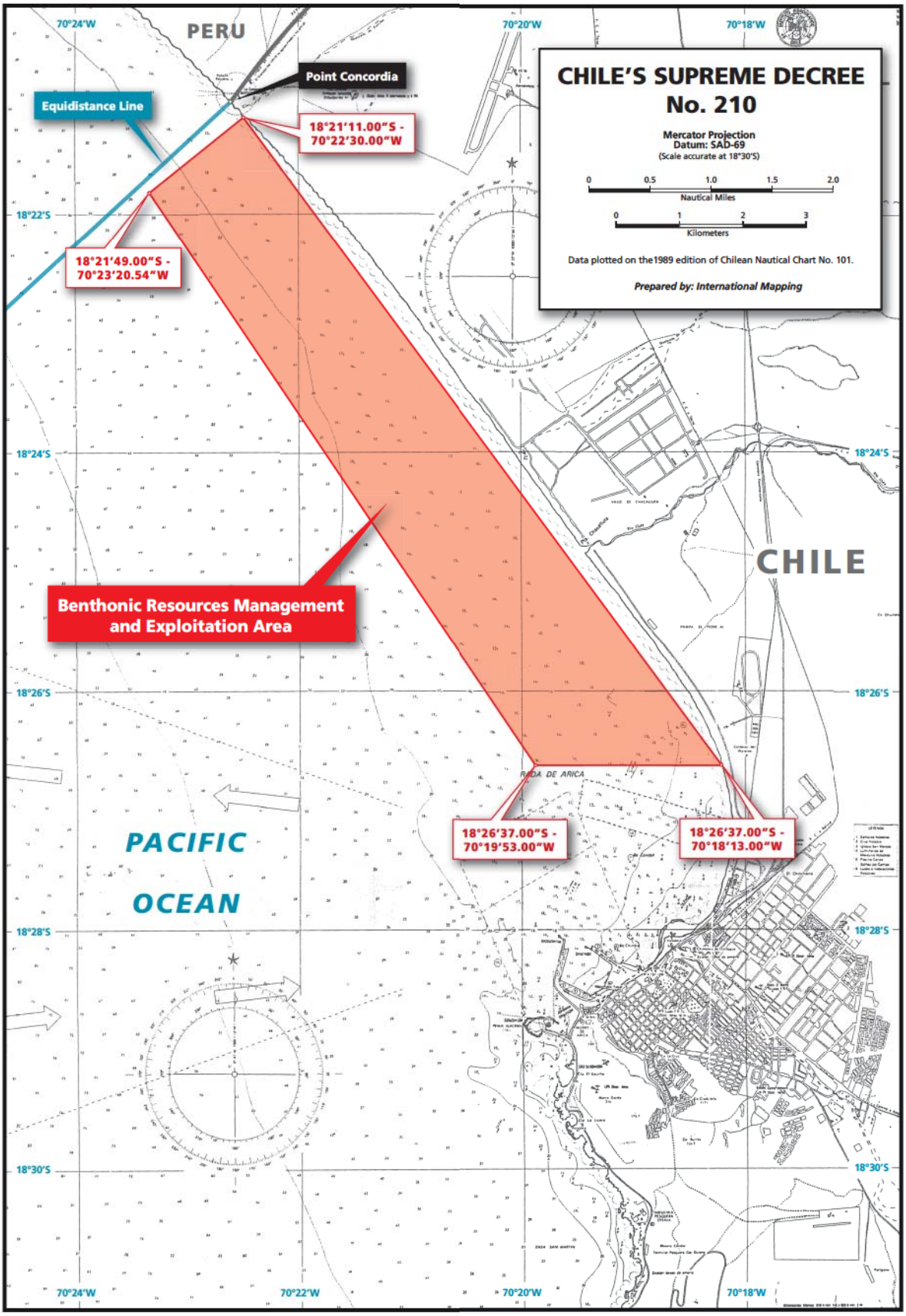
CHILE'S SUPREME DECREE
No. 210
Mercator Projection
Datum: SAD-69
(Scale accurate at 18°30'S)
0 0.5 1.0 1.5 2.0
Nautical Miles
0 1 2 3
Kilometers
Data plotted on the1989 edition of Chilean Nautical Chart No. 101.
Prepared by: International Mapping
PERU
CHILE
PACIFIC
OCEAN
Point Concordia
Equidistance Line
18°21'11.00"S - 70°22'30.00"W
18°21'49.00"S - 70°23'20.54"W
Benthonic Resources Management and Exploitation Area
18°26'37.00"S - 70°19'53.00"W
18°26'37.00"S - 70°18'13.00"W
RADA DE ARICA
70°24'W
70°22'W
70°20'W
70°18'W
18°22'S
18°24'S
18°26'S
18°28'S
18°30'S

Figure 4.4

(a) A coastal State is indeed free to relinquish its sovereign rights over either its continental shelf or its EEZ, for example by agreeing to transfer them to another State by way of sale or gift. But the geographical extent of a State's sovereignty (or sovereign rights) is central to its very existence and, as a matter of principle, any such transfer is a matter requiring the clearest evidence and proof. Sovereignty or sovereign rights are not to be regarded as having been given up inadvertently or by accident, or incidentally to some other transaction, or on a 'balance of probabilities' basis: clear evidence and proof is needed that sovereignty was, and was intended to have been, given up to another State. There is no such proof, and there was no such intention, in this case.

(b) The words of the Court in the *Pedra Branca* case may be recalled:

> "Critical for the Court's assessment of the conduct of the Parties is the central importance in international law and relations of State sovereignty over territory and of the stability and certainty of that sovereignty. Because of that, any passing of sovereignty over territory on the basis of the conduct of the Parties, as set out above, must be manifested clearly and without any doubt by that conduct and the relevant facts. That is especially so if what may be involved, in the case of one of the Parties, is in effect the abandonment of sovereignty over part of its territory."[273]

That wise and trenchant observation applies, *mutatis mutandis*, to boundaries between the zones of sovereign rights of States, whose economic and political importance is as great as that of land territory.

(c) That point was recognized by the Court in the *Nicaragua v. Honduras* case, where it said that:

> "The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed.

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[273] *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), I.C.J. Judgment of 23 May 2008*, para. 122.

> A *de facto* line might in certain circumstances correspond to the existence of an agreed legal boundary or might be more in the nature of a provisional line or of a line for a specific, limited purpose, such as sharing a scarce resource. Even if there had been a provisional line found convenient for a period of time, this is to be distinguished from an international boundary."[274]

(d) The observation is, moreover, part of the *jurisprudence constante* of the Court. Thus, in the *Gulf of Maine* case the Court held that:

> "No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result."[275]

(e) There is no agreement on the maritime boundary between Peru and Chile. Despite Peru's invitations, there have been no negotiations on the maritime boundary between Peru and Chile. No boundary was set by the simultaneous claims of the two States in 1947. The 1952 Declaration of Santiago did not settle the question of the maritime boundary. Nor did the 1954 Agreement on a Special Zone. The 1954 Agreement on a Special Zone embodied a practical and provisional arrangement for policing coastal fisheries, which Peru has applied in good faith, as the record of State practice clearly shows: but they did not and do not embody an agreement on the international maritime boundary.

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[274] *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea, I.C.J. Judgment of 8 October 2007*, para. 253. See also *Case Concerning Maritime Delimitation in the Black Sea, I.C.J. Judgment of 3 February 2009*, paras. 71-76.

[275] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984,* p. 299, para 112. See also the Court's observations in the *North Sea Continental Shelf* cases, referred to in para. 6.4 below.

(f) In the absence of an established boundary the Peru-Chile maritime boundary is, therefore, to be determined by the Court, by the application of the relevant principles of international law – that is, on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

4.142 *Second*, there is an uneven record of diplomatic and legal activity on the part of Peru and Chile in relation to their maritime zones. What is clear beyond doubt is that there is no consistent record from which the agreement of the two States on an international maritime boundary can be inferred. Such activity as occurred was directed not at the establishment of a maritime boundary between them but at the consolidation and defence of the seaward limit of their zones vis-à-vis third States, and at the adoption of practical steps to minimize friction between near-shore fishermen in waters in the general area of their land boundary.

4.143 *Third*, the recorded dealings between the States concerned fisheries matters – and, indeed, were focused on fishing activity in waters relatively close to the shore, not activities out to 200 nautical miles. Moreover, not one of them related to the question of the extent of the sea-bed or subsoil which belongs *ipso facto* and *ab initio* to each State.

4.144 For these reasons, it is Peru's submission that the record demonstrates that there was and is no international maritime boundary established between Peru and Chile. That boundary remains to be delimited by the Court, and by the application of the relevant principles of international law.