INTERNATIONAL COURT OF JUSTICE

MARITIME DISPUTE
(PERU v. CHILE)

REPLY OF THE GOVERNMENT OF PERU

VOLUME I

9 NOVEMBER 2010

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INTRODUCTION

1. The International Court of Justice, by Order dated 27 April 2010, fixed 9 November 2010 as the time limit for filing the Reply of the Republic of Peru (hereinafter "Peru") in the *Case Concerning Maritime Dispute (Peru* v. *Chile)*. Peru submits this Reply pursuant to that Order.

2. In accordance with Article 49 (3) of the Rules of Court, this Reply will focus on those issues that still divide the Parties in light of the Counter-Memorial submitted by the Republic of Chile (hereinafter "Chile").

I. The Main Characteristics of Chile's Counter-Memorial

3. Although Chile develops several lines of reasoning which seem to be independent from one another, they all appear to come down to a single thesis. According to Chile, the subject matter of the dispute – the delimitation of a maritime boundary between Peru and Chile – has been already settled by the Parties through an agreement. Chile asserts that this agreement is laid down in the Declaration on The Maritime Zone of 18 August 1952 (hereinafter "Declaration of Santiago"):

> "The Parties have already delimited their maritime boundary by agreement, in the Declaration on the Maritime Zone (the ***Santiago Declaration***). This is a tripartite international agreement between Chile, Peru and Ecuador, which was concluded in August 1952. The maritime-boundary line between Chile and Peru, and between Ecuador and Peru, is 'the parallel at the point at which the land frontier of the States concerned reaches the sea'. This agreement followed, and was consistent with, concordant unilateral proclamations made by Chile and Peru in 1947 in which each State claimed a maritime zone of at least 200 nautical miles."[1]

4. Even though Chile claims to base itself on "the ordinary meaning" of the clear text[2] of the Declaration of Santiago, it is confronted with major difficulties in using this instrument to that end since the Declaration says nothing which can be interpreted as the will of the participating States to delimit the maritime boundary between Peru and Chile. The Declaration established the guidelines for a common maritime policy of the signatory States with a primarily economic purpose[3]. Its point II is clearly and manifestly only devoted to proclaiming as a norm of the signatory States' international maritime policy that they each possess a zone of sovereignty extending 200 nautical miles from their coasts without any mention of delimitation between them; point IV concerns, on the one hand, the entitlement of islands to a maritime zone and, on the other hand, the limits of the maritime zone of certain islands. But the Parties to the present case agree that there is no relevant island as far as their maritime boundary is concerned, thus rendering point IV irrelevant as between Peru and Chile.

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1 Counter-Memorial of the Government of Chile (hereinafter "CCM"), para. 1.3 (bold letters in the original; footnotes omitted).

2 See e.g., CCM, paras. 2.6, 2.223 and 4.10-4.16.

3 See Memorial of the Government of Peru (hereinafter "PM"), para. 4.67.

5. Chile is conscious of the weakness of its textual and contextual argument based on the Declaration of Santiago, and it puts the emphasis on "[s]ubsequent agreements between Chile and Peru, as well as the two States' unilateral and bilateral practice"[4]:

> "Both States acknowledged that boundary in their subsequent agreements and practice. This historical continuum is crucial to a proper understanding of the Parties' agreed boundary."[5]

Not only does such an approach not confirm the "ordinary meaning" of the Declaration of Santiago, but also Chile bases itself on an overly extensive definition of the relevant "subsequent agreements and practice", as Peru will show again in this Reply[6].

6. In the first place, the boundary which is supposed to have been fixed by the Declaration of Santiago turns out under Chile's thesis to be the result not of one treaty but of the combination of four instruments:

> "Chile's case is that Chile and Peru fully and conclusively delimited their maritime entitlements in the Santiago Declaration of 1952. *That treaty is to be read together with the Lima Agreement of 1954, and in the context of the concordant proclamations made by the Parties in 1947.*"[7]

Following Chile's argument, the delimitation process would have started with unilateral declarations which do not entirely coincide, would have continued with a provisional declarative instrument containing general principles of

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4 CCM, para. 3.3.

5 CCM, para. 4.1.

6 See Chapters III and IV of this Reply (hereinafter "PR") below.

7 CCM, para. 4.1 (emphasis added). By "the Lima Agreement of 1954" Chile refers to the 1954 Agreement relating to a Special Maritime Frontier Zone.

"policy"[8], and would have gone on with an agreement which had a very specific purpose and was geographically limited, this all being probative only if viewed in the very large context of an uncertain subsequent practice.

7. In other words, according to Chile, the maritime boundary would have been drawn implicitly without any clear intent of the interested States to do so. The boundary would have emerged from a practice "confirming" a delimitation, the date and origin of which remain indeterminate.

8. It is indeed striking how much Chile relies on "assumptions", "presuppositions" and "implications" to make its case. To give an example, according to Chile, point IV of the Declaration of Santiago – the basis on which the whole Chile's case rests – can only be interpreted on the basis of a "presupposition":

> "Stated differently, the use of parallels of latitude to limit the zone of an 'island or group of islands' *presupposes*, and may be explained only on the basis, that the general maritime zones are also delimited by the same parallels of latitude."[9]

More generally, and more fundamentally, Chile infers from the use of the *tracé parallèle* method in 1947 by one of the Parties for defining the outer limit of the 200-nautical-mile zone that the parallel of latitude "must be" the lateral boundary[10]; it assumes that since the Parties have agreed on practical

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[8] The word is used in point II of the Declaration of Santiago: "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." (emphasis added). (Spanish text: "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." (Emphasis added)) **PM, Annex 47**.

[9] CCM, para. 2.82 (emphasis added).

[10] CCM, para. 2.34.

arrangements concerning coastal fishing activities, they have, by the same token, accepted or "confirmed" an all-purpose boundary between their respective maritime domains[11]; and Chile even concedes that "a number of authors have taken the view that the Santiago Declaration set forth, *or at least implied*, claims to 200M territorial seas"[12].

9. It therefore appears that, *faute de mieux*, Chile is reduced to building an "interpretative case" which is hardly appropriate to establish a claim of an all-purpose maritime boundary fixed once and for all, almost 60 years ago by an instrument alleged to have clearly established a boundary in its own terms according to their ordinary meaning. Moreover, this interpretation itself is based on a very wide conception of the "context" of not only one but four instruments, whose legal nature is questionable, and which have no relevance for delimitation matters. It is based on audacious assumptions, presuppositions and implications.

10. The Chilean way of building its case has deeper implications: it is simply unsustainable that a maritime *boundary* – that is a line which is supposed to define the respective areas over which the signatories of the Declaration of Santiago enjoy sovereignty and jurisdiction – could result from an alleged practice implying or presupposing its existence.

11. In this respect, it may be recalled that, in connection with issues relating to the land boundary between two States, the Court has noted "that the theory of historical consolidation is highly controversial and cannot replace the established modes of acquisition of title under international law, which take

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[11] CCM, para. 3.3. See also CCM, Figure 21 "Boundary *implied* by Peru's report of the Diez Canseco incident" (1966), plotted on an extract of Peruvian Chart 325 (emphasis added).

[12] CCM, para. 2.71 (emphasis added).

into account many other important variables of fact and law."[13] What is true for land boundaries, also holds true for maritime delimitation – and all the more so, given that:

(a) While the land boundary, by necessity, must exist, it is acceptable, and quite frequent in practice, to leave maritime areas undelimited; and

(b) *Effectivités*, which can play a subsidiary function in the delimitation of a land boundary absent a clear title, have a much reduced role in the establishment of maritime boundaries[14].

12. The cavalier legal construction offered by Chile is clearly unacceptable as a matter of principle in any event since it cannot be envisaged that a maritime (or a land) boundary would be drawn "by chance", according to the vagaries of fluctuating and uncertain practices. In the present case, this approach is even more extraordinary in so far as it implies that Peru would have accepted that its maritime domain was amputated by not less than 118,467 square kilometres[15] – without any express consent and, actually, without realizing it

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13 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 352, para. 65.

14 See e.g.: *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Decision of 11 April 2006, United Nations Reports of International Arbitral Awards (RIAA), Vol. XXVII, p. 242, para. 366. See also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 51, para. 96; *Fisheries case, (United Kingdom* v. *Norway), Judgment of December18th, 1951: I.C.J. Reports 1951*, p. 132; *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 22, para. 49; *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 191, para. 41. See also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, pp. 66-67, para. 87.

15 See PM, Figure 6.10, at p. 241.

at all – and it ignores, as between the Parties, that the Declaration of Santiago *expressis verbis* recognizes 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."[16]

Spanish text reads as follows:

> "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."

13. Not only is such an approach legally inaccurate and grounded on completely untenable assumptions, it is also fundamentally contemptuous in that it assumes that Peru would have accepted such an unbalanced delimitation by which it would have ceded a huge part of its maritime domain. In other words, not only does the Chilean line constitute in itself an inequitable delimitation depriving Peru of a huge maritime area over which Peru enjoys sovereign rights and jurisdiction, but Chile also denies that Peru is entitled to a large part of its maritime domain which lies within 200 nautical miles from its own coast (and therefore is not part of the high seas), but is beyond that distance from Chile's coast (this is the "outer triangle"), and over which Chile cannot have any claim whatsoever.

14. This disregard for Peru's rights is also apparent in another remarkable aspect of the Chilean Counter-Memorial, which does not make any attempt to discuss the line proposed by Peru in conformity with the well-established principles

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[16] 1952 Declaration of Santiago, point II. **PM, Annex 47**.

of the law of the sea. Disdainful as it is, this silence could be interpreted as a haughty concern for consistency – in that it might seem in line with the (erroneous) position of Chile that the boundary has been agreed. But the real reason is most probably not this one; it lies more in the refusal by Chile to discuss the flagrant and fundamental inequity of the line it claims in contrast with the equitable character of Peru's line, which is based on the principle of equidistance and, in the absence of any special circumstance, allocates to each Party an equal part of the natural resources of the disputed area without cutting off the respective coasts and harbours of the Parties from their access to the high seas.

15. Chile's case is also artificial in that it invents a non-existing dispute by putting into question the long-standing agreement between the Parties concerning the endpoint of the land boundary (Point Concordia – i.e., the starting-point of the sea boundary to be decided by the Court) that Chile now assimilates with the first marker on the land boundary (*Hito No. 1*). This is in clear contradiction with the explicit terms of the Treaty for the Settlement of the Dispute Regarding Tacna and Arica, and its Additional Protocol (hereinafter "1929 Treaty of Lima")[17] and the 1930 demarcation process.

16. Artificiality, disingenuousness and inequity: these are the fundamental traits characterising the Chilean thesis as exposed in the Counter-Memorial.

II. Peru and the Law of the Sea

17. In its Counter-Memorial Chile also tries to distort the real nature of Peru's 200-nautical-mile maritime domain.

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[17] Treaty for the Settlement of the Dispute Regarding Tacna and Arica, with Additional Protocol, signed on 3 June 1929. **PM, Annex 45**.

18. Peru, like Chile, took an active part in the process of the creation of the modern law of the sea. Both countries were amongst the pioneers in the policy of claims that led to the general acceptance of the coastal State's maritime rights extending up to a distance of 200 nautical miles from its coast. That principle responds to the interest of coastal States to preserve, explore and exploit the resources of the sea adjacent to their coasts in that extend for the benefit of their people. The recognition in the 1982 United Nations Convention on the Law of the Sea (hereinafter "1982 Convention on the Law of the Sea") of coastal States' sovereign rights over the exclusive economic zone and over the continental shelf – legally defined and, for the essential part, not conditioned by its geomorphology – constituted a victory for Peru and the other American South Pacific States[18].

19. Peru's consistent position, stated in the Third United Nations Conference on the Law of the Sea (hereinafter "UNCLOS III"), is that, in absence of any special circumstance, the delimitation of the territorial sea, exclusive economic zone and continental shelf between adjacent States should be made by means of an equidistance line, in order to reach an equitable result[19].

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[18] See Joint Declaration of the Representatives of Chile, Colombia, Ecuador and Peru at the Third United Nations Conference on the Law of the Sea, 28 April 1982. **PM, Annex 108**.

[19] In the framework of Working Group 7 on the territorial sea, exclusive economic zone and the continental shelf of UNCLOS III, Peru submitted the following informal proposals: NG7/6 (24 April 1978). **PR, Annex 61**; NG7/14 (8 May 1978). **PR, Annex 63**; NG7/34 (6 April 1979). **PR, Annex 64**; NG7/36 (11 April 1979, together with Mexico). **PR, Annex 67**; and NG7/36/Rev.1 (18 April 1979, together with Mexico). **PR, Annex 68**. The discussions on said proposals can be found in: Third United Nations Conference on the Law of the Sea Negotiating Group 7, Meetings: 5th (25 April 1978), p. 2. **PR, Annex 62**; 37th (6 April 1979), p. 8. PR, **Annex 65**; 38th (6 April 1979), pp. 2-3. **PR, Annex 66**; 41st (18 April 1979), pp. 15-16. **PR, Annex 69**; and 50th (17 August 1979), p. 7. **PR, Annex 70**. It is also worth noting the Declaration of the Head of the Peruvian Delegation, Ambassador Alfonso Arias-Schreiber at the 139th Plenary Meeting of UNCLOS III, 27 August 1980. *Official Records of the Third United Nations Conference on the Law of the Sea*, Vol. XIV, para. 164, document A/CONF.62/SR.139. **PM, Annex 107**. See also: Statement of the Head of the Peruvian Delegation, Ambassador Alfonso Arias-Schreiber, at the 182nd Plenary Meeting of UNCLOS III, 30 April 1982. United Nations, *Official Records of the Third United Nations Conference on the Law of the Sea*, Vol. XVI, para. 88, document A/CONF.62/SR.182. **PR, Annex 71**.

20. In view of the new maritime zones that were being discussed in UNCLOS III, the 1978-1979 Peruvian Constituent Assembly adopted a flexible wording for referring to the maritime area adjacent to Peru's coast. The notion of "maritime domain" enshrined in the 1979 Political Constitution of Peru represents a general concept that cannot be understood as a 200-nautical-mile territorial sea. Following intense debates, this position was officially and openly expressed by Luis Alberto Sánchez, President of the 1978-1979 Constituent Assembly's Principal Commission: "The State Constitution has adopted, with great prudence and realism, a flexible formula on our marine space."[20] Equally, Andrés Townsend, President of the Special Commission for the issues of State, Territory, Nationality and Integration, explained that the wording adopted in the 1979 Political Constitution was aimed at making it possible for Peru to be a Party to the 1982 Convention on the Law of the Sea: "the formula … maintains the option of adopting the international treaty that ecumenically defines the rights in the sea."[21]

21. The 1993 Political Constitution of Peru adopted the same principle. According to Article 54, within its maritime domain – which includes the sea adjacent to its coasts, as well as the seabed and the subsoil up to a distance of 200 nautical miles from the baselines – Peru "exercises sovereignty and jurisdiction, without prejudice to the freedom of international communications, pursuant to the law and the treaties ratified by the State."[22] In establishing such limitations to the exercise of the State' rights, the Constitution clearly reveals the nature of Peru's "maritime domain" in terms that cannot be equated with the concept of territorial sea, where third States only have a right of innocent passage.

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20 Sánchez, Luis Alberto: "Sobre las 200 millas", article published in Peruvian Journal *Expreso* of 23 October 1982, p. 15. **PR, Annex 85**.

21 Interview to Andrés Townsend in Peruvian Journal *El Comercio* of 28 January 1979, p. 4. **PR, Annex 84**.

22 Art. 54, para. 3 of the Political Constitution of Peru of 1993. (Spanish text: "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."). **PM, Annex 19**.

22. In this connection, it is worth mentioning that the nature of the "maritime domain" was underscored in the Report on Oceans and the law of the sea addressed in October 1998 by the Secretary-General of the United Nations to the General Assembly. The Report emphasizes that this concept is not comparable to the territorial sea because Peru's maritime domain includes the express recognition of the freedom of international communications. It reads as follow:

> "One Latin American State, a non-party to the Convention, claims a single 200-nautical-mile area called a 'maritime domain' expressly recognizing freedoms of navigation and overflight beyond 12 miles. For this reason, the maritime area of that State is listed in a separate category under 'others' instead of being classified as a territorial sea extending beyond 12 nautical miles."[23]

23. In May 2001 the President of the Council of Ministers and Minister of Foreign Affairs, Javier Pérez de Cuéllar, submitted Peru's accession to the 1982 Convention on the Law of the Sea to the Congress for approval. This was possible due to the flexible nature of Peru's "maritime domain" as established in the Constitution of 1993[24]. This request is under analysis by the Peruvian Congress and it has been the subject of discussions by the Congress Committees of Foreign Affairs and Constitutional Affairs.

24. Peruvian law is also consistent with international law when it refers to 200 nautical miles of "jurisdictional waters" and not to "territorial waters" or

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[23] Report of the Secretary-General on Oceans and the law of the sea, 5 October 1998. In: United Nations, General Assembly, Fifty-Third Session, agenda item 38 *(a)*, document A/53/456. **PR, Annex 73**.

[24] See Official Letter RE (TRA) No. 3-0/74 of 30 May 2001, from the President of the Council of Ministers and Minister of Foreign Affairs of Peru to the President of the Congress. **PR, Annex 15.** See also Supreme Resolution No. 231-2001-RE of 28 May 2001. **PR, Annex 14**.

"territorial sea". The General Fisheries Law of 1992 refers to the resources existing "in the jurisdictional waters" of Peru and contains provisions on the fisheries management, extraction, maximum catch allowed and share on surplus, scientific research, and fishing by foreign flag vessels, which are fully consistent with the provisions of the 1982 Convention on the Law of the Sea relating to the exclusive economic zone, in particular articles 62 and 63[25].

25. Furthermore, at the multilateral level, it must be pointed out that a number of instruments to which Peru is a party allude to the 1982 Convention on the Law of the Sea as a reference framework[26]. At the same time, it is important to note that several bilateral treaties concluded by Peru refer to the existence of maritime areas under the "sovereignty" or "sovereign rights and jurisdiction" of Peru in accordance with international and domestic law[27].

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[25] See in particular Articles 2, 8 and 9 of Law Decree No. 25977 of 7 December 1992, General Fisheries Law. **PR, Annex 11.**

[26] Some examples are the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 1973; International Convention on Maritime Search and Rescue (SAR), 1979; International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC), 1990; Inter-American Convention for the Protection and Conservation of Sea Turtles, 1996; and the Agreement on the Conservation of Albatrosses and Petrels, 2001. Moreover, Peru has actively participated in the negotiations of the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (OROP), adopted in Auckland, New Zealand, 2009. Available at: <http://www.southpacificrfmo.org/assets/Convention-and-Final Act/2353205v2-SPRFMOConvention-textascorrectedApril2010aftersignatureinFebruary2010forcertificationApril2010.pdf> accessed 8 October 2010. Peru signed OROP and deposited a declaration recognizing the application of the 1982 Convention on the Law of the Sea as international customary law. Peru's declaration also contains a disclaimer regarding maritime boundaries.

[27] Illustrative examples of this point are: Peru-United States Trade Promotion Agreement, 2006. **PR, Annex 40**; Free Trade Agreement between the Government of the Republic of Peru and Canada, 2008. **PR, Annex 42**; Free Trade Agreement between the Government of the Republic of Peru and the Government of the Republic of Singapore, 2008. **PR, Annex 43**; and Free Trade Agreement between the Government of the Republic of Peru and the Government of the People's Republic of China, 2009. **PR, Annex 44**.

26. For example, the Free Trade Agreement between Peru and Chile of 2006 defines Peruvian territory as comprising: "the mainland territory, the islands, the maritime spaces, and the airspace above them, under its sovereignty or sovereign rights and jurisdiction, in accordance with international law and its domestic law"[28]. This definition, in a bilateral treaty concluded between Peru and Chile, is particularly relevant since Chile recognizes that Peru enjoys sovereignty and sovereign rights and jurisdiction in accordance with its Political Constitution and international customary law, in the spaces corresponding to its maritime domain. It is worth noting that this Agreement superseded the 2000 Agreement on the Promotion and Reciprocal Protection of Investments between both countries, which provided: "'Territory' comprises, in addition to the areas lying within the land boundaries, the adjacent maritime zones and the air space in which the Contracting Parties exercise sovereignty and jurisdiction, in accordance with their respective legislations and international law"[29].

III. Historical Background

27. Peru disagrees with the Chilean assertion that the historical background predating the 1929 Treaty of Lima included in the Memorial is irrelevant to this case. For Peru, it is a fundamental fact to be underscored that when it gained its independence, it did not share boundaries with Chile. Therefore, it

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[28] Free Trade Agreement between the Government of the Republic of Peru and the Government of the Republic of Chile, signed on 22 August 2006, entered into force on 1 March 2009. Article 2.2: Paragraph *(a)*. (Spanish text: "Artículo 2.2: Definición Específica por País. Territorio significa: *(a)* con respecto al Perú, el territorio continental, las islas los espacios marítimos y el espacio aéreo bajo su soberanía o derechos de soberanía y jurisdicción, de acuerdo con el derecho internacional y el derecho nacional"). **PR, Annex 41**.

[29] Agreement between the Government of the Republic of Peru and the Government of the Republic of Chile on the Promotion and Reciprocal Protection of Investments, signed on 2 February 2000, entered into force on 3 August 2001. Article 1. para. 3. (Spanish text: "'Territorio' designa, además de las áreas enmarcadas en los límites terrestres, las zonas marítimas adyacentes y el espacio aéreo en los cuales las Partes Contratantes ejercen soberanía y jurisdicción, de acuerdo a sus respectivas legislaciones y al derecho internacional."). **PR, Annex 39**.

resulted of paramount importance to analyse the circumstances leading both countries to be neighbours on account of the War of the Pacific and to provide the backgrounds that led to the 1929 Treaty of Lima, wherein the Peruvian-Chilean land boundary was definitely settled, with Point Concordia being the starting-point.

28. The historical background provided by the Memorial also demonstrated that, along the history of the bilateral relations, the commitments that Chile had made towards Peru in the 1929 Treaty of Lima were fulfilled only seven decades later[30].

29. Peru dissents with Chile's interpretation on certain historical events. On this respect, Peru's position has been clearly stated in its Memorial, thus, it is not necessary to address this issue again.

IV. General Outline of the Reply

30. Chapter I of this Reply deals briefly with the questions of jurisdiction and admissibility of the Peruvian Application that Chile raises in its Counter-Memorial without drawing clear consequences from them. It shows that as a result of trying to establish that Peru's claims are excluded from the jurisdiction of the Court or that the Application is inadmissible in some respect, Chile –

(a) incorrectly asserts there is no dispute between the Parties as to the very existence (and, consequently and *a fortiori*, the direction) of the boundary between the maritime areas over which they exercise sovereign rights and jurisdiction;

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[30] PM, paras. 1.32-1.37.

(b) misinterprets both Article VI of the American Treaty on Pacific Settlement (hereinafter "Pact of Bogotá") and Peru's case; and

(c) wrongly puts into question the very notion of Peru's maritime domain.

31. In Chapter II, Peru answers Chile's artificial new argument concerning the starting- point for the maritime delimitation which is, on its face, incompatible with the 1929 Treaty of Lima, the work of the Peruvian-Chilean Limits Demarcation Joint Commission (hereinafter "Joint Commission") and its Final Act of 21 July 1930, and the subsequent practice of the Parties. It shows in particular that any maritime boundary between the Parties cannot start from the first Boundary Marker erected by that Commission in 1930 (*Hito No. 1*) but rather must start from the intersection of a 10-kilometre radius arc centred upon the bridge over the river Lluta with the seashore (Point Concordia).

32. Chapter III addresses the core argument of Chile according to which the 1952 Declaration of Santiago would have "fully and conclusively delimited [the signatories' respective] maritime entitlements"[31]. It discusses the genesis and legal nature of that instrument in itself and in relation with the previous (but not entirely concordant) claims issued by the two Parties in 1947, and provides an in depth analysis of its content. This analysis shows unequivocally that the Declaration can in no way be viewed as a boundary agreement.

33. Moreover, as shown in Chapter IV, even though the Declaration of Santiago has come to be considered as a treaty, the practice of the Parties after 1952, including the six agreements concluded at the Lima Conference in 1954, does not change the picture: no maritime boundary has been agreed between Chile and Peru, as is confirmed by Chile's own practice including its response to

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[31] See para. 6 above.

Peru's 1986 invitation to negotiate such a boundary. The cartographic material corroborates this conclusion.

34. Chapter V reiterates Peru's views as to the principles applicable to the delimitation of the maritime boundary between the Parties and explains why, in the absence of any special circumstance, it should follow the equidistance line. In sharp contrast with the Chilean line, which follows a parallel of latitude, the boundary proposed by Peru fully satisfies the test of proportionality and achieves an equitable result.

35. Chapter VI revisits Peru's submission concerning its entitlement to a maritime domain extending up to 200 nautical miles from its own coast (including the "outer triangle", which is situated beyond 200 nautical miles from Chile's coasts), in accordance with the modern international law of the sea and shows that it is an entirely appropriate and well-founded submission, which stands on its own. This chapter further demonstrates that Chile can have no claim whatsoever over this outer triangle.

36. In accordance with the Court's Practice Direction II, Chapter VII of this Reply provides a short summary of Peru's reasoning in the case.

37. Following the Summary in Chapter VII, Peru presents its Submissions. In accordance with Article 50 of the Rules of the Court, Peru's Reply also contains one (1) volume of documentary annexes (Volume II) together with a volume of maps and figures (Volume III). A list of 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

JURISDICTION AND ADMISSIBILITY

I. Introduction

1.1 Chile does not formally raise objections to the jurisdiction of the Court or the admissibility of Peru's Application; nor do Chile's submissions claim that the Court is without jurisdiction or that the Application is inadmissible. However, it devotes a full section of the Introduction of its Counter-Memorial to discussing "Issues of Jurisdiction and Admissibility" in which it contends that "Peru's Pleaded Case Seeks to Reopen Matters Agreed in Treaties"[32] and, in some respect, Chile's Submission *(b)* (i) echoes that contention[33].

1.2 According to Chile:

- Peru has contrived a dispute;
- Article VI of the Pact of Bogotá excludes any issues regarding the land border from the jurisdiction of the Court; and

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[32] CCM, Chapter I, Section 5, paras. 1.60-1.76.

[33] "Chile respectfully requests the Court to … (b) ADJUDGE AND DECLARE that: (i) the respective maritime zone entitlements of Chile and Peru have been fully delimited by agreement". CCM, p. 305.

- rather obscurely, "Peru's pleaded claims" are inadmissible since they bear upon Peru's "maritime dominion".

1.3 Although it is not clear whether these allegations concern issues of jurisdiction and admissibility properly speaking or belong to the merits, Peru will briefly show in the present chapter that none of them bars the jurisdiction of the Court or renders Peru's claims inadmissible. The substantive issues linked with each of these points will be dealt with in subsequent chapters.

II. Chile's Allegation that "Peru Has Contrived a Dispute"

1.4 Chile alleges that "Peru's application to the Court in the present case is the culmination of Peru's recent attempts to unsettle an agreed maritime boundary. … There is no *bona fide* dispute here. Peru simply willed a controversy into being by unilaterally denying that an agreed delimitation has been effected by the Santiago Declaration and confirmed by the Lima Agreement."[34]

1.5 Although Chile does not draw any conclusion from these grave assertions, they are made under a sub-section entitled "Issues of Jurisdiction and Admissibility". It may be laying the ground for saying that there is no dispute between the Parties in the legal sense[35] and that, therefore, the Court has no jurisdiction in accordance with Article 36 of its Statute.

1.6 These purely self-serving allegations do not deserve a long rebuttal – at least at this stage: they will be disproved as necessary in the subsequent chapters of this Reply which are devoted to discussing the substance of the case since one

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[34] CCM, para. 1.60.

[35] See the well known definition of a dispute in *The Mavrommatis Palestine Concessions* case: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons". Judgment of 30 August 1924, *P.C.I.J., Series A, No. 2*, p. 11.

of the main subject-matters of the dispute precisely is to determine whether the Parties have agreed to delimit their respective maritime areas by the Declaration of Santiago. Chile's case is that they have; Peru's case is that they have not (and, indeed, they have not, as will be shown below).

1.7 It is certainly true that "it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its nonexistence"[36] and that "[w]hether there exists an international dispute is a matter for objective determination"[37]. But, in the present case, there can be no doubt that "the Parties are in disagreement, both on the law and on the facts"[38], on the question whether the Declaration of Santiago constitutes a maritime boundary agreement.

1.8 As a matter of fact, Peru and Chile have a major disagreement regarding the nature and the purpose of the Declaration of Santiago. In the Memorial, Peru has shown that the Declaration of Santiago was conceived as an international maritime policy instrument. It served primarily an economic objective and focused on the protection of the natural resources of the three participating States. For this purpose the Declaration of Santiago asserted the existence of a 200-nautical-mile maritime zone of exclusive sovereignty and jurisdiction.

1.9 In its Counter-Memorial, Chile has taken a fundamentally different view. According to Chile, the Declaration of Santiago is a multilateral treaty that constitutes a maritime boundary agreement establishing lateral maritime

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36 *South West Africa Cases (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment of 21 December 1962: I.C.J. Reports 1962*, p. 328.

37 *Interpretation of Peace Treaties, Advisory Opinion: I.C.J. Reports 1950,* p. 74. See also *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, *Judgment of 11 September 1992, I.C.J. Reports 1992*, p. 555, para. 326.

38 *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 100, para. 22.

boundaries between the three participating States. Chile asserts that the lateral delimitation of the maritime boundary between the participants was "within the object and purpose of the Santiago Declaration."[39] It further contends that the alleged maritime boundary follows "the parallel at the point at which the land frontier of the States concerned reaches the sea"[40] partially quoting point IV of the Declaration of Santiago.

1.10 Moreover, the existence of a legal dispute between the Parties has been formally acknowledged by their respective Ministers of Foreign Affairs in 2004 in a Joint Communiqué:

> "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 ..."[41]

1.11 According to Chile there is "no *bona fide* dispute here" since Peru has "simply willed a controversy into being by unilaterally denying that an agreed delimitation has been effected by the Santiago Declaration and confirmed by the Lima Agreement."[42] Although it is of little help to accuse the other party in legal proceedings of acting *mala fide*, Peru could all too well make the same accusation against Chile: there is, indeed no *bona fide* dispute here, since Chile, after having indicated that it would carry out studies on this matter[43], at a late stage and artificially built a case according to which there exists a boundary line accepted by Peru to its considerable disadvantage without ever having consented to it.

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39 CCM, para. 4.22.

40 CCM, para. 1.3.

41 Joint Communiqué of the Ministers of Foreign Affairs of Peru and Chile, Rio de Janeiro, 4 November 2004. **PM, Annex 113**.

42 CCM, para. 1.60. See footnote 7 above.

43 See the Official Communiqué from the Ministry of Foreign Affairs of Chile of 13 June 1986. **PM, Annex 109**.

III. Peru's Claims Are Not Excluded from Reference to the Court by the Pact of Bogotá

1.12 The second "jurisdictional point" made by Chile – but not as a preliminary objection and perhaps not as an objection *tout court* – is as follows –

> "… the Parties' land boundary, including issues regarding what Peru now calls 'Point Concordia', are 'matters which are governed by agreements or treaties in force on the date of the conclusion of the [Pact of Bogotá]' within the meaning of Article VI. The land boundary was agreed in 1929 and was fully determined and marked in 1930, well before 1948. The Pact of Bogotá does not permit Peru to agitate these long-closed matters before the Court."[44]

1.13 This argument is based on distortions, on the one hand, of Article VI of the Pact of Bogotá (A.) and, on the other hand, of Peru's argument (B.).

A. Chile's Distortion of Article VI of the Pact of Bogotá

1.14 Article VI of the Pact of Bogotá applies *inter alia* to issues that "are governed by agreements or treaties in force on the date of the conclusion of the present Treaty" (that is 30 April 1948)[45]. This is precisely what the 1929 Treaty of Lima and the 1930 agreement to determine the boundary line and place the corresponding boundary markers (hereinafter "1930 Identical Instructions")[46] do in the present case by providing that the land boundary starts at Point Concordia, a point located "ten kilometres northwest from the first bridge

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44 CCM, para. 1.71 (footnotes omitted).

45 Pact of Bogotá, Art. VI. **PM, Annex 46**.

46 Agreement to Determine the Boundary Line and Place the Corresponding Boundary Markers at the Points in Disagreement in the Peruvian-Chilean Limits Demarcation Joint Commission of 24 April 1930 (Identical Instructions Sent to the Delegates). **PM, Annex 87**.

over the River Lluta of the Arica-La Paz railway"[47]. But it does not provide the answer to the question as to what are the precise co-ordinates of Point Concordia which Chile seeks to put in issue. In other words, the 1929-1930 land delimitation and demarcation process addresses the question of the starting-point of the land boundary. However, Chile's new position consists in challenging that the 1929-1930 common decisions settle the question of its precise location.

1.15 In this respect, the present case can usefully be compared with the *Nicaragua* v. *Colombia* case, in that there the Court noted that the 1928 Treaty concerning Territorial Questions at Issue between Colombia and Nicaragua expressly recognized the sovereignty of Colombia over the islands of San Andrés, Providencia and Santa Catalina but also, more vaguely, over "other islands, islets and cays that form part of the Archipelago of San Andrés"[48]. However, the Court went on to state "that it is clear on the face of the text of the first paragraph of Article I of the 1928 Treaty that *its terms do not provide the answer to the question as to which maritime features* apart from the islands of San Andrés, Providencia and Santa Catalina *form part of the San Andrés Archipelago* over which Colombia has sovereignty."[49] In other words, according to the Court in that case, the 1928 Treaty had addressed the question of the sovereignty over the San Andrés Archipelago but had not settled the question of its precise composition. For this reason, the Court considered that "*this* matter has not been settled within the meaning of Article VI of the Pact of Bogotá and [it] has jurisdiction under Article XXXI of the Pact of Bogotá."[50] Similarly, in the present case, given that Chile has recently

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47 Final Act of the Commission of Limits Containing the Description of Placed Boundary Markers of 21 July 1930. **PM, Annex 54**. See also Article 2 of the 1929 Treaty of Lima. **PM, Annex 45**.

48 *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 855, para. 66.

49 *Ibid.*, p. 863, para. 97 (emphasis added).

50 *Ibid.* (Emphasis added).

put into question the precise location of Point Concordia, it has raised a dispute between Peru and Chile concerning the co-ordinates of the starting-point of the land boundary – which correspond to the starting-point of the maritime boundary – and the Court has jurisdiction to settle it under Article XXXI of the Pact of Bogotá notwithstanding the final delimitation and demarcation of the land boundary of 1929-1930.

1.16 Although Article VI of the Pact of Bogotá excludes from the Court's jurisdiction decisions on "matters … which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty" (that is 30 April 1948), it does not prevent the Court from applying or interpreting a treaty, whatever the date of its entry into force. Article XXXI is worded in clear terms and 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 …"

This provision must be appropriately interpreted.

1.17 Moreover, in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, the Court considered that –

> "… it is clear on the face of the text of Article I that the matter of sovereignty over the islands of San Andrés, Providencia and Santa Catalina has been settled by the 1928 Treaty within the

> meaning of Article VI of the Pact of Bogotá. In the Court's view there is no need to go further into the interpretation of the Treaty to reach that conclusion and there is nothing relating to this issue that could be ascertained only on the merits."[51]

A contrario, this seems to show that had there been a need to "go further into the interpretation" of the 1928 Treaty between Colombia and Nicaragua, the Court would have decided that it had jurisdiction to do so notwithstanding Article VI of the Pact of Bogotá.

1.18 In the present case, Peru in no way calls into question the land delimitation which was agreed between the Parties when they concluded the 1929 Treaty of Lima and demarcated the following year; on the contrary, in its Memorial, Peru fully acknowledged its crucial importance as a land border agreement[52]. Nor does Peru object to the co-ordinates of Boundary Marker No. 1 (*Hito No. 1*), nor that it is the boundary marker closest to the sea. On these points, which were decided in 1929 and 1930, there is no dispute between the Parties. What Peru cannot accept is the identification of Boundary Marker No. 1 as the starting-point of the land boundary, which clearly is not in accordance with the 1929 Treaty of Lima and the agreement reached by the two Governments during the process of demarcation. In this regard, the starting-point of the land boundary is Point Concordia, as established in the 1929 Treaty of Lima. In other words, the dispute now brought before the Court is not on matters which had been settled by agreements or treaties which had entered in force before 1948 but, rather, on Chile's putting nowadays into question the settlement agreed at the time between the Parties.

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[51] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 861, para. 88.

[52] PM, paras. 1.32-1.37.

B. Chile's Distortion of Peru's Case

1.19 According to Chile:

> "Peru's pleaded case requires the Court to pronounce on one matter which the States parties to the Pact of Bogotá did not intend to include within the jurisdiction of the Court, and which the Pact expressly excludes from reference to the Court. That matter is the Parties' agreed land boundary."[53]

Such an allegation is a complete distortion of Peru's case.

1.20 Peru maintains that, as it made clear in its Application[54] and its Memorial[55], and as will be shown again in Chapter II of this Reply, the endpoint of the land boundary – which is, by necessity, the starting-point of the maritime boundary – has been definitely determined by the 1929-1930 agreements. Therefore, the Court can only take note of the fact that the maritime boundary line must start at "Point Concordia" defined as the intersection with the low-water mark of an arc with a 10-kilometre radius, having as its centre the first bridge over the River Lluta of the Arica-La Paz railway.

1.21 However, it is now clear from Chile's Counter-Memorial, that Chile seeks to challenge the agreement of the Parties regarding the endpoint of the land boundary when they agreed on the delimitation of their land boundary by the 1929 Treaty of Lima and the 1930 Identical Instructions[56]. Therefore, for the sake of argument, Peru, while maintaining its view that this alleged

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53 CCM, para. 1.61.

54 Application instituting proceedings of the Republic of Peru, filed before the I.C.J. on 16 January 2008, para. 11.

55 PM, para. 6.46.

56 See CCM, para. 1.61 and PM, para. 6.46.

dispute has been settled, will answer Chile's argument, keeping in mind that, in reality, Peru has not raised any land dispute, but that it is Chile itself which puts into question the land settlement agreed upon at the time.

1.22 In the first place, it is to be noted that Chile insistently refers to "Peru's new Point Concordia."[57] By doing so, it is clear that Chile would like to have the Court think that said point has been invented by Peru in view of the present case. This is a gross distortion of the truth.

1.23 With respect to Point Concordia, Article 2 of the 1929 Treaty of Lima provides as follows:

> "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."[58]

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".

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57 CCM, para. 1.62. See also CCM, para. 1.66.

58 Treaty for the Settlement of the Dispute Regarding Tacna and Arica, with Additional Protocol, signed on 3 June 1929 (emphasis added). **PM, Annex 45**.

1.24 In spite of Chile's conjuring tricks, Point Concordia (agreed by the Parties) cannot be assimilated to *Hito No. 1*[59] as described in the 1930 Identical Instructions given by Peru and Chile to their representatives. As will be shown in Chapter II, the instructions given by the two Governments to the Joint Commission instructed the Commissioners to fix the starting-point of the land boundary on the coast by tracing an arc with a radius of ten kilometres centred upon the first bridge of the Arica-La Paz railway "running to intercept the seashore, so that any point of the arc measures a distance of 10 kilometres from the referred bridge of the Arica-La Paz railway line over the River Lluta. This intersection point of the traced arc with the seashore, shall be the starting-point of the dividing line between Peru and Chile"; but no boundary marker was to be installed in that place: "A boundary marker shall be placed at any point of the arc, as close to the sea as allows preventing it from being destroyed by the ocean waters."[60]

1.25 *Hito No. 1* cannot therefore be erected on the "point at which the land frontier of the States concerned reaches the sea" in order to determine the endpoint of the land boundary and the starting-point for the maritime delimitation: clearly it stems from the definition of *Hito No. 1* that it is not situated on the seashore ("at the point at which the land frontier reaches the sea"), but "as close to the sea as allows preventing it from being destroyed by the ocean waters".

1.26 The difference between *points* and *markers* was again emphasized in the Final Act of the Commission of Limits Containing the Description of Placed Boundary Markers, dated 21 July 1930 and agreed by the two Parties[61].

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59 The "point" is an abstract concept, the geographical location of the terminus of the land boundary. Boundary Marker No. 1 (*Hito No. 1*) is a physical structure. Point Concordia is located at the southwest of Boundary Marker No. 1.

60 See the 1930 Identical Instructions. **PM, Annex 87**.

61 Final Act of the Commission of Limits Containing the Description of Placed Boundary Markers of 21 July 1930. **PM, Annex 54**.

Paragraph 2 of the Final Act gives a broad definition of the demarcated land frontier. It reads as follows:

> "The demarcated boundary line starts from the Pacific Ocean at a *point* on the seashore ten kilometres northwest from the first bridge over the River Lluta of the Arica-La Paz railway, and ends in the Andean mountain range at *Boundary Marker* V of the former dividing line between Chile and Bolivia."[62]

Spanish text reads as follows:

> "La línea de frontera demarcada parte del océano Pacífico en un *punto* en la orilla del mar situado a diez kilómetros hacia el noroeste del primer puente sobre el río Lluta de la vía férrea de Arica a La Paz, y termina en la cordillera andina en el *hito* quinto de la antigua línea divisoria entre Chile y Bolivia."

1.27 It is therefore apparent that:

- Point Concordia was agreed as being the point where the land boundary meets the sea;
- Point Concordia is clearly distinct from the Boundary Marker No. 1 (*Hito No. 1*);
- *Hito No. 1* consequently cannot constitute the terminus point of the land boundary, as Chile contends[63];
- And it follows that *Hito No. 1* cannot in any case be used in order to define "the parallel at the point at which the land frontier of the States concerned reaches the sea"[64] for purposes of maritime delimitation (under Chile's contention that the Declaration of Santiago delimited

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62 Final Act of the Commission of Limits Containing the Description of Placed Boundary Markers of 21 July 1930. **PM, Annex 54**. (Emphasis added).

63 CCM, para. 2.16.

64 1952 Declaration of Santiago, point IV. **PM, Annex 47**.

such a boundary) because that point lies north of Point Concordia in exclusively Peruvian territory.

1.28 It must be further noted that the Declaration of Santiago – which, according to Chile, would have fixed the maritime boundary at the parallel of *Hito No. 1* – was adopted four years after the Pact of Bogotá and this consideration alone and in itself suffices to prevent the possibility that Article VI of the latter could exclude the jurisdiction of the Court.

1.29 In this respect, and this is the second set of remarks which can be made in relation with the distortion of Peru's case by the Respondent, Chile's allegation according to which Peru asserts, "for the first time in its Application in 2008, that the terminal point of the land boundary is not, after all, the one that was agreed and demarcated in 1930, i.e., *Hito No. 1*"[65], as well as the allegation that "[u]ntil Peru sought to unsettle the maritime boundary in recent years, there was never a dispute about the location of that point …"[66] are baffling. Indeed the "unsettler" is Chile, not Peru since it is Chile, not Peru, which "agitate[s] these long-closed matters before the Court."[67]

1.30 In early 2001, the Chilean Navy placed a surveillance booth (*caseta de vigilancia*) between Boundary Marker No. 1 and the seashore, in what is unquestionably Peruvian territory as that territory has been determined by the 1929 Treaty of Lima and the demarcation process of 1930. This booth was placed with the aim of reinforcing the position that had been recently taken by Chile, which claimed that the booth had been placed on Chilean territory south of the boundary which had already been jointly demarcated pursuant to, among other instruments, the documents signed on 26 April 1968 and 19

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65 CCM, para. 1.64 (emphasis added).

66 CCM, para. 1.31.

67 CCM, para. 1.71.

August 1969. Chile's action immediately elicited a protest from Peru[68] and the surveillance booth was removed[69]. There was no need to make a similar protest earlier since there had not been a similar situation before 2001.

1.31 Later, at the end of 2006, Chile tried to bring its internal legislation into line with its newly assumed position on the subject of the terminus point of the land boundary by means of an amendment[70] to the draft law creating the new region of Arica and Parinacota, originally tabled in October 2005[71]. The intention was particularly clear since the original draft included no reference either to Boundary Marker No. 1 or to the parallel of latitude passing through that marker. Again, Peru protested against this amended draft law, because it stipulated that the starting-point of the land boundary was the intersection with the seashore of the parallel passing through Boundary Marker No. 1, rather than Point Concordia on the low-water mark. This is a clear breach of the 1929 Treaty of Lima. Peru requested that its Note of protest be forwarded to the Constitutional Court of Chile, whose approval was needed before the draft law could be enacted[72]. In January 2007, the Chilean Constitutional Court declared that the second paragraph of Article 1 of the draft law as amended, which described the terminus in terms of the abovementioned parallel of latitude passing through Boundary Marker No. 1,

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68 Note (GAB) No. 6/23 of 10 April 2001, from the President of the Council of Ministers and Minister of Foreign Affairs of Peru to the Minister of Foreign Affairs of Chile. **PR, Annex 75**.

69 Note (GAB) No. 6/25 of 12 April 2001, from the President of the Council of Ministers and Minister of Foreign Affairs of Peru to the Minister of Foreign Affairs of Chile. **PR, Annex 77**.

70 See footnote 133 below.

71 See footnote 132 below.

72 Note (GAB) No. 6/4 of 24 January 2007, from the Minister of Foreign Affairs of Peru to the Minister of Foreign Affairs of Chile. **PR, Annex 80.** See also Note (GAB) No No. 6/3 of 10 January 2007, from the Minister of Foreign Affairs of Peru to the Minister of Foreign Affairs of Chile. **PR, Annex 79.**

was unconstitutional and that it should be eliminated from the draft law[73]. The law was finally enacted without any reference to the parallel passing through Boundary Marker No. 1[74].

1.32 In any case, as far as the jurisdiction of the Court is concerned, these considerations are irrelevant. It is certainly true that the calculation of the co-ordinates of the point at which the land border ends on the basis of the agreements concluded in 1929-1930 (Point Concordia) has never been agreed[75]. However,

- this confirms that Chile has manufactured a dispute in this limited respect since Chile expressly states that it "does not recognize Peru's new Point Concordia"[76];
- Chile's recent claim that the terminal point of the land boundary is *Hito No. 1* is inconsistent with the 1929 Treaty of Lima and the work of the Joint Commission, which settled the question;
- the status quo on the terminus point of the land boundary has been recently put into question by Chile; and
- this alleged dispute on the situation of Point Concordia clearly is subsequent to the entry into force of the Pact of Bogotá in 1948.

1.33 The substantive discussion of the Chilean allegations on this issue is in Chapter II of this Reply.

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73 Judgment-Case No. 719 of 26 January 2007, issued by the Constitutional Court of Chile, regarding Draft Law Creating the XV Region of Arica and Parinacota and the Province of Tamarugal, in the Region of Tarapacá. **PR, Annex 31**.

74 See footnote 136.

75 See CCM, para. 1.62.

76 *Ibid.*

IV. Chile's Obscure Allegation that "Peru's Pleaded Claims" Are Inadmissible since They Bear Upon Peru's "Maritime Dominion"

1.34 In paragraphs 1.73 to 1.76 of its Counter-Memorial, Chile endeavours to establish the "Inadmissibility of Peru's Pleaded Claims"[77]. These four paragraphs are very obscure. On their face, they appear to bear upon the law applicable to the dispute more than upon issues of admissibility: Chile seems to deny Peru's right to rely "on UNCLOS Articles 74 and 83 as the legal basis for a delimitation of its 'maritime dominion' [*sic*], because this is not a zone that can be delimited by application of those provisions."[78] In any event, as made clear in Peru's Memorial, Peru does not allege that these provisions are applicable as such; it simply contends that "although not applicable as treaty law *per se*, [they] largely reflect customary international law."[79]

1.35 Another possible reading of Chile's allegations in this respect would be that the customary rules reflected in these provisions bear only upon the continental shelf and exclusive economic zone and that the notion of maritime domain is incompatible with the rules in question. Such an allegation – if it is made – is unsustainable.

1.36 *First*, there is an absolute contradiction between affirming that the Declaration of Santiago validly binds the participants on a supposed date and alleging at the same time that Peru's claim to a maritime domain is not compliant with the 1982 Convention on the Law of the Sea:

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77 CCM, pp. 36-37.

78 CCM, para. 1.73.

79 PM, para. 3.4.

- as Chile itself recalls[80], the participants in the Declaration of Santiago proclaimed that "they each possess exclusive sovereignty and jurisdiction ... to a minimum distance of 200 nautical miles"[81];
- this is the initial basis for Peru's *and Chile's* claims to a maritime domain;
- therefore there can be only one of two solutions: either these claims are compatible with the modern law of the sea and Chile's argument is unfounded; or they are incompatible with the modern law of the sea and the modern law of the sea prevails over the Declaration of Santiago – whatever the legal nature of the latter.

1.37 *Second*, in any case, the notion of maritime domain referred to in the Peruvian Constitution is compatible with the existence of various maritime zones within it, as is apparent from its text and from the debates of both the 1978-1979 Constituent Assembly and the 1993 Constituent Congress. As shown in the Introduction of this Reply above[82], Peru's constitutional and legal rules clearly acknowledge that the exercise of Peru's sovereign rights over its maritime space is subject to international law; and this is confirmed by the Report on Oceans and the law of the sea addressed in October 1998, by the Secretary-General of the United Nations to the General Assembly which emphasizes that the notion of maritime domain is not comparable to that of the territorial sea because it includes the express recognition of the freedom of international communications[83]. It is also confirmed by various agreements entered into by Peru that, when defining the territory in terms of geographic scope of application, expressly state the zones or maritime spaces where Peru exercises sovereignty or sovereign rights and jurisdiction, in accordance

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80 CCM, para. 1.75.

81 1952 Declaration of Santiago, point II. **PM, Annex 47**.

82 See Introduction, paras. 17-26 above. See also Chapter V, in particular paras 5.25-5.27 below.

83 For the full text of the relevant passage, see Introduction, para. 22 above.

with international law and its domestic law. Thus (and it is only one example among many others[84] – but it is directly relevant concerning Chile), Article 2.2 of the 2006 Free Trade Agreement with Chile provides that:

> "Territory means:
> (a) With respect to Peru, the mainland territory, the islands, the maritime spaces, and the airspace above them, under its sovereignty or sovereign rights and jurisdiction, in accordance with international law and its domestic law"[85].

1.38 *Third*, it must be noted that, in its Submissions at the end of its Memorial[86], and reiterated at the end of the present Reply, Peru expressly requests the Court to decide on "[t]he delimitation between the respective maritime zones between the Republic of Peru and the Republic of Chile" without alluding to the notion of maritime domain. And, more specifically in respect to the outer triangle (which is not part of the high seas since it lies within a distance of 200 nautical miles from Peru's baselines), it requests the Court to adjudge and declare that "Peru is entitled to exercise exclusive sovereign rights over a maritime area lying out to a distance of 200 nautical miles from its baselines."

This formula makes clear that Peru claims exclusive sovereign rights and jurisdiction over the water column, seabed and subsoil to which all States are entitled by virtue of the general rules of modern international law of the sea reflected in Articles 74 and 83 of the 1982 Convention on the Law of the Sea.

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84 See footnote 27 above.

85 See footnote 28 above.

86 PM, p. 275.

1.39 *Fourth* and lastly, all these considerations have little to do with issues of jurisdiction of the Court or of admissibility of the Application. They clearly belong to the substance of the case. And Peru will show in the subsequent chapters of this Reply that Chile's allegations are unfounded.

1.40 It is therefore apparent that the Court has jurisdiction to decide fully on all of the submissions made by Peru and that all Peru's claims are admissible. In particular –

(a) there is no question of "contriving a dispute": there clearly *is* a dispute between Peru and Chile as to the delimitation of their respective maritime areas and, in particular on whether or not the Declaration of Santiago was defined as a maritime boundary agreement; and

(b) the existence of such a dispute has been formally acknowledged by Chile;

(c) it is Peru's view that the endpoint of the land boundary (and, consequently, the starting-point of the maritime delimitation) has been fixed in 1929-1930; however,

(d) if Chile maintains its view that the terminal point of the land boundary is *Hito No. 1*, not Point Concordia, the Court should interpret the settlement resulting from the 1929 Treaty of Lima and the demarcation process of 1930 and determine the real point of departure of the sea boundary on which the Parties disagree (that is, the emplacement of "Point Concordia" identified in Article 2 of the 1929 Treaty of Lima and its precise co-ordinates); however,

(e) the "dispute" between the Parties on this point stems from the recent challenge by Chile of the settlement of 1929-1930;

(f) Chile's obscure allegations on Peru's maritime domain are both unfounded and by no means related to the "admissibility" of Peru's claims.

CHAPTER II

THE STARTING-POINT FOR THE MARITIME DELIMITATION

I. Introduction

2.1 For coastal States that share a common land boundary such as Peru and Chile, it is axiomatic that the delimitation of the maritime boundary starts from the terminal point on the land boundary where it meets the sea. Both Parties agree that the location of the terminal point of their land boundary was fixed by the 1929 Treaty of Lima[87], and demarcated by the Peruvian-Chilean Limits Demarcation Joint Commission in 1930 following the identical instructions issued to it by the two Governments. However, Chile disputes the fact that "Point Concordia", which is the name given by the 1929 Treaty of Lima to the point on the coast where the land boundary meets the sea, is the terminal point on the land boundary. Chile accuses Peru of inventing a "new" Point Concordia, and it argues that the terminal point lies at Boundary Marker No. 1 (*Hito No. 1*) (which is not in fact on the coast) instead.

2.2 The consequence of this is that the Parties disagree on the starting-point for the maritime delimitation. As this chapter will demonstrate, Chile's arguments on this issue are without merit.

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[87] See CCM, para. 2.9, where Chile affirms that the 1929 Treaty of Lima "was a definitive settlement of all outstanding land-boundary issues" and PM, para. 6.34.

II. The Incompatibility of Chile's Contentions with the 1929 Treaty of Lima

2.3 It is undisputed that Article 2 of the 1929 Treaty of Lima contains the applicable provision relating to the location of the segment of the land boundary in the vicinity of the sea. The relevant part of Article 2 reads as follows:

> "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."[88]

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".

2.4 Article 2 makes it clear that the land boundary, as would be expected, "start[s] from a point on the coast", and that this point is "to be named 'Concordia'".

2.5 In its Memorial, Peru indicated that the co-ordinates of Point Concordia, based on the 1929 Treaty of Lima and the definition of its location agreed

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[88] Treaty for the Settlement of the Dispute Regarding Tacna and Arica, with Additional Protocol, signed on 3 June 1929 (emphasis added). **PM, Annex 45**.

by the Parties during the demarcation operations in April 1930, are 18°21'08" S, 70°22'39" W WGS84[89]. As the southernmost point on the Peruvian coast, Point Concordia is the last of a series of 266 points included in Peru's baseline system, and therefore bears the name Point 266 within that system[90]. Any maritime boundary between the Parties must necessarily start from Point Concordia.

2.6 Chile's Counter-Memorial adopts a fundamentally different position. According to Chile, the terminal point of the land boundary is not "Point Concordia", but rather "Hito No. 1", which was the first physical boundary marker erected inland from the coast pursuant to the work of the Joint Commission. In the words of the Counter-Memorial, "Hito No. 1 is the seaward terminus of the land boundary as determined by agreement of the Parties."[91]

2.7 This assertion is unsustainable. The Parties never agreed that Boundary Marker (or *Hito*) No. 1 was the seaward terminus of the land boundary. *Hito No. 1* is not situated at a point on the coast as required by Article 2 of the 1929 Treaty of Lima; it is located some 200 metres inland. *Hito No. 1*, therefore, cannot possibly be regarded as the point where the land boundary meets the sea. *Hito No. 1* is no more than one of a number of boundary markers erected at various places along the boundary. It was purposely not situated on the coast in order to prevent it from being washed out to sea. The land boundary thus passes through *Hito No. 1*, but it does not start or stop there. The starting-point for the land boundary is "a point on the coast to be named 'Concordia'". In contrast to Peru, Chile has been unable to indicate where Point Concordia is actually located.

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89 PM, paras. 6.34-6.46.

90 PM, paras. 2.2, 2.8 and 2.13.

91 CCM, para. 2.16.

2.8 Chile's contention that *Hito No. 1* is the terminal point of the land boundary gives rise to two other insurmountable problems.

2.9 *First*, the implication of Chile's contention is that the land boundary between *Hito No. 1* and the actual low-water mark along the coast, some 200 metres away, remains undelimited. This is clearly not the case under the 1929 Treaty of Lima, and it is in contradiction with Chile's own acknowledgement that: "With the Treaty of Lima, the 1930 Final Act and the Act of Plenipotentiaries, all outstanding land-boundary matters were definitively closed."[92]

2.10 *Second*, to the extent that Chile maintains that the maritime boundary lies along the parallel of latitude passing through *Hito No. 1*, this would mean that the maritime boundary either starts at *Hito No. 1* – which is impossible because a maritime boundary cannot start on dry land some 200 metres inland from the coast – or that it starts where that parallel meets the sea. Both scenarios would be inconsistent with the 1929 Treaty of Lima and the work of the Joint Commission in 1930, as well as with Chile's contention that *Hito No. 1* is the terminus of the land boundary.

2.11 The Governmental instructions given in April 1930 to the members of the Joint Commission charged with demarcating the land boundary clearly state that the boundary follows an arc centred upon the bridge over the River Lluta with a radius of 10 kilometres running to its intersection with the seashore, not a parallel of latitude running between *Hito No. 1* and the coast. Chile's contention would have the effect not only of placing the starting-point for the maritime boundary in Peru's territory – a proposition that is obviously untenable – but also of situating it at a location which is more than 10 kilometres from the River Lluta bridge, in contravention of the express terms

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92 CCM, para. 2.16.

of the 1929 Treaty of Lima and the instructions given to the demarcation Joint Commission. It is evident that the Parties would never have agreed on a maritime boundary that had, as its starting-point on the coast, a point located exclusively within Peru's territory or a point that was at odds with the express terms of the 1929 Treaty of Lima.

III. The Work of the Demarcation Joint Commission

A. The Instructions Issued by the Two Governments to the Members of the Demarcation Joint Commission

2.12 While Article 2 of the 1929 Treaty of Lima stipulated that the frontier between the territories of the two Parties "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 did not specify how this line should be plotted and demarcated on the ground. As explained in Peru's Memorial, a dispute arose towards the end of 1929 amongst the Parties' two representatives on the Joint Commission as to how the initial part of the boundary should be delimited and demarcated and how Point Concordia – the starting-point – should be identified[93].

2.13 Peru's representative, Mr. Federico Basadre, took the position that, under the 1929 Treaty of Lima, the last portion of the land boundary starting from the seashore must be traced along an arc in a manner such that any point on the boundary arc would be at a distance of 10 kilometres from the railway bridge over the river Lluta. Chile's representative, Mr. Enrique Brieba, considered

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[93] See PM, paras. 6.38-6.41.

that the boundary should be drawn along a parallel starting 10 kilometres due north of the bridge and proceeding westwards to the sea[94]. Since adoption of the Brieba proposal would have resulted in the seawardmost portion of the boundary lying at a distance of more than 10 kilometres from the bridge, Mr. Basadre was unable to agree to his counterpart's suggestion.

2.14 This difference in positions was illustrated on a map – reproduced here as **Figure R-2.1** – that Mr. Basadre prepared for consultation by the Minister of Foreign Affairs of Peru at the time. As can be seen from the enlargement of the relevant part of the map, Mr. Basadre's position in favour of the 10-kilometre radius arc was depicted in red, Mr. Brieba's proposal for a parallel line was illustrated in blue.

2.15 In view of their disagreement, both delegates agreed to submit the question to their respective Governments on 3 December 1929.

2.16 The matter was solved by the Ministers of Foreign Affairs of Peru and Chile by agreeing the manner in which the first segment of the land boundary should be calculated, and how the first physical boundary marker should be established. On 24 April and 28 April 1930, respectively, the Foreign Ministers provided their joint views on the matter by issuing identical instructions to their delegates on the Joint Commission.

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[94] Memorandum No. 1 of 26 October 1929 on Differences in Concordia, Laguna Blanca and Visviri sent by Peruvian Delegate Federico Basadre to Chilean Delegate Enrique Brieba. In: Brieba, Enrique: *Memoria sobre los Límites entre Chile y Perú. Tomo I: Estudio técnico y documentos*. Santiago de Chile, Instituto Geográfico Militar, 1931, pp. 47-49. **PR, Annex 46**. In accordance with Article 1 of Chilean Decree with Force of Law No. 2090 of 30 July 1930, the *Instituto Geográfico Militar* "will constitute on a permanent basis, the official authority on behalf of the State on all matters concerning geography, survey and production of Charts of the territory." **PR, Annex 18**.

VARIANCE IN THE BOUNDARY POSITIONS TAKEN BY MESSRS. BASADRE AND BRIEBA

ENGLISH TRANSLATION

LEGEND:

- Border line held by the Peruvian Delegate
- Border line held by the Chilean Delegate
- Border line without disagreement, in process of demarcation
- Chupiquiña & Tacora sulfur deposits
- Possible paths from Tacna to Laguna Blanca or the Bolivian border

(signed) Federico Basadre

LEYENDA:

- Linea de frontera sostenida por el Delegado Peruano
- Id. id. id. por el Delegado Chileno
- Linea de frontera sin desacuerdos y que se está demarcando
- Azufreras del Tacora y Chupiquiña
- Caminos posibles de Tacna á Laguna Blanca y á la frontera boliviana

(signed) Federico Basadre

DEPARTAMENTO DE TACNA

Escala 1/250 000

Figure R-2.1

2.17 Chile does not dispute this fact; indeed, it refers to the documentary annex filed by Peru in which the Foreign Ministers' instructions are recorded. The relevant passage from those instructions clearly endorsed Mr. Basadre's position and rejected the notion of a parallel. It reads as follows:

> "Concordia Boundary Marker.- Starting Point, on the coast, of the borderline.-
>
> To fix this point:
>
> Ten kilometres shall be measured from the first bridge of the Arica-La Paz railway, over the River Lluta, running northwards, at Pampa de Escritos, and an arc with a radius of ten kilometres shall be traced westwards, its centre being the aforementioned bridge, running to intercept the seashore, so that any point of the arc measures a distance of 10 kilometres from the referred bridge of the Arica-La Paz railway line over the River Lluta.
>
> This intersection point of the traced arc with the seashore, shall be the starting-point of the dividing line between Peru and Chile.
>
> A boundary marker shall be placed at any point of the arc, as close to the sea as allows preventing it from being destroyed by the ocean waters."[95]

Spanish text reads as follows:

> "Hito Concordia.- Punto Inicial, en la costa, de la línea fronteriza.-
>
> Para fijar este punto:

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[95] Agreement to Determine the Boundary Line and Place the Corresponding Boundary Markers at the Points in Disagreement in the Peruvian-Chilean Limits Demarcation Joint Commission of 24 April 1930 (Identical Instructions Sent to the Delegates). **PM, Annex 87**.

> Se medirán diez kilómetros desde el primer puente del ferrocarril de Arica a La Paz sobre el río Lluta, en dirección hacia el Norte, en la Pampa de Escritos, y se trazará, hacia el poniente, un arco de diez kilómetros de radio, cuyo centro estará en el indicado puente y que vaya a interceptar la orilla del mar, de modo que, cualquier punto del arco, diste 10 kilómetros del referido puente del ferrocarril de Arica a La Paz sobre el río Lluta.
>
> Este punto de intersección del arco trazado, con la orilla del mar, será el inicial de la línea divisoria entre el Perú y Chile.
>
> Se 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."

2.18 A number of points emerge from these instructions which undermine Chile's thesis that *Hito No. 1* is the terminus of the land boundary.

First, in strict accordance with the terms of the 1929 Treaty of Lima, the instructions made it clear that the last sector of the land boundary was to be measured along an arc having a 10-kilometre radius centred upon the River Lluta bridge, such that any point on the boundary was 10 kilometres from the bridge. This disposes of any notion that the land boundary between *Hito No. 1* and the coast followed a parallel of latitude or that it intersected the coast at a distance of more than 10 kilometres from the bridge.

Second, the land boundary was to run far enough so as to "intercept the seashore". As noted above, *Hito No. 1* is not located on the seashore; Point Concordia is.

Third, the intersection of the traced arc with the seashore was the starting-point of the land boundary. This point, as stipulated in Article 2 of the 1929 Treaty of Lima, was to be named "Concordia". It was not *Hito No. 1*, which

is not located at the intersection with the seashore but rather some 200 metres inland, and which is not named "Concordia".

Fourth, the members of the Joint Commission were instructed to place a boundary marker *at any point of the arc, as close to the sea as allows preventing it from being destroyed by the ocean waters*. The instruction to place the boundary marker "at any point of the arc" shows that the marker was not necessarily to be placed at the seaward end of the arc. In fact, the instructions stated the contrary: the boundary marker was to be located close to the sea (not at the sea) so as to prevent it from being destroyed by the ocean waters. Placing the marker right at the coast line would have exposed it to the risk of being washed away.

2.19 Chile's Counter-Memorial refers to the agreed identical instructions given by the Foreign Ministers to their delegates to the Joint Commission in an incomplete and highly misleading manner. According to Chile:

> "The instructions set forth directions as to the course of the first segment of the boundary, stated that a boundary marker (*hito*) would be the 'Starting Point, on the coast [*en la costa*], of the borderline', and gave guidance as to the placement of that *hito* on the coast."[96]

2.20 This is not what the instructions say. In particular, the instructions do not indicate that a boundary marker or *hito* "would be" the starting-point of the boundary on the coast. They state that the starting-point was the intersection of the traced arc with the seashore. Chile does not mention this fact. Nor does it acknowledge that the agreed instructions stated that the boundary was to be an arc, not a parallel, and that all points on that arc were to be 10 kilometres

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[96] CCM, para. 2.11.

from the bridge. Chile also fails to explain the significance of the instruction that the first boundary marker was to be placed as close to the sea as allows preventing it from being destroyed by ocean waters (not on the coast), a provision which the Chilean Counter-Memorial buries in a footnote[97]. In other words, Chile avoids addressing the very elements of the instructions that so clearly contradict its position.

2.21 Instead, the Chilean Counter-Memorial focuses on the heading to the instructions given to the Joint Commission which reads: "Concordia Boundary Marker.- Starting Point, on the coast, of the borderline". It is based on the language of this heading that Chile makes its assertion that the instruction stated that a boundary marker, or *hito*, "would be the 'Starting Point, on the coast [*en la costa*], of the borderline', and gave guidance as to the placement of that *hito* on the coast."[98]

2.22 This line of argument is misguided in a number of key respects. *First*, as noted above, the heading to the instructions did not say that the "Concordia Boundary Marker" *would* be the starting-point on the coast of the borderline. The intersection of the 10-kilometre arc with the seashore was the starting-point (Point Concordia under the 1929 Treaty of Lima).

2.23 *Second*, with respect to the boundary marker, the instructions indicated that the marker should not be "on the coast", but at a point on the arc leading up to the coast sufficiently far away so that it would not be destroyed by the ocean waters. Consequently, the boundary marker was not the starting-point of the land boundary. Moreover, the first boundary marker was not named "Concordia Boundary Marker". The marker ultimately named "Concordia" for symbolic

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97 CCM, footnote 129.

98 CCM, para. 2.11.

reasons was Boundary Marker No. 9[99], which was established several kilometres inland. Its position may be seen on Figure 6.5 to Peru's Memorial.

2.24 Thus, the intention of the Parties was clearly for the land boundary to run all the way to the coast (as a matter of delimitation), and for the first boundary marker to be located at a safe distance inland (as a matter of demarcation).

2.25 In this respect, it is important to recall that the purpose of the 1929 Treaty of Lima was to solve the problem of the territory of the occupied Peruvian provinces of Tacna and Arica[100] by dividing the territory in two: Tacna returned to Peru; Chile retaining Arica. It is therefore evident that the dividing line was necessarily intended to go all the way to the Pacific Ocean and could not stop at *Hito No. 1*, located some 200 metres short of the sea.

B. The Contemporaneous Sketch-Map Depicting the Boundary

2.26 Chile's Counter-Memorial also ignores the important sketch-map that was prepared and signed by the Chilean delegate on the Joint Commission, Mr. Brieba, showing the seaward-most part of the boundary, notwithstanding the fact that the sketch-map had been reproduced as an insert to Figure 6.4 of Peru's Memorial. For ease of reference, a larger copy of the sketch appears

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[99] In his 1930's Memoir, the Chilean delegate Enrique Brieba stated that "in a conversation between the Delegates, [they] considered that a memorial column could be placed on the boundary marker to be built next to the Arica-Tacna railway". Brieba, Enrique, *op. cit.,* p. 3. **PR, Annex 47**. Elsewhere, Mr. Brieba added that "Boundary Marker No. 9 Concordia was constructed, in accordance with the photographs attached at the end. Two bronze plates have been placed on the base; one on the side of Chile and the other on the side of Peru, as per the instructions … Apart from the Concordia signal in a concrete casting, the inscription 'Ibañez' [Chilean President] has been placed on the railway side and the inscription 'Leguía' [Peruvian President] on the sea side." Brieba, Enrique, *op. cit.,* p. 17. **PR, Annex 48**. On the photograph from the Brieba's Memoir, attached as **Figure R-2.2** in Vol. III of this Reply, a ceremony at Boundary Marker No. 9 Concordia can be seen.

[100] See PM, paras. 1.20-1.31.

here as **Figure R-2.3**. It was included in Mr. Brieba's Memoir summarizing the work of the Joint Commission that was delivered to the Chilean Foreign Minister after the completion of the Joint Commission's task.

2.27 The Brieba sketch-map is one of a number of maps that the Chilean delegate prepared showing the details of the boundary along the 10-kilometre arc centred upon River Lluta bridge. For completeness, the other relevant sketches are included as **Figures R-2.4**, **R-2.5**, **R-2.6** and **R-2.7** in Volume III of this Reply. Plate No. IX (**Figure R-2.3**) depicts the final segment of the land boundary between *Hito No. 3* and the coast. The locations of *Hito No. 1* and *Hito No. 2* are also depicted on the map.

2.28 It can be clearly seen from the map that the land boundary does not start or end at *Hito No. 1*; it continues along the 10-kilometre arc right up to the coast in a southwest direction from *Hito No. 1*. The sketch-map thus completely undermines Chile's thesis that *Hito No. 1* is the terminus of the land boundary. Given that the map was contemporaneously prepared by Chile's own member on the Joint Commission, it is entitled to a high degree of probative value. Of equal significance is the fact that the map is entirely consistent with the 1930 Identical Instructions that were given by the Foreign Ministers of the two countries to the Joint Commission.

2.29 During the Joint Commission's work, a question arose as to how the boundary markers should be placed along the 10-kilometre radius arc measured from the bridge over the River Lluta. On 22 May 1930, therefore, a set of purely technical instructions was given by the two members of the Joint Commission to a sub-commission comprised of two Party-appointed engineers charged with this task (the Moyano-Tirado Sub-Commission). Section 19 of the technical instructions was entitled "Boundary Markers at the Arc of Concordia"[101].

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[101] Brieba, Enrique, *op. cit.*, p. 94. **PR, Annex 50**.

MAP OF THE INITIAL SECTOR OF THE PERU-CHILE LAND BOUNDARY

(Prepared and signed by Enrique Brieba)

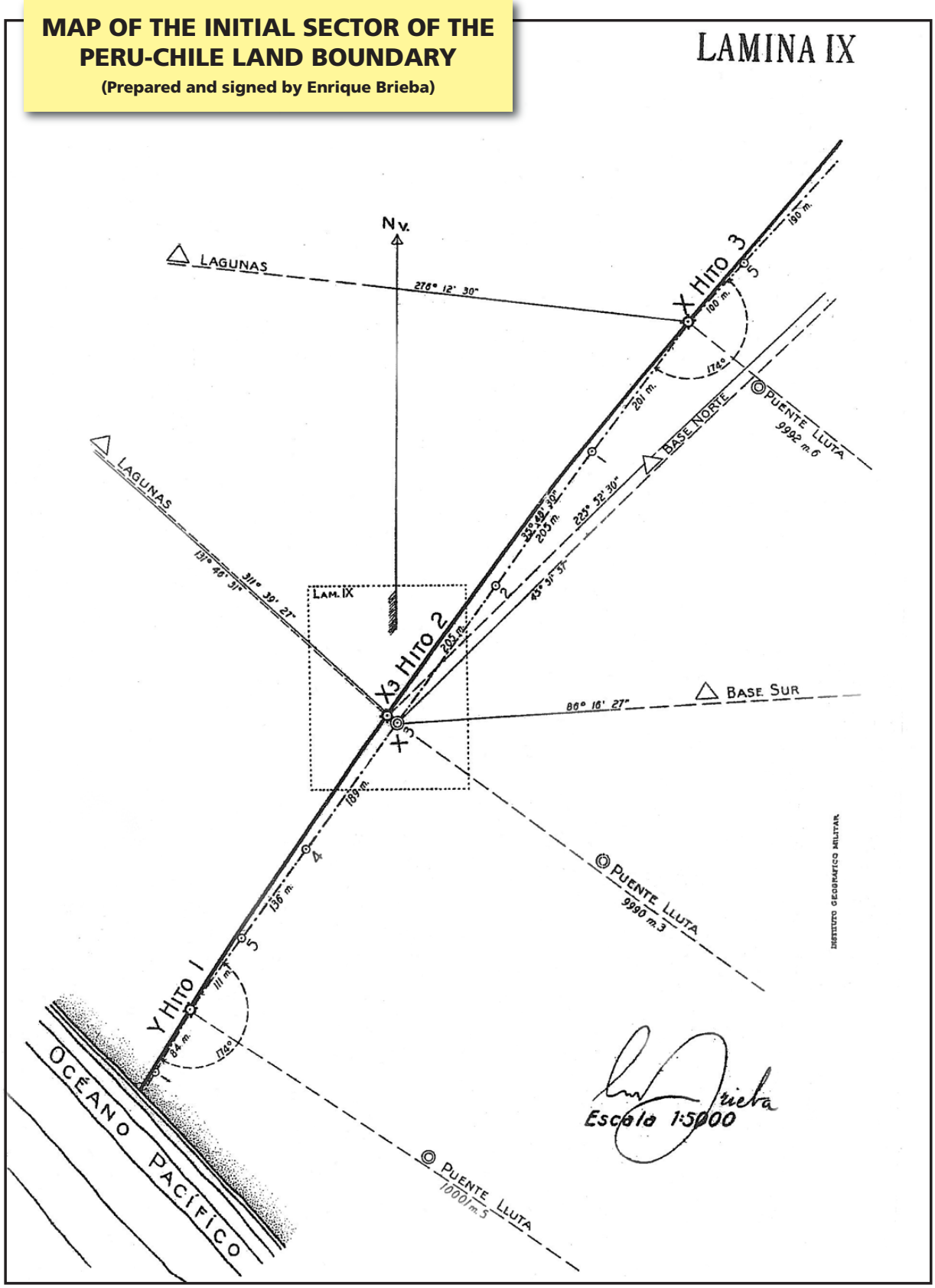

Figure R-2.3

2.30 The instructions stipulated that, starting at Boundary Marker No. 12, boundary markers would be established at 6° intervals along the arc, thereby working from the land towards the sea. To accomplish this task, a 174° angle had to be calculated in order to fix the location of the next boundary marker working towards the sea. Each boundary marker was to be erected 1046.7 metres apart, measured in a straight line or chord, so as to result in their placement falling on the 10-kilometre radius arc at the appropriate intervals. The actual boundary between each of the boundary markers continued to lie on the arc, not on the chord, but the location of the markers themselves was calculated by reference to where the straight line segments intersected the arc.

2.31 This process of demarcation shows that the location of Boundary Marker No. 1 (*Hito No. 1*) was not arbitrarily determined. As has been seen, the Joint Commission had instructions from the two Governments to place this marker some distance from the actual coast to prevent it from being destroyed by the ocean waters. They also had technical instructions that its position should be calculated by reference to the 174° angle and the 1046.7-metre distance criteria from the next relevant boundary marker lying further inland.

2.32 It can be seen from the Brieba sketch-map that these criteria were applied with respect to determining the location of *Hito No. 1*, as well as the location of the other boundary markers situated on the 10-kilometre arc. Recalling that the Joint Commission was working from the land towards the sea, at *Hito No. 3*, a 174° angle was drawn in order to determine the bearing of the chord on which the next marker would be situated. The distance of the chord between *Hito No. 3* and *Hito No. 1*, is 1047 metres, as is apparent if one adds up the distances on the Brieba map. This conforms to the technical instructions. The actual boundary line, which is shown as a solid black line on the map, lies somewhat to the north of the straight line segments because it falls on the 10-kilometre radius arc.

2.33 The Brieba sketch-map shows that the same process was repeated at *Hito No. 1*. Once again, a 174° angle was drawn from it in order to determine the direction of the chord that would be used to fix the location of what would have been the next boundary marker to the southwest if the coastline had not been closer than 1046.7 metres away, and thus interrupted the line. The sketch-map confirms (if further confirmation is needed) that the intention was for the land boundary to continue in a southwest direction from *Hito No. 1* up until it intersected with the coast.

2.34 As can be seen on the Brieba sketch-map, the Joint Commission also fixed the location of a second boundary marker – *Hito No. 2* – between *Hito No. 1* and *Hito No. 3*. This marker is less than 1046.7 metres from both of its neighbouring markers. This additional marker was intercalated by the Joint Commission, along with Boundary Marker No. 9 further inland, during the course of the demarcation process to further define the boundary. Boundary Marker No. 9, which for symbolic reasons was named "Concordia", was added because the delegation agreed to have one supplementary marker situated close to where the railway line crossed the border[102]. Boundary Marker No. 2 was added so as to be intervisible with Boundary Markers Nos. 1 and 3 which were not themselves intervisible. This was in conformity with the instructions that the Parties' delegates on the Joint Commission had given to their staff to ensure intervisibility between the various markers[103].

2.35 The alignment of the straight line segments used to calculate the positioning of each of the boundary markers along the 10-kilometre arc was carried out with precision by identifying a series of intermediate points between them. This can also be seen on the Brieba sketch-map.

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[102] See footnote 99 above and Brieba, Enrique, *op. cit.*, pp. 94-95. **PR, Annex 50**.

[103] Instructions for the Location of Boundary Markers on the Boundary Poligonal M-L-K-J-I-H, Frías-Novión Sub-Comission. *Ibid.*, pp. 90-91. **PR, Annex 49**.

2.36 Proceeding from *Hito No. 3* southwestwards towards *Hito No. 1*, the location of five intermediate points is depicted on the Brieba map, and the points are numbered 1 to 5. The same process was applied inland of *Hito No. 3*, although only the fifth point between *Hito No. 4* and *Hito No. 3* can be seen on the map before it ends. Similarly, another point (No. 1) was identified seaward, or to the southwest, of *Hito No. 1*, since this represented the first intermediate point after that boundary marker working towards the sea. Afterwards, there was no more room for any more intermediate points before the coast was reached. However, the fact that an intermediate point was identified between *Hito No. 1* and the coast is further proof that the boundary did not stop short at *Hito No. 1*, but ran past it right up to the sea, as shown on the Brieba map.

2.37 Chile's delegate on the Joint Commission (Mr. Brieba) described this process in his Memoir on the demarcation of the boundary. The Memoir also contains the photograph "La Frontera en La Playa" (The Boundary on the Beach) which shows the technical experts of the Parties standing along the frontier on the beach next to the sea (**Figure R-2.8**). Once again, it is evident that the intention was for the land boundary to extend all the way to the sea.

C. The 21 July 1930 Final Act of the Demarcation Joint Commission and the Act of 5 August 1930

2.38 Under the 1929 Treaty of Lima, Tacna returned to Peru, while Chile retained Arica. Chile's Counter-Memorial recalls the fact that Article 4 of the Treaty provided that, 30 days after the exchange of ratifications of the Treaty, "Chile

shall transfer to the Government of Peru all territories which under the Treaty are to come into the possession of Peru." Article 4 then went on to state:

> "The Plenipotentiaries of the Contracting Parties shall sign a deed of transfer containing a detailed statement of the position and distinguishing characteristics of the frontier-posts."[104]

Spanish text reads as follows:

> "Se firmará, por plenipotenciarios de las citadas Partes Contratantes, una acta de entrega que contendrá la relación detallada de la ubicación y características definitivas de los hitos fronterizos."

2.39 Chile's Counter-Memorial states that, "in fulfilment of this obligation" the Ambassador of Chile to Peru and the Peruvian Minister of Foreign Affairs signed an "Act of Plenipotentiaries" on 5 August 1930[105] following the signature of the Final Act of the Commission of Limits Containing the Description of Placed Boundary Markers (hereinafter "Final Act") by its members. Chile then goes on to assert that, with the 1929 Treaty of Lima, the Final Act and the "Act of Plenipotentiaries", all outstanding land-boundary matters were definitively closed, and that "Hito No. 1 is the seaward terminus of the land boundary as determined by agreement of the Parties."[106]

2.40 This account neither reflects what actually happened nor lends any support to the contention that *Hito No. 1* was the seaward terminus of the land boundary.

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104 Treaty for the Settlement of the Dispute Regarding Tacna and Arica, with Additional Protocol, signed on 3 June 1929. **PM, Annex 45**.

105 CCM, para. 2.15.

106 CCM, para. 2.16.

"THE BOUNDARY ON THE BEACH"

(Taken from Mr. Brieba's *Memoir)*

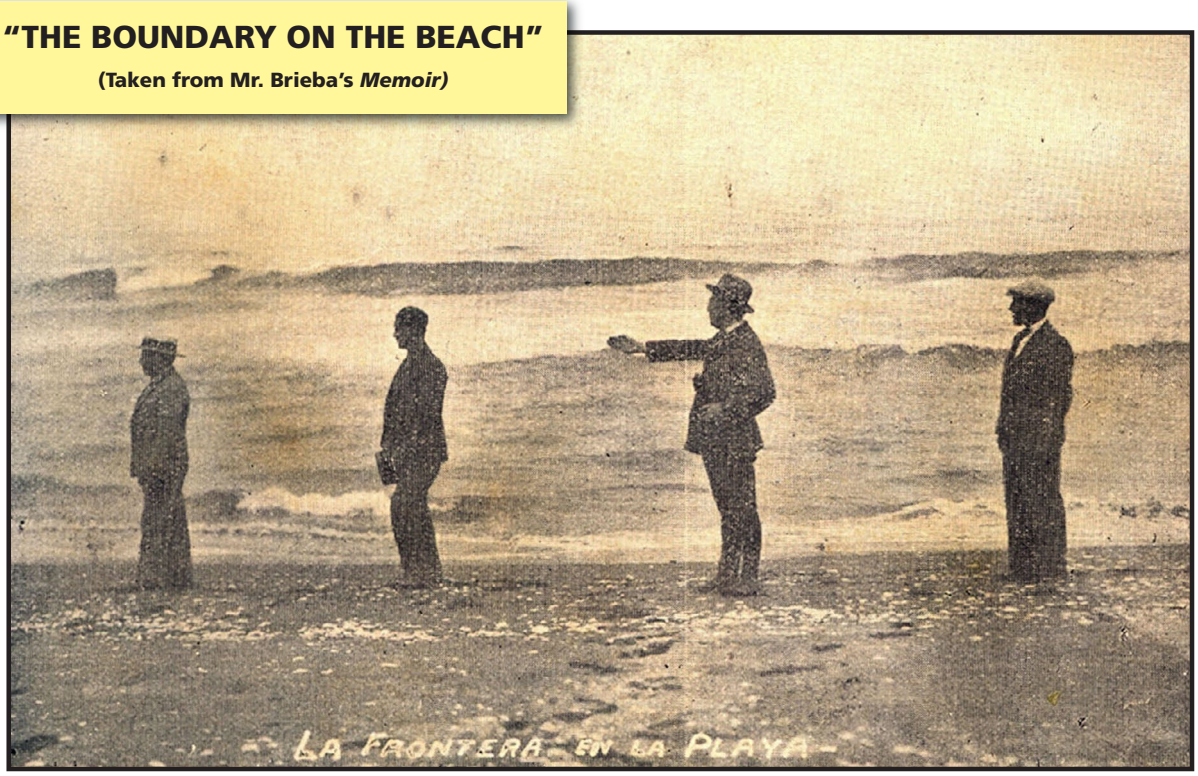

Figure R-2.8

2.41 The transfer of territories actually took place, and the Deed of Transfer was signed on 28 August 1929. At that time, the demarcation operations of the Joint Commission had not yet begun, and the members of the Joint Commission had not received the instructions from their Ministers of Foreign Affairs relating to the plotting of the final part of the boundary and the placement of the first boundary marker. Accordingly, the Deed of Transfer referred to in Article 4 of the 1929 Treaty of Lima could not contain a detailed statement of the positions and distinguishing characteristics of the frontier-posts. Instead, the Deed of Transfer stipulated that this would be included in a subsequent act to be signed upon the completion of the demarcation process[107].

2.42 The Joint Commission finished its work on 21 July 1930, at which time the two delegates of the Parties on the Commission signed the Final Act. The description of the land boundary was set out in the second paragraph of the Final Act as follows:

> "The demarcated boundary line *starts from the Pacific Ocean* at a point on the seashore ten kilometres northwest from the first bridge over the River Lluta of the Arica-La Paz railway, and ends in the Andean mountain range at Boundary Marker V of the former dividing line between Chile and Bolivia."[108]

Spanish text reads as follows:

> "La línea de frontera demarcada parte del océano Pacífico en un punto en la orilla del mar situado a diez kilómetros hacia el noroeste del primer puente sobre el río Lluta de la vía ferrea de Arica a La Paz, y termina en la cordillera andina en el hito quinto de la antigua línea divisoria entre Chile y Bolivia."

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107 Deed of Transfer of Tacna of 29 August 1929. **PR, Annex 45**.

108 Final Act of the Commission of Limits Containing the Description of Placed Boundary Markers of 21 July 1930 (emphasis added). **PM, Annex 54**.

2.43 Consistent with Article 2 of the 1929 Treaty of Lima, which stipulated that the land frontier "shall start from a point on the coast", and the 1930 Identical Instructions, which provided that the "intersection point of the traced arc with the seashore, shall be the starting-point of the dividing line", the Final Act stated that the boundary "starts from the Pacific Ocean at a point on the seashore". Quite clearly, the Final Act did not suggest that the boundary started at *Hito No. 1*. Had this been the intention of the Commission members, the Final Act would have been drafted differently. Given the reference in the Final Act to the boundary ending (at its furthest point inland) at Boundary Marker V on the former dividing line between Chile and Bolivia, it is clear that the Joint Commission knew how to refer to a specific Boundary Marker when they wished to do so. Significantly, they did not indicate that the first Boundary Marker (*Hito No. 1*) was the starting-point of the boundary.

2.44 The Final Act went on to describe how the position of the boundary markers had been identified and the markers constructed. It then listed a description of all 80 boundary markers (*hitos*) with their co-ordinates and place of location.

2.45 Chile seizes on the fact that *Hito No. 1* is recorded as being placed on the "seashore" at astronomical co-ordinates 18°21'03" S, 70°22'56" W[109]. It then points out that, in the subsequent Act signed on 5 August 1930 by the Minister of Foreign Affairs of Peru and the Chilean Ambassador to Peru pursuant to Article 4 of the 1929 Treaty of Lima (and the 28 August 1929 Deed of Transfer), the place of location of *Hito No. 1* is also recorded as being the "seashore"[110]. These facts, according to Chile, justify its claim that *Hito No. 1* is the terminus of the land boundary.

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[109] CCM, paras. 2.14-2.15 and footnote 136 thereto.

[110] *Ibid.* See also Act of 5 August 1930. **PR, Annex 51**.

2.46 Once again, Chile's argument is unsound. The purposes of the Final Act and the Act of 5 August 1930 were different. The Final Act was signed by the two delegates representing the Parties on the Joint Commission (Messrs. Brieba and Basadre). It stipulated that, with its signature, the work of the Commission carried out by mutual accord, and in accordance with the instructions received by both delegates, was concluded, and that all the boundary markers required to demarcate the boundary were positioned[111]. The Final Act also made it clear that the demarcated boundary started from the Pacific Ocean (not from *Hito No. 1*) at a point on the seashore 10 kilometres northwest (not north) from the river Lluta bridge. It then listed the location of each of the boundary markers.

2.47 In contrast, pursuant to Article 4 of the 1929 Treaty, the Act of 5 August 1930 signed by the Foreign Minister of Peru and the Ambassador of Chile, was to include "a detailed statement of the position and distinguishing characteristics of the frontier-posts", not a description of the boundary as a whole. It is obvious that the actual boundary was not comprised solely of boundary markers. The boundary ran between those markers along an arc, and beyond *Hito No. 1* up to the point where it intersected with the coast. This is confirmed by the Brieba sketch-map and the 1930 Identical Instructions to the Joint Commission.

2.48 The reference to *Hito No. 1* being located on the "seashore" (*Orilla del mar*) in both the Final Act and the Act of 5 August 1930 was no more than a general description of where it was located – i.e., in an area adjacent to and near the sea. Similar general descriptions were used for numerous other boundary markers in both the Final Act and in the Act of 5 August 1930. For example, Boundary Markers Nos. 3, 4, 5, 6, 7 and 8 were all stated to be located at

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[111] Act of the Commission of Limits Containing the Description of Placed Boundary Markers of 21 July 1930. **PM, Annex 54**.

the "plain of Escritos to the west of the Arica to Tacna railway" (*Pampa de Escritos al Oeste del F.C. de Arica a Tacna*). Boundary Marker No. 13 was located at the "gorge of Escritos" (*Quebrada de Escritos*)[112], and the location of a number of other markers was described using similar generalized language. None of these descriptions referred to a specific point; they were all general in nature.

D. The Location of the Terminus of the Land Boundary at Point Concordia

2.49 Based on the foregoing, it can be seen that Chile's contention that the terminus of the land boundary is at *Hito No. 1* is plainly wrong. Chile's argument is incompatible with the terms of Article 2 of the 1929 Treaty of Lima, inconsistent with the instructions given to the Joint Commission, and impossible to reconcile with the Brieba sketch-map.

2.50 The start of the land boundary is the point where the 10-kilometre radius arc centred upon the bridge over the River Lluta intersects with the coast. That point is named "Concordia". Peru has identified the co-ordinates of Point Concordia as 18°21'08" S, 70°22'39" W WGS84. These co-ordinates did not need to be calculated in 1930 because no boundary marker was constructed there. However, they have since been determined by Peru when it established the various points along its baseline system and enacted its Maritime Domain Baselines Law in 2005[113]. The southernmost point on Peru's baselines is Point 266, the co-ordinates of which are those of Point Concordia noted above.

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112 Act of 5 August 1930. **PR, Annex 51**.

113 Law No. 28621 of 3 November 2005, Peruvian Maritime Domain Baselines Law. **PM, Annex 23.**

2.51 Chile asserts that "Point 266 unilaterally seeks to depart from the Parties' long-standing agreement that *Hito No. 1* is the first demarcated point on the land boundary"[114], and that Point 266 "is simply incapable of producing any effect vis-à-vis Chile (i.e., it is not opposable to Chile)."[115] The first assertion is wrong; the second avoids addressing the key point. While *Hito No. 1* is the first boundary marker that was erected along the course of the land boundary – a matter that Peru does not dispute – it was not the first point on that boundary. That point is the "point on the coast to be named 'Concordia'", as Article 2 of the 1929 Treaty stipulates. It is Chile that unilaterally seeks to depart from these established legal facts by refusing to acknowledge that Point Concordia is the terminal point on the Parties' land boundary.

2.52 Point Concordia is opposable to Chile by virtue of the 1929 Treaty of Lima and the work of the Joint Commission. Peru has in fact sought to verify the co-ordinates of Point Concordia jointly with Chile, but the latter has refused to do so.

2.53 For example, before Peru's Baselines Law had been approved and in response to a Note that Chile sent on 28 October 2005[116], Peru sent on 31 October 2005 a diplomatic Note to Chile proposing that the Parties, through their representation on the 1997 Peru-Chile Permanent Joint Commission of Limits[117], verify the accuracy of the co-ordinates of Point 266 at Point Concordia. The relevant part of the Note reads as follows:

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114 CCM, para. 2.20 (emphasis added).

115 *Ibid.*

116 Note No. 17,192/05 of 28 October 2005, from the Minister of Foreign Affairs of Chile to the Ambassador of Peru. **CCM, Annex 106**.

117 On 6 March 1997, Peru and Chile set up a Commission by means of the "Agreement on the Conservation of Markers on the Common Boundary". Among its responsibilities, provided for in Article 1, this Commission is entitled to determine the co-ordinates and dimensions of the boundary markers with reference to a geodetic system in use by cartographic organizations of both countries as well as to elaborate a common cartography of the land boundary. **PR, Annex 38**.

> "As to point 266, contained in Annex 1 of the Draft Law entitled 'List of Co-ordinates of the Contributing Points for the Baseline System of the Peruvian Littoral', I must express to Your Excellency that in fact, Annex 1 of the aforesaid Draft Law consigns the co-ordinates 18°21'08" S and 70°22'39" W in the WGS84 system as the 'Point on the Coast, International Land Boundary between Peru-Chile'. This contributing point has been obtained through the calculation made to determine the starting-point of the land boundary on the seashore, *established by virtue of the only boundary treaty in force between our countries*, namely the Treaty for the Settlement of the Dispute regarding Tacna and Arica and its Additional Protocol, signed on 3 June 1929 and the Final Act of the Joint Commission of Limits between Peru and Chile, in force since it was signed on 21 July 1930. These co-ordinates correspond to the starting-point of the land boundary on the seashore of the 10-kilometre radius arc, whose axis is located at the first bridge over River Lluta of the Arica to La Paz railway, an arc that constitutes the land boundary line between both countries. Any other interpretation or application of this juridical framework constitutes an act contrary to international law.
>
> Whenever the Parties mutually agree, the Permanent Joint Commission of Limits could verify the accuracy of the endpoint co-ordinates on the seashore of such arc, contained in the Peruvian Baselines Draft Law."[118]

Spanish text reads as follows:

> "En cuanto al punto 266, contenido en el Anexo 1 del proyecto de ley titulado 'Lista de las coordenadas de los puntos contribuyentes del sistema de líneas de base del litoral peruano', debo expresar a Vuestra Excelencia que, efectivamente, el Anexo 1 del citado proyecto consigna las coordenadas 18°21'08" S y 70°22'39" W en el sistema WGS84, como el 'Punto en la costa Límite

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[118] Note (GAB) No. 6-4/154 of 31 October 2005, from the Minister of Foreign Affairs of Peru to Ambassador of Chile (emphasis added). **PR, Annex 78**.

> Internacional terrestre Perú-Chile'. Este punto contribuyente ha sido obtenido por el cálculo que se ha efectuado para determinar el punto inicial de la frontera terrestre en la orilla del mar, establecido en virtud del único tratado de límites vigente entre nuestros países, titulado Tratado y Protocolo Complementario para resolver la cuestión de Tacna y Arica, suscrito el 3 de junio de 1929, y del Acta Final de la Comisión Mixta de Límites entre Perú y Chile, vigente desde su firma, el 21 de julio de 1930. Estas coordenadas corresponden al punto inicial de la frontera terrestre en la orilla del mar del arco de diez kilómetros de radio, cuyo eje está en el primer puente sobre el río Lluta del ferrocarril de Arica a La Paz, arco que constituye la línea limítrofe terrestre entre ambos países. Cualquier otra interpretación o aplicación de este marco jurídico constituye un acto contrario al derecho internacional.
>
> En una oportunidad mutuamente convenida, la Comisión Mixta Permanente de Límites podría verificar la exactitud de las coordenadas del punto final en la orilla del mar del citado arco contenidas en el proyecto de ley de líneas de base del Perú."

2.54 Chile did not accept this proposal. In a Note dated 3 November 2005, Chile asserted that Point 266 "does not coincide with the measurements established by both countries and fails to recognize, and modifies, the agreed frontier line."[119]

2.55 These allegations miss the mark. *First*, the Parties never jointly established the co-ordinates where the land boundary intersected the coast as provided for in the 1929 Treaty of Lima and the 1930 Identical Instructions to the Joint Commission because there was no need to do so at that time. The instructions to the Joint Commission were not to establish a boundary marker directly on the coast or to identify that point with co-ordinates. This is why Peru

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[119] Note No. 17359/05 of 3 November 2005, from the Minister of Foreign Affairs of Chile to the Ambassador of Peru. **CCM, Annex 107**.

invited Chile to join it in verifying those co-ordinates. *Second*, when Peru subsequently identified the location of Point Concordia in the course of issuing its baselines law, it in no way modified the agreed boundary line. Peru simply identified by co-ordinates the point on the coast where the 10-kilometre radius arc constituting the boundary meets the sea which, in turn, corresponds to the last point (Point 266) of its baseline system. The location of this point can be seen on the satellite image of the relevant area reproduced as **Figure R-2.9**.

2.56 Chile also did not accept a further proposal made by Peru on 24 January 2007, in the framework of the Sixth Ordinary Session of the 1997 Permanent Joint Commission of Limits, to map jointly the course of the boundary resulting from the work of the Commission in 1930[120]. Chile's excuse for not taking up this initiative was that the 1997 Permanent Joint Commission was not authorized to deal with such issues[121].

2.57 It follows that the only reason why there has been no agreement between the Parties on the co-ordinates of Point Concordia is because of Chile's refusal to join Peru in carrying out the task of verifying those co-ordinates. This does not mean that Point Concordia does not exist or cannot be located. Peru's identification of the co-ordinates of Point Concordia stands unrebutted. It is Chile that has been unable or unwilling to inform the Court of the location of the point where the land boundary actually meets the sea under the terms of the 1929 Treaty of Lima.

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[120] Minutes of the Sixth Ordinary Session of the Peru-Chile Permanent Joint Commission of Limits, 24 January 2007, p. 3. **PR, Annex 53**.

[121] See footnote 117 above. Under Article 11 of the Rules of Activities, General Provisions and Working Plan of the Peru-Chile Permanent Joint Commission of Limits, the Commission was authorised to consider as consultation documents the Memoirs of Messrs. Brieba and Basadre. **PR, Annex 52**.

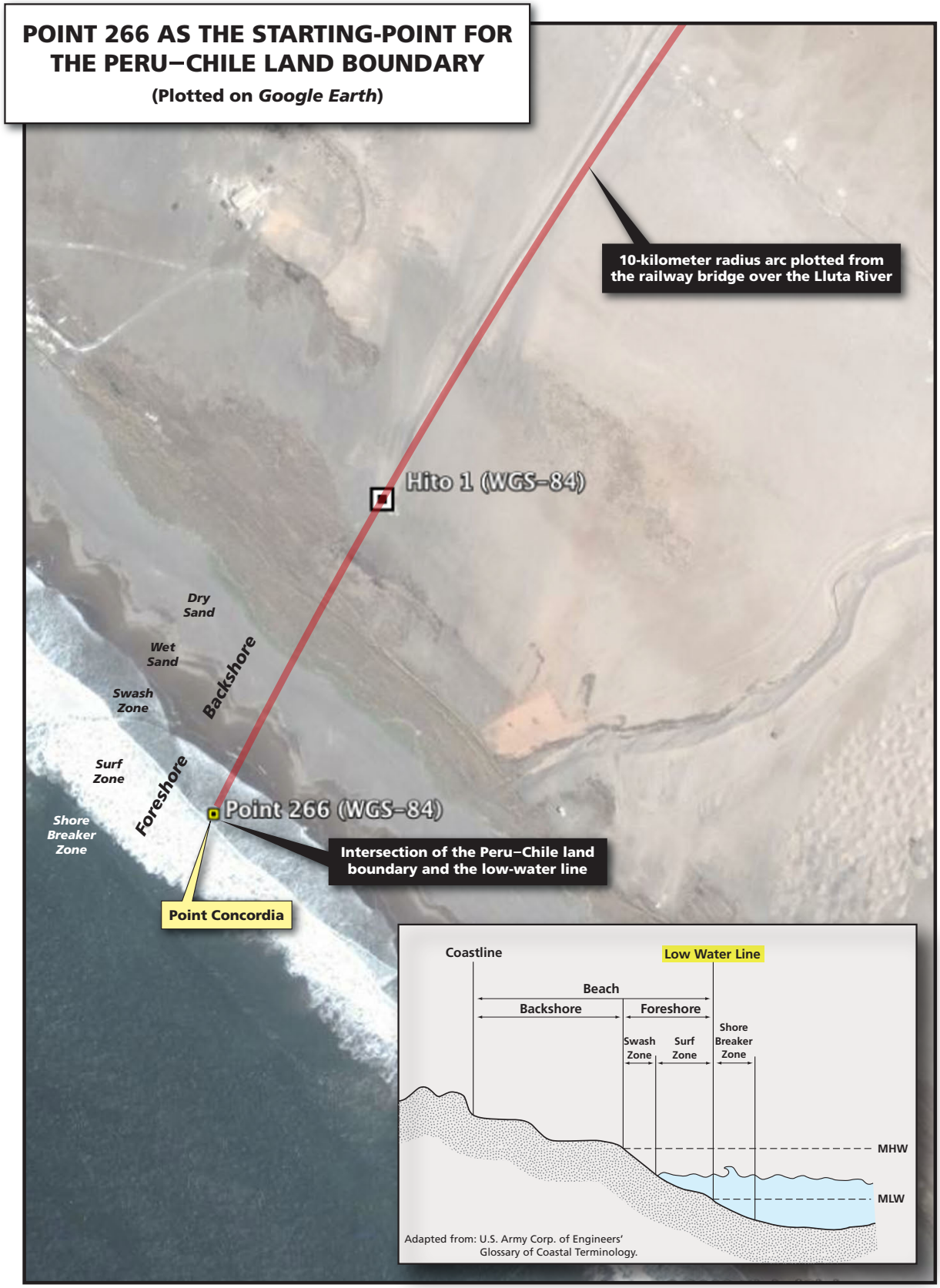
POINT 266 AS THE STARTING-POINT FOR THE PERU–CHILE LAND BOUNDARY
(Plotted on Google Earth)
10-kilometer radius arc plotted from the railway bridge over the Lluta River
Hito 1 (WGS–84)
Dry Sand
Wet Sand
Backshore
Swash Zone
Surf Zone
Foreshore
Shore Breaker Zone
Point 266 (WGS–84)
Intersection of the Peru–Chile land boundary and the low-water line
Point Concordia
Coastline
Low Water Line
Beach
Backshore
Foreshore
Swash Zone
Surf Zone
Shore Breaker Zone
MHW
MLW
Adapted from: U.S. Army Corp. of Engineers' Glossary of Coastal Terminology.

Figure R-2.9

IV. The Subsequent Practice of the Parties

2.58 Chile's own cartography, at least up to the 1990s when it started to change its maps, makes it clear that Chile recognized that the terminal point of the land boundary was situated at Point Concordia, a point that was distinct from *Hito No. 1*. Chile's maps issued during this period also did not show any maritime boundary along the parallel of latitude passing through *Hito No. 1*.

2.59 In Volume I of his Memoir, Chile's representative on the 1929-1930 Joint Commission (Mr. Brieba) included a "General Map of the Departments of Tacna and Arica, as they had been divided" (reproduced here as **Figure R-2.10**). It shows "Concordia" as the name of the point where the land boundary meets the sea. The same notation appears on a 1929 map issued by Chile's Railway Department of the Public Works Department of the Chilean Ministry of Promotion, where "Concordia" can again be seen to be the terminal point (**Figure R-2.11** in Volume III of this Reply).

2.60 With respect to Chile's cartography after the 1952 Declaration of Santiago, reference may be made to an official 1966 map of Arica published by Chile. This map is reproduced here as **Figure R-2.13**. The map shows "Concordia" and "Hito 1" as two distinct points at different locations. Concordia is located where the land boundary meets the coast; *Hito 1* is situated inland. The curved arc of the land boundary can be seen to extend seaward of *Hito No. 1* right up to the coast[122]. The map is consistent with the terms of the 1929 Treaty of Lima and the work of the 1930 Joint Commission. It directly contradicts Chile's contention that *Hito No. 1* is the terminus of the land boundary. Significantly, the map does not display any maritime boundary extending along a parallel

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[122] See also **Figure R-2.12** in Vol. III of this Reply.

of latitude offshore, whether from Point Concordia or from the parallel of latitude passing through *Hito No. 1*.

2.61 Chile's 1973 and 1989 editions of Nautical Chart 101, showing the city of Arica and the westernmost portion of the land boundary, also depict the land boundary following the arc right up to the sea beyond the Peruvian light tower that had been erected in 1968-1969 in proximity to *Hito No. 1*. These charts were reproduced as Figures 5.19 and 5.23 to Peru's Memorial at pages 183 and 189. They are inconsistent with the view now expressed in Chile's Counter-Memorial that the land boundary terminated at *Hito No. 1*, inland from the coast.

2.62 As noted in Peru's Memorial, it was only in 1998 that Chile started to modify its charts in a belated and self-serving way to eliminate the part of the curved boundary line between the sea and *Hito No. 1*. It is striking to compare Chile's 1998 chart showing the relevant area reproduced as **Figure R-2.15**, with its 1989 chart, which appears in **Figure R-2.14**. Chile's 1998 chart simply refashions geography by altering the course of the treaty boundary line[123].

2.63 Notwithstanding this belated change to Chile's official cartography, earlier Chilean maps had consistently depicted "Concordia" as the point where the land boundary meets the sea. Reference may be made to Figure 5.8, in page 179 of Peru's Memorial, which is a 1941 map published by the Military Geographic Institute of Chile. It labels the point where the land boundary meets the sea "Concordia". Three other maps issued by the Military Geographic Institute in 1955, 1961 and 1963 show the same thing – namely, "Concordia" as the terminal point on the land boundary. This can be seen on **Figures R-2.16**, **R-2.17** and **R-2.18** in Volume III of this Reply.

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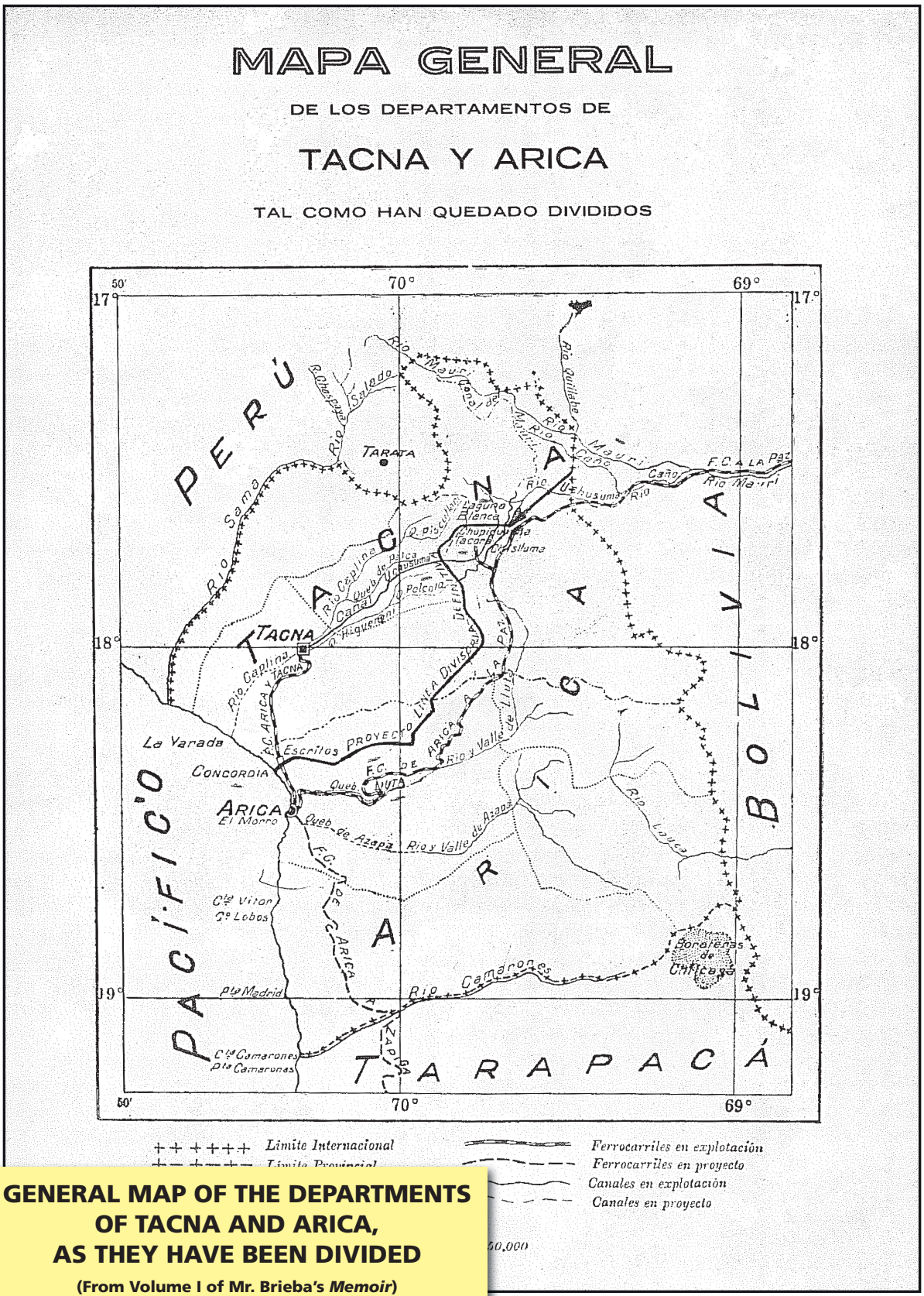
[123] See PM, paras. 5.27-5.28. See also Figures 5.19 and 5.25 in Vol. IV thereto (Maps and Figures).



GENERAL MAP OF THE DEPARTMENTS OF TACNA AND ARICA, AS THEY HAVE BEEN DIVIDED

(From Volume I of Mr. Brieba's *Memoir*)

Figure R-2.10

OFFICIAL MAP OF ARICA: 1966

(Published by the Instituto Geográfico Militar de Chile)

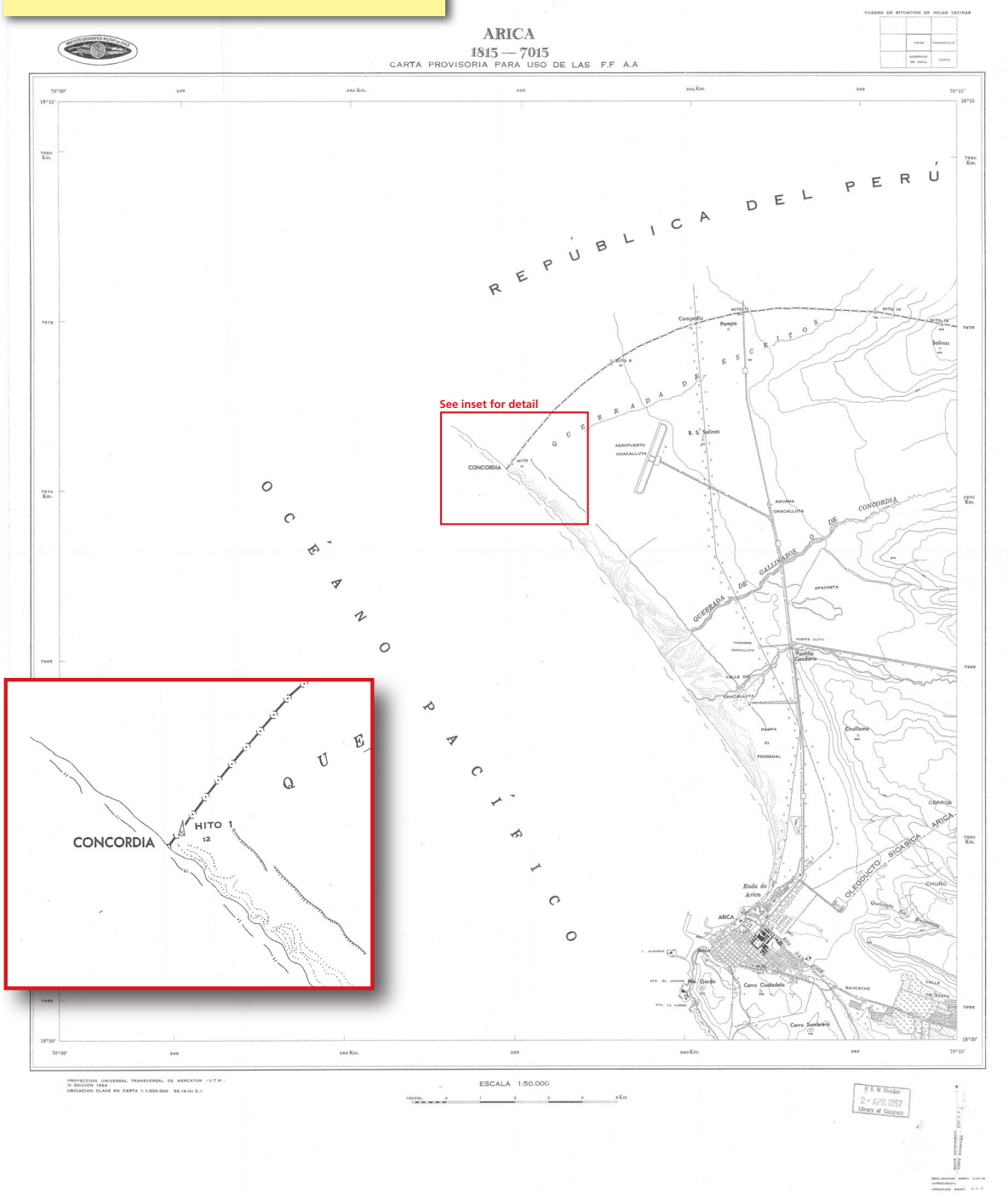


Figure R-2.13

RADA Y PUERTO DE ARICA: 1989

(Excerpt from Chilean Nautical Chart 101)

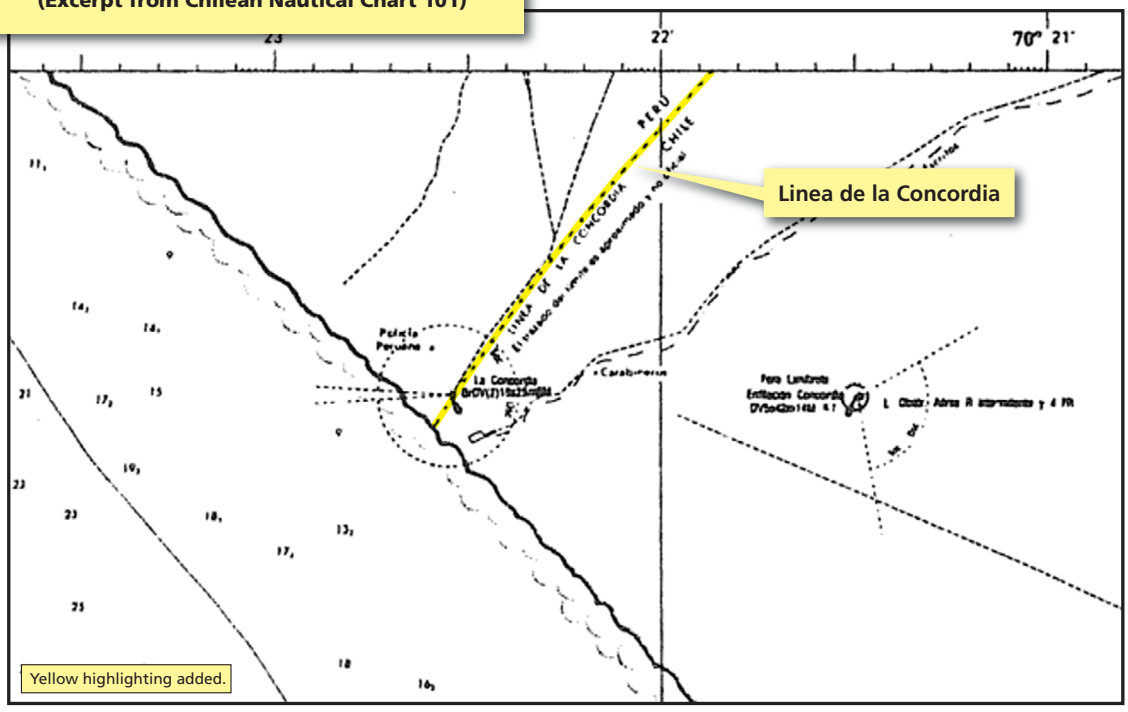


Figure R-2.14

RADA Y PUERTO DE ARICA: 1998

(Excerpt from Chilean Nautical Chart 1111)

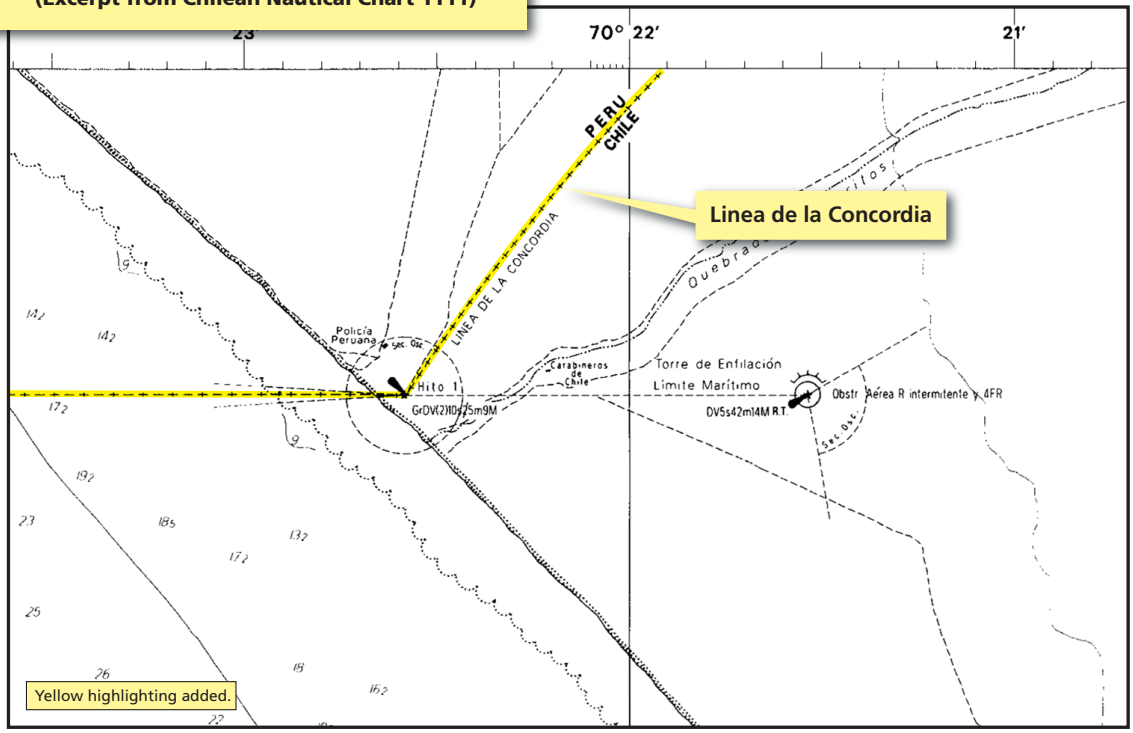


Figure R-2.15

2.64 With respect to the bilateral practice of the Parties, in 1987 a Peru-Chile Commission was set up for the inspection, repair and repositioning of boundary markers on the land boundary, some of which had been destroyed or moved. Under the technical rules governing the Commission's work, it was agreed that reports (or monographs) verifying individual boundary markers would be prepared with each Party taking responsibility for certain markers. **Figure R-2.19**, reproduced herein, is a reproduction of one of the monographs dated July 1992 prepared by the Chilean delegation as part of the inspection of Boundary Marker No. 2. The enlarged inset to the figure again shows the arc of the land boundary extending seaward to the southwest of *Hito No. 1* up to the coast. It contradicts Chile's current assertion that the land boundary end at *Hito No. 1*.

2.65 Chilean authors have also acknowledged that *Hito No. 1* is not synonymous with "Point Concordia", and that *Hito No. 1* does not constitute the terminal point on the land boundary. For example, the distinguished Chilean jurist, Hugo Llanos Mansilla, who was a member of the Advisory Council for the Maritime Boundary of the Chilean Government, wrote as recently as 2006 that:

> "The Joint Commission placed Boundary Marker No. 1 at approximately 140 metres from the seashore and Point Concordia."[124]

2.66 Notwithstanding Chile's practice to the contrary, the Chilean Counter-Memorial attempts to argue that Peru has treated *Hito No. 1* as the point under Article 2 of the 1929 Treaty of Lima, "i.e. the starting point of the land

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[124] Llanos Mansilla, Hugo: *Teoría y práctica del Derecho Internacional Público*. Tomo II, Vol. 1, Tercera edición actualizada, Santiago de Chile, Editorial Jurídica de Chile, 2006, p. 157.

boundary"[125]. In this respect, Chile refers to the 1982 and 1988 editions of Peru's *Sailing Directions*, which are said to describe a point referred to as "Hito Concordia" as the southern frontier of Peru.

2.67 The *Sailing Directions* do no such thing. Quite apart from the fact that the *Sailing Directions* have no legal status and are designed to assist navigation, not to describe boundaries, the actual description found in the *Sailing Directions* is very general and does not equate *Hito No. 1* (or "Hito Concordia") with the terminal point on the land boundary where it meets the sea. The Instructions merely note that:

> "In the eastern part of the *boundary marker Concordia* lies the gorge of *Las Salinas* and, on the coastline, a place named *Pascana del Hueso*, which constitutes the last topographical feature of the Peruvian coast before reaching the southern frontier."[126]

2.68 Chile also mentions a 2001 Peruvian law, which refers to the boundary of the Province of Tacna starting at Boundary Marker No. 1 (Pacific Ocean)[127]. What Chile fails to mention, however, is that Law No. 29189 specifies that the limit of the Province of Tacna runs "along the boundary line with Chile until it intersects with the Pacific Ocean at Point Concordia ..." on the grounds that domestic legislation cannot derogate from international agreements, including the 1929 Treaty of Lima[128]. Peru's current law relating to the limits of the Tacna Province provides that Point Concordia is the southern limit of the province, in conformity with the 1929 Treaty of Lima.

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125 CCM, para. 2.17.

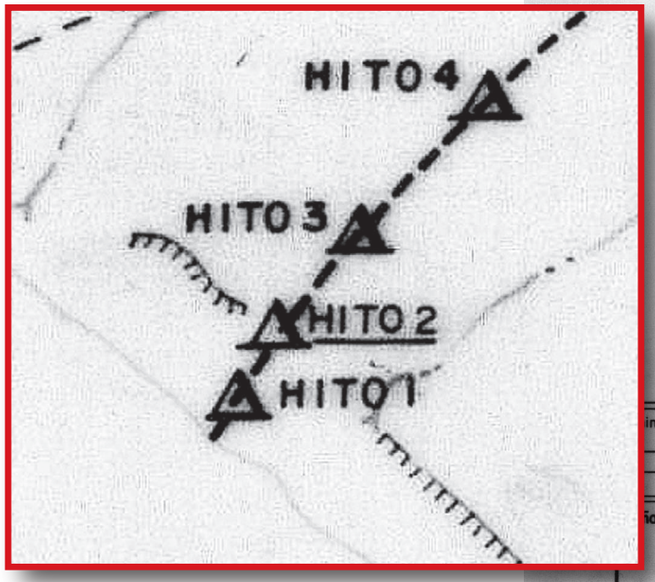
126 Directorate of Hydrography and Navigation of the Navy, Derrotero de la Costa del Perú, Vol. II, 1982. **CCM, Annex 172**.

127 CCM, para. 2.17. See also Law No. 27415 of 25 January 2001: Territorial Demarcation of the Province of Tacna. **CCM, Annex 191**.

128 Law No. 29189 of 16 January 2008, Law specifying Article 3 of Law No. 27415, Law on Territorial Demarcation of the Province of Tacna, Department of Tacna. **PR, Annex 16**.

MONOGRAPH
2 JULY 1992

(Prepared by the Chilean Delegation as part of their inspection of Boundary Marker No. 2)

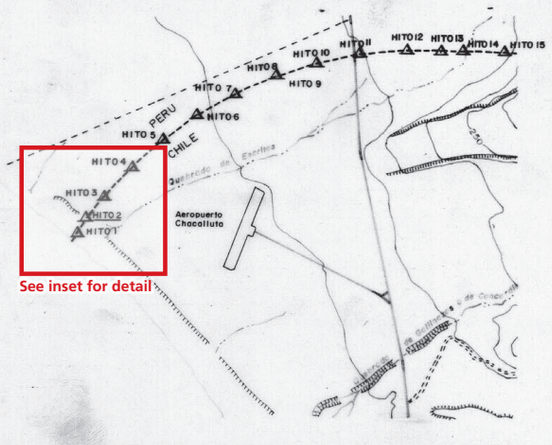


COMISION MIXTA DE LIMITES
PERUANO - CHILENA

Hito Número : 2 de Fierro Fecha de Erección : Temporada de 1930 de Inspección : 02 de julio de 1992

Lugar de situación : Borde Pampa Escritos frente al mar

Croquis Topográfico de localización
Origen :
Escala 1:100.000



See inset for detail

Fotografía (indicar su orientación)

Otras fotografías en:

...inos que conducen al Hito:

...ales de referencia

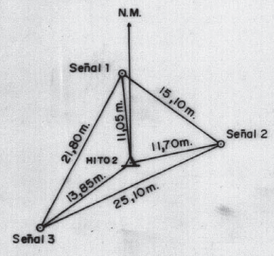
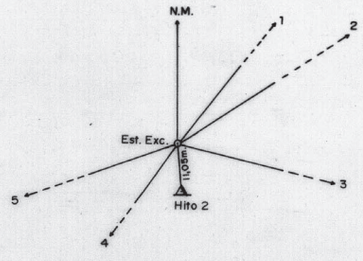


Gráfico de vinculación



Altura del Hito: 3,90 m.

Coordenadas oficiales

Latitud : −18° 20' 51",6

Longitud : −70° 22' 47",9

Referidas al P.A. Arica
Elipsoide de Clarke 1866

NOMBRE	ACIMUT	Prof.
Estacion Hito 2		
N.M.	00°00'	
Señal 1	356° 30'	0,30m
Señal 2	79° 20'	0,27m
Señal 3	234° 35'	0,24m

NOMBRE	ACIMUT
Est. Exc. a 11,05 m. del Hito 2	
N.M.	00° 00'
1. Hito 3	39° 10'
2. Control Satélite Chileno	57° 45'
3. Foro Chileno	104° 40'
4. Hito 1	214° 30'
5. Construcción Policía N. Perú	249° 35'
6. Hito 2	176° 30'

Delegado de Chile
Gabriel Montero Uranga

Delegado del Perú
Gerardo Pérez del Aguila

Figure R-2.19

2.69 On the other hand, Chile's Counter-Memorial fails to mention two incidents, referred to in Chapter I above, which reinforce the fact that the land boundary neither stopped at *Hito No. 1*, nor continued along the parallel passing through that marker to the sea.

2.70 The first occurred in April 2001 when a Peruvian technical commission travelled to the border zone to inspect the position of a Chilean surveillance booth that had been erected between *Hito No. 1* and the seashore. Peru discovered that the location of the surveillance booth was in Peruvian territory, north of the arc of the boundary line that was established in 1929-1930 by means of the bilateral agreements on the delimitation of the boundary discussed above. By a Note dated 10 April 2001, Peru protested the construction of the booth, stating that under no circumstances should it remain in Peruvian territory[129].

2.71 Chile immediately responded on 11 April 2001, arguing that the booth was situated in Chilean territory to the south of a "boundary" said to have been demarcated pursuant to the light tower arrangements that were implemented in 1968 and 1969[130]. This line of argument was misconceived because the light tower arrangements had nothing to do with the delimitation or demarcation of the land boundary. Consequently, Chile was obliged to remove the surveillance booth the next day, and the incident was satisfactorily resolved[131].

2.72 The second incident occurred in the mid-2000s when Chile attempted to introduce new internal legislation modifying the land boundary that had been agreed in 1929-1930.

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[129] Note (GAB) No. 6/23 of 10 April 2001, from the President of the Council of Ministers and Minister of Foreign Affairs of Peru to the Minister of Foreign Affairs of Chile. **PR, Annex 75**.

[130] Note No. 1022 of 11 April 2001, from the Minister of Foreign Affairs of Chile to the President of the Council of Ministers and Minister of Foreign Affairs of Peru. **PR, Annex 76**.

[131] See Note (GAB) No. 6/25 of 12 April 2001, from the President of the Council of Ministers and Minister of Foreign Affairs of Peru to the Minister of Foreign Affairs of Chile. **PR, Annex 77**.

2.73 On 21 October 2005, the Chilean Government submitted a draft constitutional law proposing the creation of a new Region of Arica and Parinacota comprising those two provinces. The draft law indicated that the limits of these provinces were, to the north, the same as those that had been set out in Chile's Decree No. 2-18.715 of 1989, which had simply referred to "the boundary with Peru"[132]. This formulation posed no problem for Peru given that it did not derogate from the 1929 Treaty of Lima.

2.74 However, on 13 November 2006, the Chilean Government submitted an amended draft of the same legislation to the Chilean Senate in which the limits of the new region were modified. Instead of describing the northern limits of the region as "the boundary with Peru", the amended draft of Article 1 of the law changed the provision to refer to the boundary as the "parallel of Boundary Marker No. 1."[133]

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[132] The draft as proposed on 21 October 2005 by the President of Chile, Ricardo Lagos, provided in the relevant part as follows:
"Article 1.- The XV Region of Arica and Parinacota, whose capital city is Arica, which comprises the current Provinces of Arica and Parinacota of the Region of Tarapacá, is hereby created. The limits of the abovementioned provinces are the ones mentioned in Article 1 of the Decree with Force of Law No. 2-18.715 of 1989, issued by the Ministry of the Interior."
(Spanish text reads as follows: "Artículo 1.- Créase la XV Región de Arica y Parinacota, capital Arica, que comprende las actuales Provincias de Arica, y Parinacota, de la Región de Tarapacá. Los límites de las provincias mencionadas se encuentran establecidos en el artículo 1° del Decreto con Fuerza de Ley No. 2-18.715, de 1989, del Ministerio del Interior."). **PR, Annex 28**.
The text of Article 1 of the Decree with Force of Law No. 2-18.715 of 1989 provided: "The specific delimitation of the provinces of the I Region of Tarapacá is as follows: 1. Province of Arica: To the north: The boundary with Peru, from the Chilean Sea up to the astronomic parallel of the Huaylas trigonometric. ... To the west: the Chilean Sea, from Point Camarones up to the boundary with Peru."
(Spanish text: "La delimitación específica de las provincias de la I Región de Tarapacá es la siguiente: 1. Provincia de Arica: Al Norte: el límite con Perú, desde el Mar Chileno hasta el paralelo astronómico del trigonométrico Huaylas. ... Al Oeste: el Mar Chileno, desde la punta Camarones hasta el límite con Perú."). **PR, Annex 25**.

[133] The relevant part of the amendment submitted by the President of Chile, Michelle Bachelet, to the Chilean Senate reproduced in Bulletin No. 4048-06 of 13 November 2006 reads as follows: "Article 1 … The limits of the new Region shall be as follows: To the North: The boundary with Peru, from parallel of Boundary Marker No. 1 on the Chilean Sea to the tripartite Boundary

2.75 Because this formulation was so patently inconsistent with the 1929 Treaty of Lima and the work of the Joint Commission in 1930, Peru sent two diplomatic notes (on 10 January and 24 January 2007, respectively) protesting the proposed amendment[134].

2.76 In the meantime, the amended draft law had been submitted to the Constitutional Court of Chile for its review in conformity with internal Chilean law. On 26 January 2007, just after the second Peruvian protest had been sent, Chile's Constitutional Court ruled that the new paragraph of Article 1 of the draft law describing the boundary as the parallel of Boundary Marker No. 1 was unconstitutional because its content did not bear a direct relation with the main ideas that had originally been submitted by Chile's Executive branch[135]. The law was accordingly revised, and the new law enacted on 23 March 2007 did not contain the offending passages referring to the parallel[136].

Marker No. 80 in the boundary with Bolivia. ... To the West: the Chilean Sea, from Point Camarones up to the parallel of Boundary Marker No. 1, on the boundary with Peru."
(Spanish text: "Artículo 1 ... Los límites de la nueva Región serán los siguientes: Al Norte: el límite con Perú, desde el paralelo del Hito No. 1 en el Mar Chileno hasta el Hito No. 80 tripartito de la frontera con Bolivia. ... Al Oeste: el Mar Chileno, desde la punta Camarones hasta el paralelo del Hito No. 1, en la frontera con Perú."). **PR, Annex 29**.
See also Second Report of 5 December 2006, issued by the Government, Decentralization and Regionalization Commission on the Second Constitutional Reading of Draft Law Creating the XV Region of Arica and Parinacota and the Province of Tamarugal, in the Region of Tarapacá. **PR, Annex 30**.

134 Notes (GAB) No. 6/3 of 10 January 2007 and No. 6/4 of 24 January 2007, from the Minister of Foreign Affairs of Peru to the Minister of Foreign Affairs of Chile. **PR, Annexes 79** and **80**.

135 Judgment-Case 719 of 26 January 2007, issued by the Constitutional Court of Chile, regarding Draft Law creating the XV Region of Arica and Parinacota and the Province of Tamarugal, in the Region of Tarapacá. **PR, Annex 31**.

136 Law No. 20.175 of 23 March 2007, Law Creating the XV Region of Arica and Parinacota and the Province of Tamarugal, in the Region of Tarapacá. **PR, Annex 32**.

2.77 When considered together with Chile's issuance of a new chart in 1998 modifying the land boundary by suppressing the prolongation of the boundary along the 10-kilometre arc seaward of Boundary Marker No. 1, these incidents reveal how Chile has (unilaterally and unsuccessfully) tried to alter the course of the land boundary in an attempt to build up its claim to a pre-existing maritime boundary extending along the parallel of latitude passing through Boundary Marker No. 1. However, Chile's maritime boundary claim cannot possibly be reconciled with the fact that the terminal point on the land boundary is Point Concordia, not *Hito No. 1*.

V. The Significance of the Land Boundary for Maritime Delimitation

2.78 The fact that the point where the land boundary meets the sea is at Point Concordia has a number of important consequences for Chile's contention that there is a pre-existing maritime boundary between the Parties extending along the parallel of latitude passing through *Hito No. 1*. While Chile's arguments will be addressed in more detail in Chapters III and IV below, it is instructive to recall the essence of Chile's position in so far as it depends on the incorrect identification of *Hito No. 1* as the terminus of the land boundary. The sequence of argument goes as follows.

2.79 *First*, Chile maintains that "[t]he point at which the land boundary reaches the sea determines the parallel of latitude forming the maritime boundary under the Santiago Declaration."[137] *Second*, Chile asserts that this parallel is the same one referred to in Article 1 of the 1954 Agreement relating to a Special Maritime Frontier Zone (what Chile terms the "Lima Agreement")[138]. *Third*,

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[137] CCM, para. 3.40.

[138] *Ibid.*

Chile claims that the Parties decided to signal that parallel of latitude by two light towers established in 1968-1969[139]. *Lastly*, Chile argues that "[t]he Parties thus consensually identified Hito No. 1 as the reference point for the parallel 'at the point at which the land frontier ... reaches the sea' for purposes of Article IV of the Santiago Declaration."[140] None of these contentions stand up to scrutiny for the basic reason that Chile's "parallel of latitude" does not reach the sea at Point Concordia, which is the land boundary terminus.

2.80 Apart from the fact that point IV of the Declaration of Santiago only applied to a situation where the 200-mile potential entitlements of islands (or groups of islands) were limited by a parallel (a situation that exists as between Peru and Ecuador, but not as between Peru and Chile), it was not a delimitation agreement. The Declaration of Santiago nowhere referred to the 1929 Treaty of Lima, the terminal point on the Peru-Chile land boundary (Point Concordia), or to *Hito No. 1* (which had no status other than being the first physical boundary marker). Consequently, there was no agreed starting-point for any maritime boundary between Peru and Chile, no identification of the co-ordinates of that point, no co-ordinates or indication of the seaward limit of a putative delimitation line, and no map depicting any resulting maritime boundary.

2.81 The same can be said for the 1954 Agreement relating to a Special Maritime Frontier Zone (hereinafter "1954 Agreement on a Special Zone"). It too made no mention of Point Concordia, and it did not provide for any delimited boundary extending along the parallel passing through *Hito No. 1*, which was also not referred to in the agreement. There was no need for the 1954 Agreement on a Special Zone to address these points because it was not an international boundary treaty, but only a practical arrangement to establish a provisional zone of tolerance to avoid conflicts between fishermen.

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139 CCM, para. 3.40.

140 CCM, para. 3.44.

2.82 With respect to the 1968-1969 lights, Chile acknowledges that they were constructed "as a practical solution for a specific purpose."[141] This, as Peru has explained, was also for the avoidance of fishing incidents. It is significant, in this respect, that when Peru proposed the idea of erecting posts or signs in 1968, it did so by referring to a point at which the common border reaches the sea, "*near* boundary marker number one."[142] This wording shows that the point at which the land boundary reached the sea was not *Hito No. 1*, and that consequently *Hito No. 1* did not represent the land boundary terminus. Chile accepted Peru's proposal indicating that the land boundary terminus was not at *Hito No. 1*, but rather "near" it, as acknowledged in Chile's Counter-Memorial[143].

2.83 When the Parties thereafter decided to erect the two lights in the vicinity of the land boundary, they agreed that the front light tower would be situated in Peruvian territory and the rear light in Chilean territory[144]. *Hito No. 1* was chosen as the appropriate location for the front structure because its co-ordinates had been specified in the Final Act of the Joint Commission in 1930 and it was the boundary marker closest to the sea. But this did not imply that *Hito No. 1* was the terminal point of the land boundary. It was obvious that the Peruvian lighthouse had to be located far enough from the coast to avoid being washed away by the sea just as Boundary Marker No. 1 had been so located. Given that the land boundary was an arc that extended up to Point Concordia, it would have been impossible to situate a light structure within Peruvian territory at that point. The choice of locating the Peruvian light near *Hito No. 1* was for practical purposes; it allowed one of the light beacons to be located on Peruvian soil.

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141 CCM, para. 3.6.

142 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 (emphasis added). **PM, Annex 71**.

143 CCM, paras. 3.22-3.23.

144 Document of 26 April 1968, para. 1. **PM, Annex 59**.

2.84 **Figure R-2.20** is a satellite image showing the base of the Peruvian light tower that was constructed close to *Hito No. 1*. That light tower was destroyed by an earthquake in 2001 (the rubble from the tower can be seen on the image). The orange line superimposed on the figure depicts the course of the 10-kilometre boundary arc passing through *Hito No. 1*. It can be seen that the base of the light tower lies on Peru's side of the boundary, and thus in Peruvian territory as had been agreed by the Parties.

2.85 In the photo reproduced as **Figure R-2.21** a blue line has been superimposed to show the parallel of latitude passing through *Hito No. 1* according to Chile's thesis. It can be seen that the parallel passes through of the light structure. Had the blue line represented either the maritime boundary or the extension of the land boundary up to the sea, more than half of the light structure would have been situated either in Chilean territory or on Chile's side of the maritime boundary. This would not have been consistent with the Parties' agreement, and it was not what was intended to be achieved by the establishment of the lights.

2.86 It was not necessary for the lights to materialize a precise line extending from Point Concordia because they were constructed only in order to provide a general orientation to artisanal fishermen operating near to the coast, not for purposes of indicating a previously delimited maritime boundary. Aligning the lights along the parallel passing through *Hito No. 1* was sufficient for this purpose. The delegates of the Parties forming the Peru-Chile Commission charged with installing the light towers were "technical representatives", as Chile's Note of 29 August 1968 confirms[145]. Their mandate did not involve revisiting or revising in any way the

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

delimitation of the land boundary agreed pursuant to the 1929 Treaty of Lima and the work of the Joint Commission in 1930[146].

2.87 The activities related to the erection of the lights therefore could not, and did not, derogate from the Parties' previous agreement (in the 1929 Treaty of Lima) on the location of the land boundary, including the fact that it extended right up to the coast at Point Concordia. That treaty could only have been amended with the agreement of the Parties, as reflected by the rules set forth in Article 39 of the Vienna Convention on the Law of Treaties. No such amendment ever occurred. Indeed, Chile confirms as much when it states that, "[w]ith the Treaty of Lima, the 1930 Final Act and the Act of Plenipotentiaries, all outstanding land-boundary matters were definitively closed."[147] As the Court observed in the *Cameroon-Nigeria* case, "while it may interpret the provisions of delimitation instruments where their language requires this, it may not modify the course of the boundary as established by those instruments."[148]

2.88 In the present case, the boundary established by the 1929 Treaty of Lima starts at Point Concordia where the land boundary meets the sea. The stretch of coast between Point Concordia and the parallel of latitude that passes through *Hito No. 1* is Peruvian. The result of this is that the maritime areas lying adjacent to that stretch of coast appertain to Peru. This is another reason why the Parties could not have agreed a maritime boundary along the parallel of latitude passing through *Hito No. 1*; any such line would have cut through exclusively Peruvian waters. The international delimitation of maritime boundaries between the Parties must necessarily start from Point Concordia.

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146 See, in this connection, the written Statement of Mr. Javier Pérez de Cuéllar attached as **Appendix B** to Vol. II of this Reply.

147 CCM, para. 2.16.

148 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 370, para. 107 and pp. 373-374, para. 123.

SATELLITE IMAGE SHOWING THE BASE OF THE DESTROYED PERUVIAN LIGHT TOWER

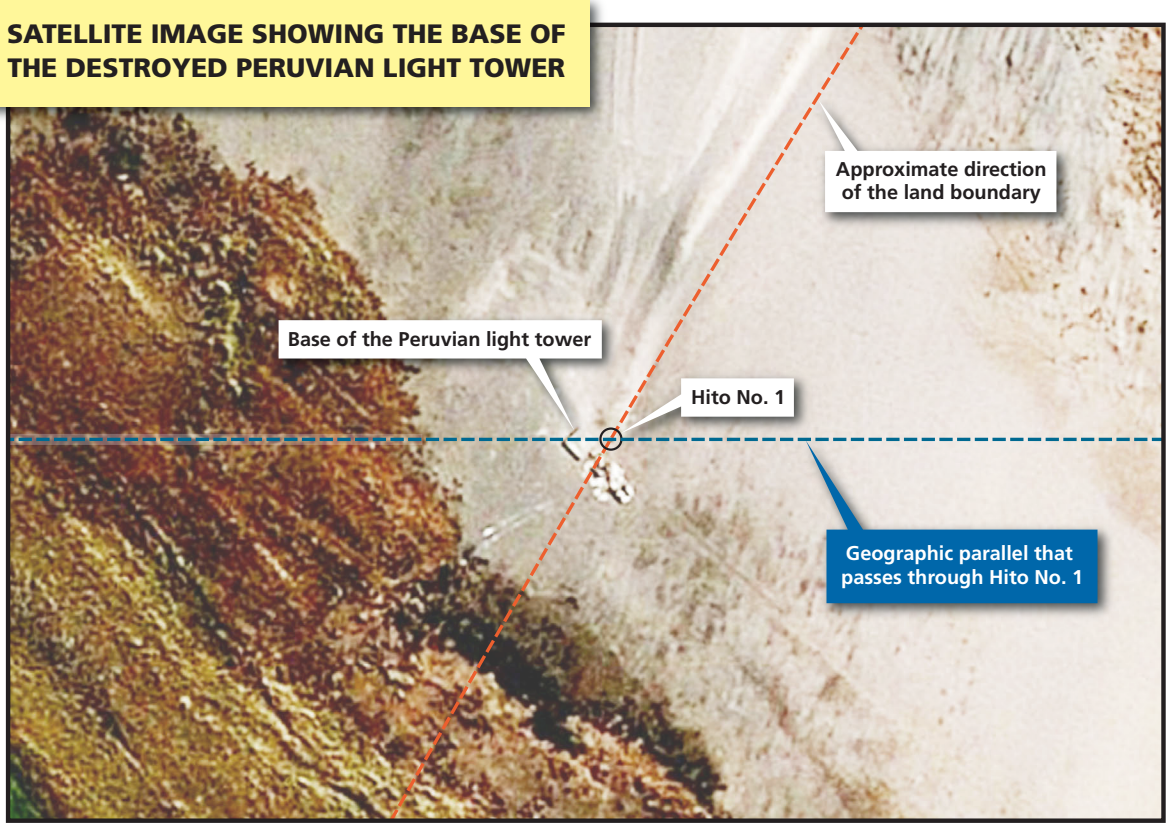

Figure R-2.20

PHOTOGRAPH OF THE BASE OF THE DESTROYED PERUVIAN LIGHT TOWER AND ITS ALIGNMENT WITH THE CHILEAN LIGHT TOWER

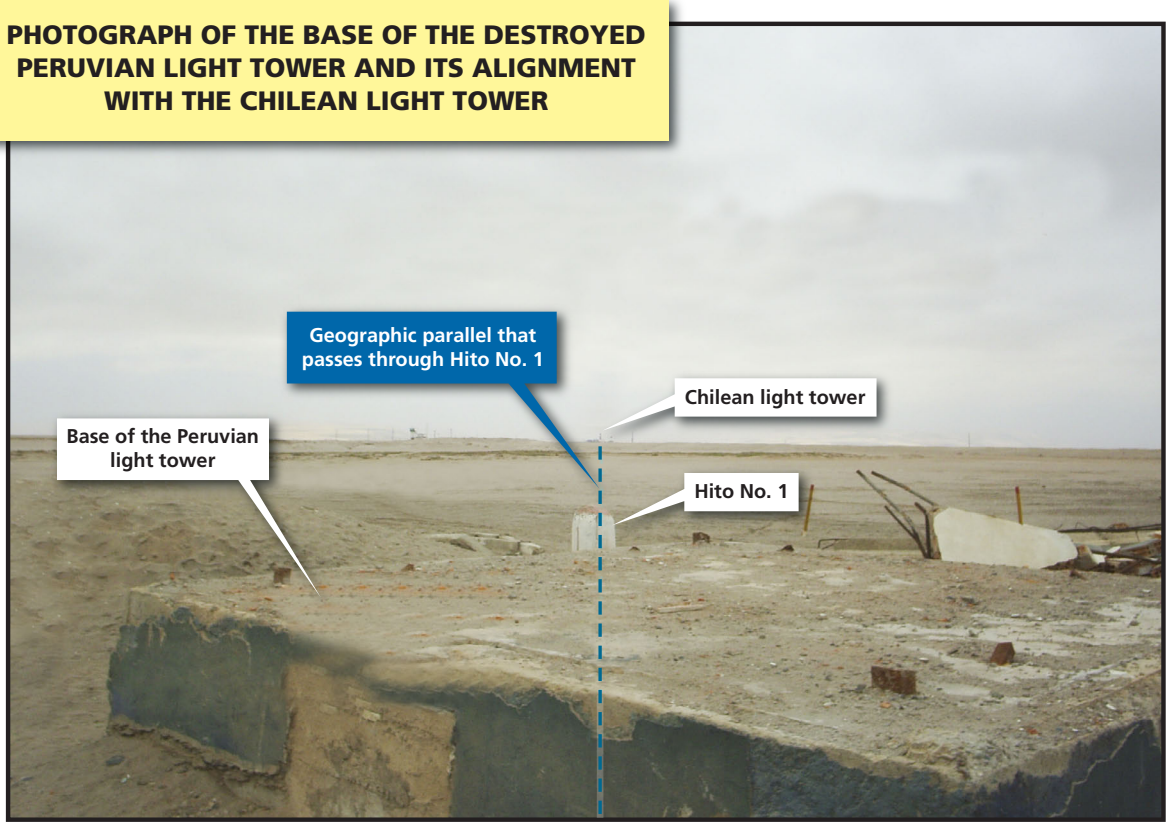

Figure R-2.21

VI. Conclusions

2.89 This chapter has demonstrated the following key points:

(a) The land boundary between the Parties was fully delimited by the 1929 Treaty of Lima. That treaty provided that the frontier between the two countries starts from a point on the coast to be named Concordia.

(b) The Joint Commission that subsequently demarcated the boundary in 1930 was under explicit instructions from the two Governments that the final portion of the land boundary was defined by a 10-kilometre radius arc measured from the bridge over the river Lluta, and that the starting-point of the dividing line between the Parties' respective territories was the intersection of that arc with the seashore.

(c) The contemporaneous sketch-map prepared by the Chilean member of the Joint Commission clearly showed that the boundary did not stop or start at *Hito No. 1*, but passed through *Hito No. 1* along the arc all the way up to where it met the sea.

(d) *Hito No. 1* was intentionally not placed at the coast, but rather some 200 metres inland so as to prevent it from being destroyed by the ocean. The location of *Hito No. 1* was determined by reference to a series of technical calculations for the placing of the last 12 boundary markers working from the land towards the sea.

(e) Chile's contention that the land boundary terminus is at *Hito No. 1* therefore has no basis.

(f) Over a long period of time, Chile's own maps recognized that Point Concordia is the terminal point on the land boundary, not *Hito No. 1*. Peru's practice was similar and has always been consistent.

(g) It was only in 1998 that Chile began to publish a chart unilaterally changing the course of the land boundary by eliminating the final section of the arc between *Hito No. 1* and the sea. The same chart also depicted a putative maritime boundary out to the sea along the parallel passing through *Hito No. 1*. For some 40 years previously, Chile's maps showed no such maritime boundary. Peru promptly protested.

(h) Chile also attempted to buttress its position by *first* placing a surveillance booth on Peruvian territory near the land boundary, and *second* proposing a change to its domestic legislation by providing for the northern boundary of its provinces to extend up to the parallel of latitude passing through *Hito No. 1*. Neither of these initiatives was successful. The surveillance booth was taken down, and Chile's Constitutional Court ruled that the amended draft law making reference to a changed land boundary was unconstitutional.

(i) Any maritime boundary between the Parties must start from Point Concordia. Neither the 1952 Declaration of Santiago, nor the 1954 Agreement on a Special Zone, nor the 1968-1969 light arrangements provided for any maritime boundary extending from that point. The maritime boundary starting from Point Concordia remains to be delimited by the Court.

CHAPTER III

THE 1952 DECLARATION OF SANTIAGO

I. Introduction

3.1 Chile's position in this case is clear and unambiguous. Chile argues explicitly and repeatedly that the international maritime boundary was established by agreement between Peru and Chile in the 1952 Declaration of Santiago.

3.2 Chile says: "in the Santiago Declaration of 1952, Chile and Peru delimited their maritime zones using the parallel of latitude passing through 'the point at which the land frontier of the States concerned reaches the sea'"[149] and that "[t]he agreement of the Parties concerning the lateral delimitation of their respective maritime zones is contained in Article IV of the Santiago Declaration"[150]; and also that "[s]ince the Santiago Declaration, parallels of latitude have been agreed as all-purpose maritime boundaries along the west coast of South America"[151]. It says that "the parallel of latitude agreed in the Santiago Declaration limits all seaward extensions of the States parties' maritime zones"[152]; and that "[t]here is long-standing recognition … that the Chile-Peru maritime boundary has been fully delimited by agreement."[153]

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149 CCM, para. 2.3.

150 CCM, para. 2.5.

151 CCM, para. 1.8.

152 CCM, para. 1.12. Cf., CCM, paras. 1.16, 1.30, 1.51, 2.3, 2.6, 2.81, 2.150.

153 CCM, para. 1.17.

3.3 Chile refers to "[t]he agreement on maritime boundaries in the Santiago Declaration" and "[t]he maritime boundary agreed in the Santiago Declaration"[154].

3.4 Chile identifies the heart of this case in the following words: "ultimately this case turns on fundamental rules of *pacta sunt servanda* and stability of boundaries."[155] The *pactum* in question is the 1952 Declaration of Santiago; and Chile's case stands or falls on its status and – if it is legally binding – upon its precise meaning and legal effect. This is the case that Chile has presented in its Counter-Memorial; and this is the case to which Peru responds.

3.5 This chapter accordingly reviews the 1952 Declaration of Santiago. Insofar as Chile claims that the Declaration of Santiago is a binding treaty, it would necessarily follow that the question must be approached as a matter of treaty interpretation – of the interpretation of the actual terms of the Declaration of Santiago.

3.6 Peru's case rests on two basic propositions: *First*, that the Declaration of Santiago was not, and was not intended to be, a legally-binding instrument establishing international maritime boundaries. *Second*, that on a plain reading of the text of the Declaration of Santiago it is obvious that the text was a declaration of international maritime policy which (regardless of its legal status) cannot have the effect as an international boundary treaty that Chile tries to ascribe to it.

3.7 This chapter of Peru's Reply addresses those two propositions. It begins by recalling the key episodes that illuminate the manner in which and the purpose for which the 1952 Declaration of Santiago was drafted and announced. It can

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154 CCM, para. 1.9. Cf., CCM, para. 1.22.

155 CCM, para. 1.21.

thus be seen why it was that the Declaration of Santiago took the form that it did. The chapter then analyses the status and meaning of the text as a matter of international law. In this way Peru demonstrates that the Declaration of Santiago was not intended to constitute, and did not constitute, an agreement establishing an international maritime boundary between Peru and Chile.

3.8 It is an incontestable fact that the 1952 Declaration of Santiago does not expressly refer to an international maritime boundary. Chile's case relies upon the argument that in the Declaration of Santiago the participating States impliedly adopted a parallel adumbrated in the 1947 unilateral claims made independently by Chile and Peru. That is why the events leading up to the adoption of the Declaration are crucial in this case. It is the characterization of those facts that lies at the heart of this dispute.

3.9 In essence, Peru and Chile differ over their reading of history. Where Peru sees a series of tentative responses to the pressure of circumstances, whose long-term legal significance was rarely contemplated and often unclear, Chile purports to see the patient and incremental working out of a carefully-planned legal régime that solidified, rapidly and unnoticed, into a permanent international maritime boundary. Unravelling the fabric that Chile has woven requires attention to the precise nature of the strands from which it is made, and particular care in assessing the legal implications of acts done and statements made in circumstances where the authors did not intend to assert or base themselves upon a legal analysis.

3.10 The 1947 claims by Peru and Chile, like the 1952 Declaration of Santiago, derived from the acknowledgement that the traditional extension of the territorial sea and a contiguous zone (which together extended only a dozen miles from the coast) were insufficient to guarantee the coastal State's right to protect, conserve and develop the resources of the seas adjacent to its coasts for the benefit of its people.

3.11 Chile and Peru were the first countries in the world to claim rights – sovereign rights and jurisdiction – in respect of the living resources of the sea out to 200 nautical miles from their coasts. In this sense, the unilateral claims of 1947 and the 1952 Declaration of Santiago are at the root of the concept of the 200-nautical-mile maritime zone consecrated by the modern law of the sea. But that does not mean that it is accurate to regard the 1947 unilateral claims of Chile and Peru and the zone envisaged by the Declaration of Santiago as having the same precise and well-defined juridical character as the exclusive economic zone recognized by the modern law of the sea.

3.12 Thus, the 1947 claims and the 1952 Declaration of Santiago asserted the rights of the coastal States while recognizing the navigational and communications rights of third States through the waters in question[156], and even the possibility of accepting the exploitation of the resources of the seas adjacent to the coastal States by nationals of third States, as long as they complied with non-discriminatory regulations adopted by the coastal State. The zones proclaimed in 1947 and 1952 were embryonic manifestations of the concept that evolved into the exclusive economic zone. But the fact that these measures heavily influenced the later development of the exclusive economic zone must not obscure the fact that at the time of their adoption they were tentative, provisional steps testing the limits of international law as it then stood[157]. There was considerable confusion as to what the 1947

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156 See paras. 3.63, 3.136-3.138, 3.150, 6.37 below.

157 As, indeed, they might also be said to have been the precursors of the concept of preferential rights over high seas resources. See, e.g., *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, pp. 25-27, paras. 57-60; and separate opinion of Judge Federico De Castro, *Fisheries Jurisdiction, (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, pp. 80-88, paras. 1-8. Other elements of the 1952 Declaration of Santiago, such as the idea that the rules were ultimately rooted in the concept of human rights, did not flourish as the basic concept developed. See, e.g., the comments of Dr. Alberto Ulloa: "Underlying all the new Maritime Law is the concept of Human Rights; the ability of mankind to take advantage of the natural resources for whom International Law

measures and the Declaration of Santiago purported to do[158]. This unsettled situation was recognised by the Court in 1974 in its judgment in the *Fisheries Jurisdiction* cases, where it remarked on the lack of agreement on the scope of the entitlements of States to maritime zones that was evident at the time of the first United Nations Conference on the Law of the Sea in 1958[159].

3.13 The Declaration of Santiago did not establish a prototype exclusive economic zone: it spelled out the basic principles of an international maritime policy, some, but not all, of which were implemented or adopted in a wide range of measures and practices, national and international, in the decades that followed. This is the context in which the 1947 claims, and the Declaration of Santiago, were drawn up.

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exists. This is about a new concept which was hitherto unknown in International Law. In another category, inferior but analogous, we cannot ignore mentioning the idea related to the conservation of maritime species. This is also a new concept in International Law, as it was previously thought that maritime Fishing and Hunting were inexhaustible and could be exploited uncaringly." Ulloa, Alberto: "Speech by Dr. Alberto Ulloa, Head of the Peruvian Delegation to the 1958 Geneva Conference, General Debate of the First Committee held on 5 March 1958". (*Revista Peruana de Derecho Internacional*, Tomo XVIII, No. 53, 1958, Enero-Junio, pp. 17-18). **PR, Annex 59**. See also García Sayán, Enrique: "Speech by Dr. Enrique García Sayán, Peruvian Delegate at the General Debate of the Second Committee held on 13 March 1958". *Ibid*., p. 47. **PR, Annex 60**.

158 See the comments of Méndez Silva, Ricardo: *El Mar Patrimonial en América Latina*. México, Universidad Autónoma de México, 1974, p. 26: "It is useful to point out that ... the legal nature of the 200-mile zone was not defined clearly. The decrees of Chile and Peru indicate that the claims over the 200-mile zone do not affect the right to free navigation of ships of all nations. The Declaration of Santiago establishes that it does not affect the right to innocent passage. None of the instruments qualify this zone as territorial sea; nonetheless, the right of innocent passage, stipulated in the Declaration of Santiago, is a unique legal element of the territorial sea. Even to this day ... the controversy over the legal nature of the zone between the Latin American States continues."

159 *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, pp. 22-24, paras. 50-54.

II. The 1952 Declaration of Santiago and Its Background

A. Chile's Claim that the Declaration of Santiago Has Its Origins in the Unilateral Claims of 1947

3.14 While Chile's main contention is that an international maritime boundary between the Parties was agreed in the 1952 Declaration of Santiago, it also argues that it accepted that its own 200-mile zone claimed in 1947 was laterally bounded in the north by a parallel of latitude abutting Peru's 200-mile zone declared in the same year, and that the Parties' two claims were thus "concordant"[160]. In this manner, Chile tries to paint the 1947 claims as the precursors to the 1952 Declaration of Santiago, which it asserts "constitutes a comprehensive and complete boundary between the Parties."[161] This argument cannot be reconciled with Chile's legislation at the time or with its contemporary conduct.

B. The Purpose and Character of the 1947 Claims

3.15 Chile refers to the two 1947 claims as "Concordant Unilateral Proclamations"[162]. It is not clear what is meant by this. The claims were closely related in time and in their objectives: but they were not co-ordinated and were in no sense agreed by Chile and Peru. There was no agreement on the terms of the claims; nor was there an agreement that the two States would take parallel but unilateral steps. They were concordant only in the sense that they are similar to one another.

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160 CCM, para. 1.29. Chile deals with the developments between the 1947 claims and the 1952 Declaration of Santiago at pages 50-97 of its Counter-Memorial.

161 CCM, para. 1.9.

162 CCM, p. 50.

3.16 It is common ground that both Peru and Chile were concerned by the exploitation by foreign fleets of whale and fish stocks in the waters off their coasts[163]; although from Peru's perspective it is clear that the primary focus in 1947 was upon whaling rather than upon fishing. The International Convention for the Regulation of Whaling had been adopted in December 1946 and was seen by both Peru and Chile as inimical to their interests[164], and the 1947 claims addressed this issue[165]. Chile does not contest the account of the background to these claims that is given in Peru's Memorial.

1. Legal Character of Chile's 1947 Proclamation and Peru's Supreme Decree

3.17 Chile has misunderstood an important difference between the two claims. It says that "[e]ach State's 200M zone was immediately established by its respective proclamation, without the need for any further formality or enacting legislation."[166]

3.18 It is for Chile to explain to the Court the provisions of its own law; but Peru observes that there are clear indications that the Chilean "Proclamation" did not have legal force.

3.19 *First*, Chile's 1947 declaration was an expression of political will that did not have the nature of a legal norm[167]. While Chile's Counter-Memorial characterizes the Proclamation as "official"[168], it was never published in the

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163 CCM, paras. 2.22-2.24. See also García Sayán, Enrique: *Notas sobre la Soberanía Marítima del Perú – Defensa de las 200 millas de mar peruano ante las recientes transgresiones*, 1955. **CCM, Annex 266**.

164 See the account in Whiteman, Marjorie M.: *Digest of International Law*, Vol. 4, Department of State Publications, 1965, pp. 1053-1061.

165 PM, paras. 4.42-4.45.

166 CCM, para. 2.30.

167 Chile's 1947 claim was discussed in PM, paras. 4.45-4.49.

168 CCM, para. 2.21.

Official Gazette of Chile as an official decree; rather, it appeared in a daily newspaper[169]. Given that publication in the Official Gazette was a pre-requisite for an instrument to have the force of law[170], it follows that Chile's contention that its 200-mile zone originally declared in 1947 was "immediately established ... without the need for any further formality or enacting legislation" is plainly wrong[171].

3.20 *Second*, a number of respected Chilean authors have acknowledged this point. For example, the Chilean diplomat Luis Melo Lecaros, described Chile's 1947 declaration in the following way:

> "The 1947 Presidential Declaration, logically, does not have any legal value. Our Constitution does not establish this sort of documents and it can only be deemed as an expression of the interest of having a positive law on the matter, but never to give it the value of a law that can modify a previous law which is in force and has been enacted in the same way as the Civil Code."[172]

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169 PM, para. 4.45. See also Presidential Declaration Concerning Continental Shelf of 23 June 1947. **PM, Annex 27**.

170 Article 6 of the Chilean Civil Code of 1855, in force in 1947, set forth: "The law does not compel unless it is promulgated by the President of the Republic… The promulgation must be done in the official journal; and the date of promulgation will be, for its legal effects, the date of such journal." (Spanish text: "La lei no obliga sino en virtud de su promulgación por el Presidente de la República… La promulgación deberá hacerse en el periódico oficial; i la fecha de la promulgación será, para los efectos legales de ella, la fecha de dicho periódico."). **PR, Annex 17**.

171 CCM, para. 2.30.

172 Melo Lecaros, Luis: "El Derecho del Mar". (*Revista de Derecho*, Universidad de Concepción, Año XXVII, No. 110, 1959, Octubre-Diciembre, pp. 424-425). Luis Melo Lecaros was one of the experts invited to assist the United Nations Secretariat with preparation for the first United Nations Conference on the Law of the Sea. See United Nations Doc. A/CONF.13/20, *Preparation of the Conference: Report of the Secretary-General*. Available at: <http://untreaty.un.org/cod diplomaticconferences/lawofthesea-1958/docs/english/vol_I/18_A-CONF-13-20_PrepDocs_ vol_I_e.pdf> accessed 8 October 2010. See also the views of the Chilean diplomat Enrique Bernstein, which are to the same effect, in: Bernstein Carabantes, Enrique: *Recuerdos de un diplomático. Haciendo camino, 1933-1957*. Santiago de Chile, Editorial Andrés Bello, 1984, pp. 102-103.

3.21 Similar views were expressed by Jaime Rivera Marfán (a respected Chilean commentator) in his treatise on the 1952 Declaration of Santiago. He writes:

> "On 23 June 1947, the Government of Chile, through the President of the Republic, Gabriel González Videla, issued an Official Declaration that, although it has no legal value, constituted a formulation of the principles on which our country would base itself, later, to sign the 1952 Declaration on the Maritime Zone together with Ecuador and Peru, where it affirmed its international policy on these matters.
>
> …
>
> As we have already said, the value of this Declaration is limited to being an expression of our Government's thoughts on these matters, and of being an immediate precedent to the 1952 Agreement; but it has no value for the domestic law because it was not enacted by any of the means established by the Constitution and the laws, unlike what the United States and Mexico had done, by supplementing or enacting their proclamations by means of executive orders or decrees.
>
> A declaration of this sort also lacks value before international law; if a State cannot enforce it upon its nationals and within its own territory, where it exercises absolute jurisdiction, all the more reason for it not to be able to enforce it upon other nations over which such jurisdiction does not exist."[173]

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[173] Rivera Marfán, Jaime: *La Declaración sobre Zona Marítima de 1952 (Chile-Perú-Ecuador)*. Santiago de Chile, Editorial Jurídica de Chile, Universidad Católica de Chile, Facultad de Ciencias Jurídicas, Políticas y Sociales, Memoria No. 27, 1968, pp. 29 and 31.

3.22 Likewise, Patricio Arana Espina remarked on the lack of legal endorsement for the Chilean Declaration:

> "This Declaration, though never enacted into a legal instrument, constitutes the first precedent in the world concerning the two-hundred-nautical mile claim. Subsequently, following the Chilean example, many countries, especially Latin American, extended their sovereignties to a distance equal to the one established by our country."[174]

3.23 *Third*, the lack of legal effect of the 1947 Chilean declaration appears to have been a necessary conclusion because its content was inconsistent with the provisions of Chilean law as it stood at the time. As of 1947, the only Chilean law in force relating to Chile's maritime zones was Article 593 of the Chilean Civil Code. That article, which dated from the 1855 edition of the Civil Code, provided as follows:

> "Article 593. The adjacent sea, up to a distance of one marine league, 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, measured in the same manner."[175]

3.24 Given that one marine league equals three nautical miles, Article 593 of the Civil Code provided for a three-mile territorial sea and a 12-mile policing zone for security and fiscal law purposes. It provided for no other zones.

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[174] Arana Espina, Patricio: "Las regulaciones de pesca". In: Orrego Vicuña, Francisco (ed.), *Preservación y Medio Ambiente Marino. Estudios presentados al Seminario Internacional sobre Preservación del Medio Ambiente Marino, organizado por el Instituto de Estudios Internacionales de la Universidad de Chile. 25-27 de Septiembre de 1975*. Chile, Universidad Técnica del Estado, 1976, p. 101.

[175] Chilean Civil Code of 1855. **PM, Annex 25**.

The 1947 Chilean declaration did not change this position. Indeed, Article 593 remained unchanged until 1986, when it was amended to provide for a 12-mile territorial sea, and a new provision was added providing for a 200-mile exclusive economic zone and for continental shelf rights (Article 596)[176]. And it will be appreciated that since there were, as of 1947, no zones provided for in Chilean law extending out to 200 miles, Chile's 1947 declaration could not have established a 200 mile zone bounded by a parallel of latitude with Peru[177].

3.25 It appears from doctrinal sources that Chile did at one time consider amending its Civil Code to reflect elements of the 1947 declaration. Ultimately, however, Chile decided not to do so because of the problems that would have been encountered enacting such legislation before the Chilean Congress. As the former Secretary-General of the Permanent Commission for the South Pacific, Professor Hugo Llanos Mansilla (a Chilean national), explained:

> "Indeed, the enactment of a decree clashed with the legal provision set out in Article 593 of the Civil Code which enshrined as territorial sea the adjacent sea up to a distance of one marine league (three nautical miles), measured from the low-water mark. To propose the passing of a law to have this provision amended (only done in 1986, with Law 18.565) implied not only a delay, but also a gruelling task of persuading Congress of the virtues and advantages of such a revolutionary thesis that ran against a century-old tradition."[178]

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176 Law No. 18.565 of 13 October 1986, Amendment to the Civil Code Regarding Maritime Spaces. **PM, Annex 36**.

177 Consequently, not a single Chilean author at this time suggested that the 1947 claims had established an international maritime boundary between Chile and Peru.

178 Llanos Mansilla, Hugo: "Las 200 millas y sus consecuencias en el Derecho del Mar". In: Llanos Mansilla, Hugo (ed.), *Los cincuenta años de la tesis chilena de las doscientas millas marinas (1947-1997)*, Santiago de Chile, Universidad Central de Chile, 1998, pp. 25-26.

3.26 More direct evidence to the same effect is provided by Chilean diplomat Enrique Bernstein, who served twice as Under-Secretary of the Chilean Ministry of Foreign Affairs. He explained the Ministry's reservations concerning plans to issue a decree that included the text of the declaration of 1947, and explained the reason why the Chilean claim of 1947 was issued as a "Declaration" rather than as a "supreme decree":

> "As soon as he came into office, President González Videla took note that whaling, together with the exploitation of other species of our marine resources at the hands of foreign fleets, had a very unfavourable projection for Chile. Having previously consulted his Minister of Economy, Roberto Wachholtz, on the matter; he sent the Ministry of Foreign Affairs a draft Supreme Decree by means of which national sovereignty over the continental shelf adjacent to the coast was proclaimed, reserving Chile's fishing and hunting activities to a distance of 200 miles.
>
> This draft caused a stir in the Ministry of Foreign Affairs, which by obligation and tradition, is always prudent and prudish. The matter was passed on, for further study, to the Department that I was responsible for. … However, the draft decree that was sent to us for consultation appeared to everyone to be quite reckless. I submitted it to an exhaustive examination by the technical offices of the Ministry. Its provisions seemed to be irreconcilable with those in the Civil Code, which restricted up to a distance of four leagues only their right of policing the sea. Nor did it agree with the existing norms of international law. It furthermore seemed indispensable to consult other public divisions, notably the Navy, which would be in charge of the enforcement of such a Decree. Finally, a previous inquiry amongst other American countries was recommended.
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> …
>
> We finally voiced our opinion. We deemed it indispensable to previously modify all pertinent articles of the Civil Code. A law was required to this effect, otherwise the Comptroller's Office would surely object to the Supreme Decree. We also foresaw some difficulties from the point of view of international law.

…

> The issuing of a 'Declaration' instead of a Supreme Decree was intended to avoid the Comptroller's objections. And even if the internal legal effects of the Presidential gesture were dubious, the desired international impact was accomplished."[179]

3.27 *Fourth*, subsequent Chilean legislation identifies the 1952 Declaration of Santiago, not the 1947 Declaration, as the legal origin of Chile's 200-nautical-mile claim. Thus, Decree No. 453 of 18 July 1963 issued by the Ministry of Agriculture of Chile and published in the Official Gazette on 26 August 1963, stipulated that:

> "1. Licences for the operation of fishing factory ships, within *the 200-mile zone, established in the Declaration on maritime zone, of 18 August 1952*, enacted as law of the Republic by decree No. 432, of 23 September 1954, issued by the Ministry of Foreign Affairs, shall only be granted to ships of Chilean flag."[180]

3.28 In contrast to the position of the Chilean declaration, the 1947 Peruvian claim was contained in a piece of legislation – Supreme Decree No. 781 of 1 August 1947, published in the Official Gazette, which declared national sovereignty and jurisdiction over the adjacent waters, specifically extending its control out to 200 miles from the coast.

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179 Bernstein Carabantes, Enrique, *op. cit.*, pp. 102-103.

180 Decree No. 453 of 18 July 1963, Regulation of Permits for the Exploitation by Factory Ships in the Specified Zone. (Emphasis added). (Spanish text: "1. Los permisos para la operación de barcos fábrica pesqueros, dentro de la zona de 200 millas, establecida en la Declaración sobre zona marítima, de 18 de Agosto de 1952, promulgada como ley de la República por decreto Nº 432, de 23 de Septiembre de 1954, expedido por el Ministerio de Relaciones Exteriores, sólo se otorgarán para barcos de bandera chilena."). **PM, Annex 32**.

3.29 These points are not made simply in order to correct the account given by Chile in its Counter-Memorial. They have a direct bearing upon the case. They demonstrate that the 1947 Chilean Presidential declaration did not create any maritime zone in Chilean legislation. It is for Chile to explain to the Court how a bilateral maritime boundary could have been established between Peru's legally-existent maritime zone and Chile's declared but legally non-existent maritime zone.

3.30 The 1947 claims were most definitely *not* coordinated legal measures. They were not carefully-engineered, coordinated parallel legal components that were subsequently bolted together in the 1952 Declaration of Santiago to produce a stable, sophisticated, integrated, legal régime for the South-East Pacific. The claims were innovative, speculative steps taken unilaterally in response to an immediate problem. The certainty and stability of the legal régime that they foreshadowed and envisaged did not develop until many years later.

2. The Use of the 'Mathematical Parallel' to Construct the Seaward Boundary

3.31 With regard to the 1947 Chilean proclamation and the Peruvian supreme decree Chile says that "[b]oth texts addressed the issue of the perimeter of the maritime zone in which sovereignty and jurisdiction were claimed."[181] But Chile's own account of the declarations disproves this.

3.32 Chile quotes a provision in the 1947 Chilean Proclamation which stated that Chile's maritime zone was "within the perimeter formed by the coast and the mathematical parallel projected into the sea at a distance of 200 nautical miles from the coasts of Chilean territory."[182] Chile also quotes the provision

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[181] CCM, para. 2.31.

[182] CCM, para. 2.31.

in the Peruvian supreme decree which stipulated that Peru's maritime zone covered the area "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*."[183] It describes the Chilean declaration and the Peruvian supreme decree as "substantially similar in form, content and effect."[184] The implication is that the Chilean declaration defined the boundary or perimeter [Greek *peri* (around); *meter* (measure)] that encircled and thus defined the entire limit of the respective maritime zones of the two States.

3.33 But Chile also states that its concept of the "mathematical parallel" "is a technical concept which in effect leads to a form of *tracé parallèle* of the coastline"[185]. At the time Chile did not prepare any map to accompany its 1947 claim in order to depict the effect of this technical concept. It now offers a verbal explanation of how this operated (by reference to the case of Peru):

> "The 'imaginary parallel line' forming the seaward limit of Peru's maritime claim was to be formed by taking each point of the Peruvian coastline and moving it due west, along the corresponding parallel of latitude, for 200 nautical miles to a point in the Pacific Ocean. The aggregate of those points in the Pacific Ocean formed that 'imaginary parallel line'. To use the terms employed by the Court, Peru's outward limit was a form of *tracé parallèle*, a method 'which consists of drawing the outer limit of the belt of territorial waters by following the coast in all its sinuosities'"[186].

3.34 Chile's reasoning then runs as follows. First, it assumes that this retrospective explanation of Chile's own declaration must be applied to Peru's 1947

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183 CCM, para. 2.32.

184 CCM, para. 2.29.

185 CCM, para. 2.31.

186 CCM, para. 2.33 (footnote omitted).

supreme decree. Chile then proceeds to draw the inference that "[t]he method employed by Peru to measure the outward limit of its maritime zone also determined the northern and southern lateral limits of its zone."[187] It is a perfect example of a *petitio principii*. The inference assumes that the northernmost and southernmost parallels of latitude used for the technical cartographic task of constructing the *tracé parallèle* were also to be used as the international maritime boundaries of Peru. But *nothing* in Peru's supreme decree states or implies that the application of the cartographic technique had as a side-effect the establishment of an international maritime boundary.

3.35 It will be noted that Peru's 1947 supreme decree in fact contains *two* material provisions. Chile quotes the *third* operative paragraph of Peru's decree, which contains the reference to the 200-nautical-mile zone the outer limit of which is described in terms of a *tracé parallèle*[188]. Chile ignores the two paragraphs that precede paragraph 3, which:

> "1. ... 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."[189]

Spanish text reads as follows:

> "1. Declárase que la soberanía y la jurisdicción nacionales se extienden a la plataforma submarina o zócalo continental e

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187 CCM, para. 2.34.

188 CCM, para. 2.32.

189 Supreme Decree No. 781 of 1 August 1947. **PM, Annex 6**.

> 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."

3.36 It will be observed that in those two paragraphs Peru does *not* limit its claim to 200 nautical miles. Peruvian law explicitly asserted that Peru's maritime claim reaches out as far as "the extension necessary to reserve, protect, maintain and utilize natural resources" of the water column and of the seabed. Given that the reference to the *tracé parallèle* in the 1947 supreme decree related to only a part of Peru's claim – the initial implementation in paragraph 3 of its broader jurisdictional claim set out in paragraphs 1 and 2 – it is difficult to see how it can be thought that the 1947 supreme decree could have been an element in a co-ordinated establishment of final international maritime boundaries.

3.37 The relevant provision in paragraph 3 of the 1947 supreme decree was plainly concerned with the drawing of the "seaward limit" (to use Chile's own description of it)[190]. Indeed, the entire point of the *tracé parallèle* is to draw outer, seaward boundaries of maritime zones: the *tracé parallèle* cannot be used to draw lateral boundaries. The reference to the geographical parallels is expressly tied to the manner of measuring the 200 nautical miles ("a distance of two hundred (200) nautical miles *measured following the line of the geographical parallels*"): nothing suggests that the geographical parallels were also intended to serve as the northern and southern boundaries

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[190] CCM, para. 2.33, quoted above at para. 3.33.

of Peru's zone. Nothing in the Peruvian supreme decree suggests that it was establishing maritime boundaries with Chile and with Ecuador: and Ecuador, it will be noted, had not at this time even made a 200-nautical-mile claim of its own.

3.38 Chile asserts that "Peru's maritime zone was conceived in 1947 as a corridor"[191] and that Peru "fixed the limits of its maritime zone in 1947 using the same parallels of latitude on which the three States agreed in the Santiago Declaration."[192] It uses this argument to build the conclusion that the Declaration of Santiago was an uncontentious consolidation of a pre-existent understanding on maritime boundaries. That assertion is a wholly baseless attempt to rewrite history. There is not a shred of evidence to suggest that Peru conceived its 1947 measure as establishing a "corridor"; and Peru did not conceive it in that way. Peru was focused on third States, and the declaration of the principle that States have rights over the living resources of the seas adjacent to their coasts that cannot be ignored by distant-water fishermen from other States.

3.39 Chile's own 1947 declaration[193] escapes close analysis in the Counter-Memorial. It is, however, clear that it did not purport to establish maritime boundaries with Chile's neighbours (including Argentina, which had already made its own claim to the epicontinental sea and continental shelf)[194]. Chile's declaration claim simply states, in paragraph 4, that it "does not disregard the similar legitimate rights of other States on a basis of reciprocity".

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191 CCM, para. 2.39.

192 CCM, para. 4.14.

193 Presidential Declaration Concerning Continental Shelf of 23 June 1947. **PM, Annex 27**.

194 Argentinean Declaration Proclaiming Sovereignty over the Epicontinenal Sea and the Continental Shelf, formulated on 11 October 1946. **PM, Annex 90**.

3.40 There is no express indication in either of the 1947 declarations that they were intended to establish the international maritime boundary between Peru and Chile. If Chile were correct in suggesting that maritime boundaries were established by implication in 1947, one might have expected to see those boundaries described as such, and recorded in a treaty, or domestic legislation, or diplomatic correspondence. But there is nothing. Chile has not presented a single document that gives any hint that Peru and Chile intended in 1947 to establish the international maritime boundary between them or even that they supposed that such a boundary had come about as a side-effect of their unco-ordinated unilateral claims.

3.41 One point is particularly telling. If there had been any intention to co-ordinate the two maritime zones there would surely have been a formal exchange of notifications between Peru and Chile. But there was no such exchange: each country acted unilaterally and autonomously. When Peru enacted Supreme Decree No. 781 concerning its claim of 200 miles, it addressed a single Circular Letter to Peruvian Embassies in more than 30 countries[195], with Chile being among them. That Circular Letter, dated 23 September 1947, only summarized the content of Supreme Decree No. 781, stating that Peru had declared that its national sovereignty and jurisdiction extended to the continental shelf and to the sea adjacent to the national coast "up to a parallel line to it, at a distance of 200 nautical miles". The Circular Letter stated that the text of Supreme Decree No. 781 should be sent to the Ministries of Foreign Affairs of each of the recipient States *for the purposes of information*[196].

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[195] Circular Letter No. (D) 2-6-N/27 of 23 September 1947, from the Secretary-General of the Ministry of Foreign Affairs of Peru to Peruvian Embassies and Missions in: Argentina, Belgium, Bolivia, Brazil, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, the Dominican Republic, Ecuador, El Salvador, France, Great Britain, Guatemala, Haiti, Honduras, Italy, Mexico, Norway, Panama, Paraguay, Portugal, Spain, Sweden, Switzerland, The Netherlands, the United States, Uruguay and Venezuela. The full text is set out as **PR, Annex 1**.

[196] The Circular Letter said: "Please *find attached a copy of Supreme Decree No. 781 issued on 1 August*, declaring that national sovereignty and jurisdiction extend to the continental and insular

3.42 Peru sent Chile no more than the Circular Note for information when it adopted Supreme Decree No. 781 of 1947. Note No. 5-4-M/45 of 8 October 1947 was sent by the Peruvian Ambassador to the Chilean Minister of Foreign Affairs. The Peruvian Note made no mention whatsoever of the Chilean declaration of 23 June 1947, of the Note by which Chile had brought its own declaration to the attention of the Peruvian Government, or to any exchange of information between the two States on this matter. The Peruvian Note does not include any expression that could be construed as suggesting that an acknowledgment of receipt would have the effect of establishing lateral maritime boundaries between both countries; nor that would suggest that the Note represented Peru's half of a mutual recognition of an international maritime boundary between the countries. As Peru had done when it received Chile's equivalent communication, Chile's Ministry of Foreign Affairs simply acknowledged receipt of the Note: it made no reference to the possible establishment of an international maritime boundary between both countries, or to any understanding on the matter.

3.43 Chile's argument from this point onwards focuses upon *Peru's* practice. Chile's inability to point to anything in its own practice evidencing the alleged concordance of unilateral claims establishing an international maritime boundary is highly significant. How can it be said that there was a common intention on the part of Chile and Peru to establish lateral boundaries

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shelves adjacent to the coasts of the national territory and to the sea adjacent to those coasts up to a parallel line to it, at a distance of 200 nautical miles. *The text of said Supreme Decree shall be sent to the attention of the Foreign Ministry of that country, for the purposes of information*." (Emphasis added). (Spanish text: "Acompaño al presente oficio copia del Decreto Supremo No. 781, expedido el 1 de agosto último, por el que se declara que la soberanía y la jurisdicción nacionales se extienden a la plataforma submarina o zócalo continental e insular adyacente a las costas del territorio nacional y al mar adyacente a dichas costas hasta una línea paralela a éstas, trazada a 200 millas marinas. El texto de dicho Decreto Supremo se servirá usted, ponerlo en conocimiento de la Cancillería de ese país, en vía de información.").

when Chile is unable to produce a single piece of contemporaneous evidence showing that it held that intention itself?

3.44 The only materials to which Chile points are a handful of later secondary sources. The earliest, a depiction described by Chile as "contemporaneous", appears in E. García Sayán's *Notas sobre la Soberanía Marítima del Perú*, a book which in fact post-dates not only the 1952 Declaration of Santiago but also later developments such as the 1954 agreements. Chile says that "[h]is contemporaneous depiction of Peru's maritime zone ... shows the zone bounded in the north and south by the two parallels of latitude ..."[197]. The implication is that the lines of latitude that "bounded" the zone were international maritime boundaries.

3.45 That is a distortion. In fact, nothing in García Sayán's text – either in the passages quoted by Chile[198] or elsewhere in the work – gives any indication that he thought that Peru's 1947 decree established an international maritime boundary. Chile reproduces, as Figure 4 (after p. 60) in the Counter-Memorial, a sketch-map included in García Sayán's book and suggests that it depicts lateral boundaries of Peru's maritime zone. But the sketch-map is not referred to at all in García Sayán's text[199]. Moreover, the sketch-map indicates the seaward boundary of the 200-nautical-mile zone with a thick black line but has no such line at the north or south of the zone. The sketch-map shows that the outer limit is 200 nautical miles from the coast, measured along the parallels: but there is no basis whatever for asserting that it indicates lateral boundaries for Peru's maritime zone.

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197 CCM, para. 2.35.

198 García Sayán, Enrique, *op. cit.* **CCM, Annex 266**.

199 The provenance of the sketch-map is unclear. It appeared in the first edition but not in the second edition of García Sayán's book.

3.46 Chile's argument – or rather its suggestion – is based once again upon the same *petitio principii*. The sketch-map included in the book can be read as depicting international maritime boundaries only if one makes an initial assumption that the parallels of latitude used to construct the line had somehow come to have the status of international maritime boundaries; and they had not.

3.47 Chile also refers to the thesis written by a geographer, Eráclides Vergaray Lara, entitled *El Mar del Perú es una Región Geográfica*[200] and published in 1962. It is no more helpful to Chile. It does not refer to maritime boundaries between Peru and neighbouring States. It says nothing to suggest that such international maritime boundaries exist. It simply purports to describe the maritime "region" created by Peru's maritime zone. The accompanying sketch-map (from which Chile omits the footnote stating that "This information is provisional")[201], depicts no lateral boundaries.

3.48 The same is true of the third text adduced by Chile in support of its claim that the 1947 Peruvian supreme decree established an international maritime boundary: J. L. Bustamante y Rivero's *Derecho del Mar*[202], published a quarter-century after the decree, in 1972. This work refers to the construction of the zone by use of the measurement of the 200-nautical-mile distance along the parallel, but says nothing to suggest that the method used to draw the outer limit would have as a side effect the production of a line that constitutes an international maritime boundary. Chile has chosen to overlook Bustamante's 1953 work, much closer to the relevant time, which also gives no indication

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200 Vergaray Lara, Eráclides: *El Mar del Perú es una Región Geográfica*. Asociación Nacional de Geógrafos Peruanos, Anales, Vol. III, 1962. **CCM, Annex 314**. The sketch-map appears as Figure 5, after page 60 of the CCM.

201 *Ibid*., p. 31.

202 Bustamante y Rivero, J. L.: *Derecho del Mar – La Doctrina Peruana de las 200 Millas*, 1972. **CCM, Annex 255**.

whatever that Bustamante thought that lateral boundaries had been established in 1947 or in 1952[203]. The same is true again of an agricultural statistics document from 2000[204], also cited by Chile[205].

3.49 The diplomatic Notes cited by Chile[206], by which Chile and Peru formally notified each other in 1947 of their 200-nautical-mile claims, contain no hint whatever that the claims had established an international maritime boundary between the two States. Therefore, there was no reason for Peru to protest, as Chile erroneously suggests.

3.50 It is remarkable that in these diplomatic Notes there is no mention – not the slightest hint – that either Peru or Chile thought that the instruments about which they wrote and whose existence they "acknowledged without protest",

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203 "… the decree itself establishes that its provisions do not affect the right of freedom of navigation by ships of all nations. And implicitly, it also has it understood that – if the norms of juridical hermeneutics are properly applied – the acts of sovereignty performed by the Peruvian State in the zone will be restricted only to the purposes of the proclamation, i.e., to the protection, conservation and defence of the natural resources found therein and, as a consequence, to the surveillance and regulation of these national economic interests. All in all, this entails the announcement of the exercise of some degree of control and of a certain jurisdiction to these effects; in other words, something that is substantially identical to what the United States of America proclaimed in 1945. Hence, whether or not we like it, for the 'Truman Proclamation', jurisdiction and control are acts of sovereignty; albeit even relative or partial, as applied to a certain matter and within an international community order or system." Bustamante y Rivero, José Luis: "Las Nuevas Concepciones Jurídicas sobre Dominio Territorial del Estado y Soberanía Marítima (Memoria que contiene la exposición de motivos del Decreto Supremo expedido por el Gobierno del Perú el 1 de agosto de 1947)", Madrid, 1953. (*Revista del Foro*, Colegio de Abogados de Lima, Año XLI, No. 3, 1954, Setiembre-Diciembre, pp. 480-481).

204 Ministry of Agriculture, *Perú: Estadística Agraria 2000*, 2002. **CCM, Annex 194**.

205 CCM, para. 2.40.

206 CCM, para. 2.41. See Note No. 621/64 of 24 July 1947, from the Ambassador of Chile to the Minister of Foreign Affairs of Peru. **CCM, Annex 52**; Note No. 5-4-M/45 of 8 October 1947, from the Ambassador of Peru to the Minister of Foreign Affairs of Chile. **CCM, Annex 53**; Note No. (D)-6-4/46 of 17 November 1947, from the Minister of Foreign Affairs of Peru to the Ambassador of Chile. **CCM, Annex 54**; and, Note No. 015799 of 3 December 1947, from the Vice-Minister of Foreign Affairs of Chile (signing for the Foreign Minister) to the Ambassador of Peru. **CCM, Annex 55**.

had established an international maritime boundary between the two States. There could scarcely be a more striking contrast with the prolonged and laborious bureaucratic process, documented in painstaking detail, with which delimitation issues were approached by Chile and Peru in 1929-1930[207]. If a 200-mile international maritime boundary had come into being in 1947, someone would surely have noticed, and someone would surely have made a note of the fact somewhere in the governmental records of Chile or Peru. But there is nothing.

3.51 Chile offers no other support for its contention that the 1947 declarations established an international maritime boundary between Peru and Chile.

3. The 'Prior Instances of Use of Parallels of Latitude'

3.52 The only contemporaneous evidence adduced by Chile for its argument that the maritime boundaries were contemplated in 1947 is in a short section of the Counter-Memorial headed "Prior Instances of Use of Parallels of Latitude in the Practice of American States"[208]. It cites just two such instances. One is the use of the parallel by Ecuador in the context of the neutrality zone around North, Central and South America under the 1939 Declaration of Panama. A glance at the map that is Figure 6 (following page 64) in the Counter-Memorial makes it obvious that the pan-continental neutrality zone was drawn without reference to the limits of national maritime zones. But the whole of that zone

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207 See PM, paras. 6.34-6.46. See also Treaty for the Settlement of the Dispute Regarding Tacna and Arica, with Additional Protocol, signed on 3 June 1929. **PM, Annex 45**; Final Act of the Commission of Limits Containing the Description of Placed Boundary Markers of 21 July 1930. **PM, Annex 54**; Act of 5 August 1930. **PM, Annex 55**; and, Agreement to Determine the Boundary Line and Place the Corresponding Boundary Markers at the Points in Disagreement in the Peruvian-Chilean Limits Demarcation Joint Commission of 24 April 1930 (Identical Instructions Sent to the Delegates). **PM, Annex 87**.

208 CCM, paras. 2.44-2.49.

had to be rested on an assertion by one or other coastal State of a neutrality zone off its coasts; and the use of parallels by Ecuador as a convenient way of describing its part of that neutrality zone was a reasonable pragmatic approach to this issue, applicable in an emergency situation. There is nothing in the fact of the line, or the texts quoted by Chile, that gives the slightest reason to suppose that there was an assumption that international maritime boundaries followed lines of latitude. And, of course, in 1939 no 200-mile claims had been made: even the Truman Proclamations lay six years in the future.

3.53 Chile's second instance, the 1836 Ecuadorean decree on smuggling which referred to the "neighbouring State parallel"[209] is an unusual and interesting example of a law that appears to deny a right of innocent passage through a three-mile territorial sea; but it obviously does not indicate a belief that the "neighbouring State parallel" constituted an international maritime boundary. Neither Ecuador nor Peru has ever taken the position that the maritime boundary between them was established by a parallel of latitude in or before the 1830s. Indeed, there was not even a settled land boundary between them at that time[210].

3.54 Again, the point is not simply that the evidence adduced by Chile in support of its case does not begin to support the interpretation that Chile wishes to put on it. The important point is that this evidence exemplifies the flaw at the heart of Chile's case: it wishes the Court to treat each and every reference to a parallel, regardless of its context, purpose or actual terms, as a recognition that any mention of the parallel in relations between Chile and Peru signifies

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209 CCM, para. 2.49; **CCM, Annex 204**.

210 The land border between Peru and Ecuador was agreed in the Protocol of Peace, Friendship and Boundaries (*Protocolo de Río de Janeiro*) signed in 1942, and the differences that arose between both countries regarding the demarcation were settled by means of the Presidential Act of Brasilia in 1998.

that the two States were agreed that it should be used as an international maritime boundary. The conclusion does not follow from the premises: the argument is a *non sequitur*.

3.55 Moreover, it is not only what is said that must be considered, but also what is not said. There is no suggestion by Chile that throughout the period in which the International Law Commission (or indeed the subsequent sessions of the United Nations Conferences on the Law of the Sea) was considering the question of maritime boundaries, it was ever proposed that a line of latitude could be presumed to be the boundary[211]. Chile cites the example of the agreed use by France and Spain of a parallel for the delimitation *of the territorial sea*[212] on their north-south Mediterranean coast (on the Atlantic coast, where the configuration is much closer to that of Peru and Chile, an approximation to the equidistance line was used[213]), and a Bulgarian decree (apparently not implemented)[214] in relation to which Chile quite properly records the view of ILC Rapporteur François that "[c]ette règle ne saurait toutefois être considérée que comme une solution pour un cas spécial"[215].

3.56 Given the weight attached to the median line as the presumed boundary in the absence of historic title or special circumstances, this marginalizing of the

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211 See, e.g., the discussion of the territorial sea boundary by François, J. P. A., in: United Nations, Yearbook of the International Law Commission: Summary Records of the 171st Meeting, (Doc. A/CN.4/SR.171), 1952, Vol. 1, pp. 180-185. **PR, Annex 55**.

212 CCM, para. 2.155.

213 See Charney, J. I. and Alexander, L. M.: *International Maritime Boundaries*. Dordrech, etc., Martinus Nijhoff Publishers, 1993, Vol. II, pp. 1719-1734.

214 CCM, para. 2.153. The 1951 Bulgarian decree quoted by Chile does indeed refer to the *parallèle geographique* as the delimitation line, but the line in the 1997 Treaty with Turkey "is based in principle on a simplified equidistant line to produce a just and equitable delimitation". See Charney, J. I. and Smith, Robert W.: *International Maritime Boundaries*. The Hague, etc., Nijhoff, 2002, Vol. IV, pp. 2871-2886, at p. 2874. There is as yet no boundary agreed with Romania.

215 CCM, para. 2.153.

parallels of latitude as suited only to "special cases" is strong evidence against any suggestion that the use of the parallel of latitude was so well understood as a principle in maritime delimitation that a passing reference in a unilateral declaration to a parallell was sufficient to signal an intention on the part of the States concerned to fix their international boundary along that parallel. The arbitrariness of the parallel of latitude stands in stark contrast to the *prima facie* fairness of the equidistance principle – as was clearly recognized at the time within the ILC where the Chairman is recorded as having said that "where the frontier ended on a concave indentation of the coastline, there was no difficulty about applying the rule of the median line; and indeed the great majority of the illustrations given by Mr. Whittemore Boggs[216] had been cases of that kind."[217]

4. Conclusion Concerning the 1947 Claims

3.57 For the reasons set out above it is clear that the 1947 Peruvian supreme decree and the 1947 Chilean declaration were not "concordant" and did not establish a lateral international maritime boundary. The significance of this conclusion is that it rules out any possibility that the 1952 Declaration of Santiago could have been based upon an international maritime boundary that had already been established in 1947[218].

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216 Special Adviser on Geography to the United States State Department and a member of the expert group advising the ILC during its work on the law of the sea.

217 United Nations, Yearbook of the International Law Commission: Summary record of the 171st Meeting (Doc. A/CN.4/SR.171), 1952, Vol. 1, p. 182, para. 16; cf., *ibid.*, para. 17. Available at: <http://untreaty.un.org/ilc/documentation/english/a_cn4_sr171.pdf> accessed 8 October 2010.

218 See paras. 3.83-3.86 below.

C. Absence of Developments between the 1947 Claims and the 1952 Declaration of Santiago

3.58 Chile does not suggest that there were any relevant developments between 1947 and the 1952 Declaration of Santiago.

3.59 It follows that if Chile's argument is correct, the international maritime boundary between Chile and Peru could only have been established by the 1952 Declaration of Santiago and not based upon any earlier consensus or understanding concerning lateral boundaries.

3.60 It will be recalled, however, that there was a significant development in Peruvian practice during these years. As was explained in the Memorial[219], in March 1952 Peru enacted the Petroleum Law No. 11780. That Law provided for a 200-nautical-mile zone "drawn seaward at a constant distance of 200 miles" from the coast. It thus used what is in effect the "arcs of circles" method, rather than the earlier method of projecting 200 miles seaward along the parallels of latitude and drawing a *tracé parallèle*. That change in practice, shortly before the Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific held in Santiago de Chile in 1952 (hereinafter "1952 Santiago Conference"), reinforces the conclusion that there was no agreement between Peru and Chile at this time on the drawing on maritime boundaries.

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[219] PM, paras. 4.60-4.61.

D. The 1952 Declaration of Santiago

1. The Declaration of Santiago Does Not Purport to Establish any Maritime Boundaries between the States that Signed the Declaration

3.61 The 1952 Declaration of Santiago is the next development to be considered. Chile's argument is that the Declaration of Santiago is a treaty which established an international maritime boundary. In Peru's view that is incorrect both because the Declaration of Santiago was conceived and drafted as a declaration of international maritime policy and not as a treaty, and because the text of the Declaration does not even purport to address the question of the international maritime boundary between Chile and Peru. While the legal status of the Declaration of Santiago might appear to be a matter logically prior to its interpretation, an understanding of the context in which, and reasons for which, it was drafted makes it easy to understand its legal status; and accordingly the question of its context is addressed first.

3.62 Chile repeatedly refers to the Declaration of Santiago (and to point IV in particular) as if it were a general provision delimiting maritime boundaries, both continental and insular. Chile uses phrases such as "as well as delimiting the 'general' maritime zones, the States parties also had to deal with the delimitation of one State's insular zone"[220], "[the] agreement of the Parties concerning the lateral delimitation of their respective maritime zones is contained in Article IV of the Santiago Declaration"[221], and "Chile, Ecuador and Peru agreed in the Santiago Declaration of 1952 that their maritime zones were delimited laterally by parallels"[222]. That is not what the Declaration of Santiago says.

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220 CCM, para. 1.6.

221 CCM, para. 2.5.

222 CCM, para. 3.1. See also paras. 1.9, 1.10, 1.30, 1.48, 2.3, 2.6, 2.56, 2.76, 2.80, 2.88, 2.118, 4.1, 4.16.

3.63 It is a straightforward, undeniable fact that the Declaration of Santiago does not say that it establishes any international maritime boundaries between the countries that formulated the Declaration. The Declaration has, no doubt, been read and re-read many times during this litigation. Familiarity with texts can dull the apprehension of what, precisely, they say – particularly when they are read in form of selected passages. This is true of the Declaration of Santiago, which can rarely be re-read in full without some forgotten aspect striking the eye. As Chile's case rests upon the interpretation of the Declaration of Santiago, it may be helpful to set out here the full text of the Declaration:

> "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.
>
> In view of the foregoing considerations, 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, formulate the following Declaration:
>
> I) The geological and biological factors which determine the existence, conservation and development of marine fauna and flora in the waters along the coasts of the countries making the Declaration are such that 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.

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.

III) The exclusive jurisdiction and sovereignty over this maritime zone shall also encompass exclusive sovereignty and jurisdiction over the seabed and the subsoil thereof.

IV) In the case of island territories, the zone of 200 nautical miles shall apply to the entire coast of the island or group of islands. If an island or group of islands belonging to one of the countries making the declaration is situated less than 200 nautical miles from the general maritime zone belonging to another of those countries, 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.

V) This declaration shall be without prejudice to the necessary limitations to the exercise of sovereignty and jurisdiction established under international law to allow innocent and inoffensive passage through the area indicated for ships of all nations.

VI) For the application of the principles contained in this Declaration, the Governments of Chile, Ecuador and Peru hereby announce their intention to sign agreements or conventions which shall establish general norms to regulate and protect hunting and fishing within the maritime zone belonging to them, and to regulate and co-ordinate the exploitation and development of all other kinds of products or natural resources existing in these waters which are of common interest."[223]

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[223] 1952 Declaration of Santiago. **PM, Annex 47**.

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.
>
> 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 insustituibles de subsistencia y de recursos económicos que les son vitales.
>
> Por las consideraciones expuestas, los Gobiernos de Chile, Ecuador y Perú, decididos a conservar y asegurar para sus pueblos respectivos, las riquezas naturales de las zonas del mar que baña sus costas, formulan la siguiente declaración:
>
> I) Los factores geológicos y biológicos que condicionan la existencia, conservación y desarrollo de la fauna y flora marítimas en las aguas que bañan las costas de los países declarantes, hacen que 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 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.

> IV) En el caso de territorio insular, la zona de 200 millas marinas se aplicará en todo el contorno de la isla o grupo de islas. Si una isla o grupo de islas pertenecientes a uno de los países declarantes estuviere a menos de 200 millas marinas de la zona marítima general que corresponde a otro de ellos, la zona marítima de esta isla o grupo de islas quedará limitada por el paralelo del punto en que llega al mar la frontera terrestre de los estados respectivos.
>
> V) La presente Declaración no significa desconocimiento de las necesarias limitaciones al ejercicio de la soberanía y jurisdicción establecidas por el derecho internacional, en favor del paso inocente e inofensivo, a través de la zona señalada, para las naves de todas las naciones.
>
> VI) Los Gobiernos de Chile, Ecuador y Perú expresan su propósito de suscribir acuerdos o convenciones para la aplicación de los principios indicados en esta Declaración en los cuales se establecerán normas generales destinadas a reglamentar y proteger la caza y la pesca dentro de la zona marítima que les corresponde, y a regular y coordinar la explotación y aprovechamiento de cualquier otro género de productos o riquezas naturales existentes en dichas aguas y que sean de interés común."

3.64 The Declaration states that Chile, Ecuador and Peru "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."[224] Neither that claim, nor any other provision in the Declaration of Santiago, stipulates how the maritime zones are delimited from each other.

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[224] 1952 Declaration of Santiago, point II. **PM, Annex 47**.

2. Points II and IV of the Declaration of Santiago

3.65 The only language in the Declaration of Santiago that has any bearing upon the extent of the 200-mile maritime zones of the States concerned is to be found at points II and IV of the Declaration. No other part of the Declaration has any bearing whatever upon the extent (and it is important to bear in mind the distinction between the definition of the *extent* of a maritime zone and the *delimitation* of a maritime zone – the former being a distance; the latter, a line) of maritime zones generated by the mainland coasts of the States concerned.

3.66 Point II reads as follows:

> "... 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."

3.67 Point II proclaims a policy: it does not purport to create rights or obligations; and it has nothing to do or say in respect of the maritime boundaries between the States concerned. Point II cannot provide a basis for Chile's case. Accordingly, Chile's case must rest entirely upon point IV of the Declaration of Santiago.

3.68 Chile repeatedly mis-states the effect of point IV of the Declaration of Santiago. Chile seizes upon two phrases in point IV, out of context: "the parallel at the point at which the land frontier of the States concerned reaches the sea", and "the general maritime zone belonging to another of those countries".

3.69 In point IV the concept of the parallel is not applied to the general, mainland-generated maritime zone, but to islands. The wording of point IV is clear and precise. It reads in full as follows:

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

3.70 Chile repeatedly conflates the two phrases, so as to suggest that point IV provides that the boundary of 'the general maritime zone of the parties' is "the parallel at the point at which the land frontier of the States concerned reaches the sea." For example, it does so in paragraphs 1.6, 1.10, 1.30, 1.64, 2.3, 2.6, 2.69, 2.76, 2.79, 2.91, 2.93, 2.118, 2.223, 2.263, 3.40, 3.41, 4.14, 5.3 and 5.4 of its Counter-Memorial. That is not the case.

3.71 The meaning of point IV is plain and unambiguous. It *limits* the maritime zones of islands; but it does not purport to *delimit* the zones between States in any other circumstances. Nor does point IV say anything about the maritime zones generated by the mainland, except in relation to the overlap between "mainland" maritime zones and "island" maritime zones. It says nothing whatever about the boundaries between the maritime zones of adjacent States generated by the mainland coasts.

3.72 Point IV limits the maritime zones generated by islands by saying how far "island" zones may extend. It indicates that *(a)* in principle islands are entitled to 200-nautical-mile maritime zones, *(b)* which extend from the entire coastline around the island (and not, for example, only on the coast facing towards or away from the mainland), but that *(c)* in certain circumstances islands will not be entitled to a full 200 miles of maritime zone. Specifically, and as a pragmatic and simple solution, the maritime zones which they generate may be curtailed by lines of latitude in circumstances

where they overlap with the "general maritime zone" of another country that participated in formulating the declaration.

3.73 Point IV makes sense in the context of point II of the Declaration of Santiago. Point II affirmed the more general and fundamental question that it was the policy of the three States to claim maritime zones out to a "minimum distance" of 200 nautical miles. The natural, and correct, assumption is that this affirmation applied primarily to the maritime zones generated by the mainland coasts.

3.74 Point II says nothing about international maritime boundaries or parallels of latitude. An ordinary reading of point II would therefore indicate *(a)* that the maritime reach of the mainland coasts would radiate in all directions for 200 nautical miles as an "arcs of circles" entitlement, *(b)* that each country had its own distinct radial maritime entitlement, *(c)* that those entitlements would inevitably overlap, and *(d)* that future maritime claims could extend beyond 200 nautical miles and increase the areas of overlap.

3.75 As was noted in Peru's Memorial[225], the initial proposal for language on the maritime zones of islands came from Chile, which suggested that the 200-mile zone would be applied to the entire coast of the island or group of islands, except that:

> "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

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225 PM, footnote 194 at para. 4.76.

> 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"[226].

3.76 That proposal, for inclusion in the text of what was then draft point 3, could have been interpreted in a manner adverse to Ecuador's interests. In the north, the maritime zone generated by Peru's mainland would overlap with the maritime zones generated by Ecuador's coastal islands: indeed, the Peruvian zone could in principle overlap and could reach right across the mouth of the bay at the back of which is situated Ecuador's largest port and most populous city, Guayaquil.

3.77 The Chilean draft might have been thought to imply that Peru's "mainland-generated" zone would have its full extent and that the zones measured from Ecuador's islands would extend only to the distance that separated those islands from Peru's mainland maritime zone. The Chilean draft would not permit any "interference" by islands with the maritime zones generated by the mainland.

3.78 It was in that context that the Ecuadorean representative, Jorge Fernández S., made his proposal.

> "... Mr. Fernández observed that it would be advisable to clarify more article 3, in order to prevent any misinterpretation of the interference zone in the case of islands, and suggested that the declaration be drawn on the basis that the boundary line of the jurisdictional zone of each country be the respective parallel from the point at which the borders of the countries touches or reaches the sea."[227]

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[226] 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 of 11 August 1952. **PM, Annex 56**.

[227] *Ibid.*

3.79 After debate, the final drafting of the Declaration of Santiago was entrusted to Dr. Alberto Ulloa, Peruvian delegate, and to Mr. David Cruz Ocampo, Chilean delegate, who addressed the issue of the islands' 'zone of interference' raised by the Ecuadorean delegate.

3.80 Thus, the final text of point IV read as follows:

> "In the case of island territories, the zone of 200 nautical miles shall apply to the entire coast of the island or group of islands. If an island or group of islands belonging to one of the countries making the declaration is situated less than 200 nautical miles from the general maritime zone belonging to another of those countries, the maritime zone of the island or group of islands shall be limited by the parallel at the point at which the land frontier of the States concerned reaches the sea."[228]

Spanish text reads as follows:

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

3.81 It has long been understood that point IV of the Declaration of Santiago addressed the question of the maritime zones of Ecuador's coastal islands. In that sense, Peru has consistently sustained that there are no boundary problems with Ecuador. The Letter of 9 June 2010, addressed by Peruvian President, Alan García, to Ecuadorean President, Rafael Correa, is the latest Peruvian statement in this regard, which reads as follows:

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228 1952 Declaration of Santiago, point IV. **PM, Annex 47**.

"Given that, in accordance with the provision stated by Article 63 of the Statute of the International Court of Justice, Ecuador has been notified by the Court as a Party to the instruments that have been mentioned with different scopes in the pending proceedings concerning the maritime dispute between Peru and Chile, I hereby send you this letter in order to inform you about the position of the State of Peru about the effects of those instruments in connection with our two countries.

In that sense, Peru asserts that the international instruments in question shall be interpreted in good faith, in accordance with their content and respecting their object and purpose. Accordingly, by virtue of what is expressly stated in the text, the second part of article IV of the Declaration on the Maritime Zone, adopted in Santiago on 18 August 1952, addresses a situation only applicable to the case of Peru and Ecuador. Such a situation responds to a specific circumstance, derived from the presence of islands under the sovereignty of a signatory State, whose maritime projection to a distance of two-hundred nautical miles is limited by the parallel of latitude. Hence, the parallel of latitude from the point at which the land boundary reaches the sea, at *Boca de Capones* (03°23'33.96" SL), is only applicable to Peru and Ecuador.

The formulation set forth in the above-mentioned paragraphs confirms the official position of the State of Peru on this matter, in the sense that there are no boundary problems with Ecuador. For this reason, the proceedings instituted by Peru before the International Court of Justice solely refers to the maritime boundary between Peru and Chile, where there are characteristics and circumstances different from those existing between our two countries.

I sincerely wish that you interpret this letter as another sign of the spirit of fraternal and transparent dialogue, within the framework of the deep integration that we have been promoting as representatives of our peoples and that is proved by the high level attained in our bilateral relations."[229]

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[229] Letter of 9 June 2010 from His Excellency Alan García, President of the Republic of Peru to His Excellency Rafael Correa Delgado, President of the Republic of Ecuador. **PR, Annex 81**.

Spanish text reads as follows:

> "Como quiera que, conforme a lo dispuesto por el artículo 63 del Estatuto de la Corte Internacional de Justicia, Ecuador ha sido notificado por el Tribunal en razón a su condición de parte en instrumentos que han sido mencionados con distintos alcances en el proceso relativo a la controversia marítima entre el Perú y Chile que está actualmente en curso, me permito dirigirle la presente para poner en su conocimiento la posición del Estado peruano sobre los efectos de dichos instrumentos en relación a nuestros dos países.
>
> En ese sentido, el Perú sostiene que los instrumentos internacionales en cuestión deben ser interpretados de buena fe, atendiendo a su contenido y respetando el objeto y fin de los mismos.
>
> Consiguientemente, a mérito de lo que expresamente señala el texto, la segunda parte del artículo IV de la Declaración sobre Zona Marítima, adoptada en Santiago el 18 de agosto de 1952, aborda un supuesto únicamente aplicable al caso del Perú y del Ecuador. Tal supuesto responde a una circunstancia concreta, derivada de la presencia de islas bajo soberanía de un Estado signatario cuya proyección marítima a una distancia de doscientas millas marinas está limitada por el paralelo geográfico. Por ello, el paralelo geográfico a partir del punto en que la frontera terrestre llega al mar, en Boca de Capones (03°23'33.96"LS), sólo es aplicable al Perú y Ecuador.
>
> El planteamiento de los párrafos anteriores confirma la postura oficial del Estado peruano en la materia, en el sentido de que no existen problemas de límites con Ecuador. Por tal motivo, el proceso incoado por el Perú ante la Corte Internacional de Justicia se refiere exclusivamente al límite marítimo entre Perú y Chile, donde se presentan características y circunstancias distintas a las que existen entre nuestros dos países.
>
> Deseo vivamente que Usted interprete esta carta como una muestra más del espíritu de diálogo fraterno y transparente, en el marco de la integración profunda que hemos venido impulsando

> como representantes de nuestros pueblos y que se refleja en el alto nivel alcanzado en la relación bilateral."

But there is not, and has never been, any such understanding with Chile.

3.82 There are no islands that could affect a Peru-Chile boundary in the way that the islands in the north could affect the Peru-Ecuador boundary. That is a simple geographical fact. Point IV of the Declaration of Santiago deals with islands, and it has no application to the waters adjacent to the land boundary between Peru and Chile.

3. Point IV of the Declaration of Santiago Is Not Based Upon a Presumed Use of the Parallel as the Mainland Boundary

3.83 Point IV of the Declaration of Santiago did not establish an international maritime boundary between Chile and Peru, and Chile's attempt to argue that it does cannot succeed. Chile has therefore turned to a second level of argument: that point IV *presupposes* the existence of an international maritime boundary.

3.84 Thus, in its Counter-Memorial, Chile states that "the use of parallels of latitude to limit the zone of an 'island or group of islands' *presupposes*, and may be explained only on the basis, that the general maritime zones are also delimited by the same parallels of latitude."[230] This is plainly incorrect.

3.85 There are two obvious answers to this argument. The first is that the suggestion is absurd. If, as Chile's argument asserts, the parallels were established as international maritime boundaries before 1952, there would have been no

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[230] CCM, para. 2.82 (emphasis added).

need for point IV. The "presupposed boundaries" would themselves have settled the question of the maritime entitlement of islands.

3.86 The second answer is that, as was shown above, there is no evidence whatever that an international maritime boundary between Chile and Peru had been established in 1947 or between 1947 and 1952; and it is not credible that an international maritime boundary could have been established without anyone noting the fact[231].

3.87 A point might be "presumed" or "assumed" if it is so well-known and so clearly established as not to need to be said. In such a case there will be a wealth of evidence in support of the point. Here one would expect at least government statements, written or oral, or official reports or maps referring to the establishment of an international maritime boundary between Peru and Chile. But there is nothing.

3.88 In the absence of any actual evidence of a pre-existent boundary, Chile's explanation is that the evidence for the "presupposition" lies in some sense in a necessary implication of the Declaration of Santiago. But even this argument is fallacious.

3.89 In its Counter-Memorial[232] Chile sets out the three diagrams reproduced in **Figure R-3.1** of this Reply. The labels "Centre Diagram", "Right-side Diagram" and "Left-side Diagram" refer to the original layout in the Counter-Memorial — the diagrams are reordered in this Reply to match the order in which they are discussed.

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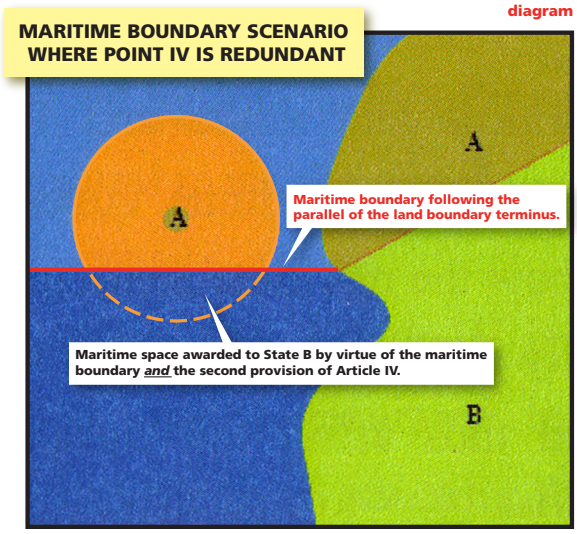
231 See Sections A., B., and C. of this chapter above.

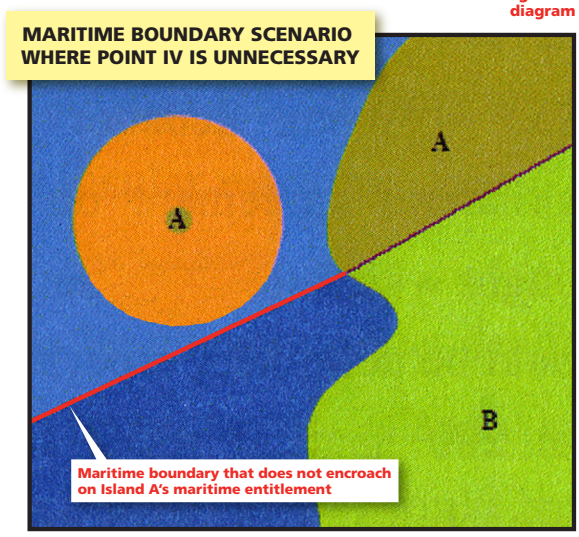
232 CCM, para. 2.82.

Centre diagram



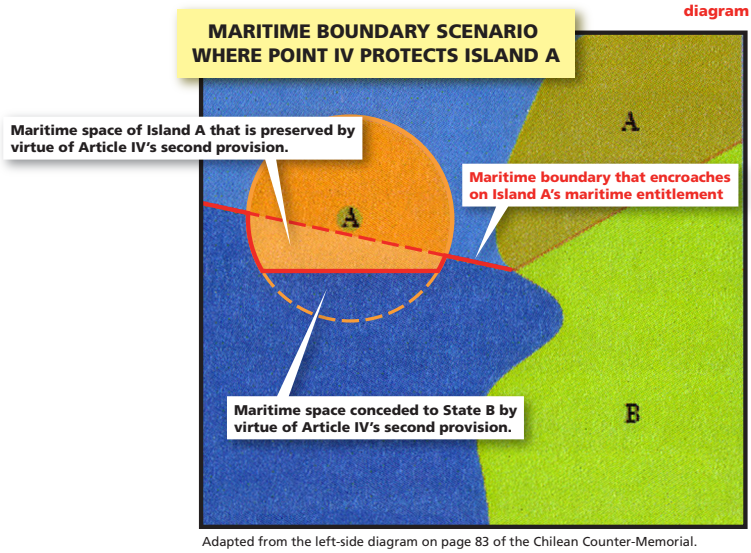
Adapted from the centre diagram on page 83 of the Chilean Counter-Memorial.

Right-side diagram



Adapted from the right-side diagram on page 83 of the Chilean Counter-Memorial.

Left-side diagram



Adapted from the left-side diagram on page 83 of the Chilean Counter-Memorial.

Figure R-3.1

3.90 Chile argues that the diagrams support its argument that point IV of the Declaration of Santiago presupposes the existence of an international maritime boundary between Chile and Peru. The first point to make is that there are no islands near the land boundary between Peru and Chile to which the situation in these diagrams might be applicable by analogy. The hypothetical situation is quite different from that in the present case.

3.91 Even if the hypothetical situation did have some bearing upon the present case, a methodical analysis of the graphic shows that it offers no support to Chile's assertion that the terms of point IV of the Declaration of Santiago can only be explained if it is assumed that mainland maritime boundaries following the parallels of latitude were already in existence.

3.92 Chile begins by noting that the middle diagram (reproduced in this Reply in **Figure R-3.1**, at the top of the page) portrays the situation where a parallel of latitude not only limits the island maritime zone but also delimits the "general maritime zones" (i.e., the "mainland" maritime zones). That is correct. Island A (the tiny green circle lying in the middle of the orange circle that represents the island's 200-nautical-mile zone) is portrayed with a truncated maritime zone that would, in such a situation, have resulted from the provisions of point IV of the Declaration of Santiago. That diagram accordingly also depicts a maritime boundary that follows the parallel from where the land boundary meets the sea (the *presupposed* boundary that Chile contends is needed to understand point IV).

3.93 Chile then says –

> "… if the general maritime zones of adjacent States A and B are delimited in any way other than by a parallel of latitude starting from the seaward terminus of the land boundary (as illustrated

> in the boxes on the right and left), there is no reason to delimit the insular maritime zone of State A (the area in orange) by using that parallel of latitude."[233]

That is not correct.

3.94 As far as the middle diagram itself is concerned, if Chile were correct in asserting that the parallel was already established and presupposed as an international maritime boundary, point IV of the Declaration of Santiago would have been unnecessary, as was pointed out above. The established, presupposed maritime boundary would have automatically limited the maritime zones generated by *all* coasts, including islands: otherwise, it would not be an international maritime boundary. There would have been no need to reiterate this point with point IV of the Declaration. With lateral maritime boundaries in place, all questions that might arise concerning the maritime reach of islands would have already been settled, and these boundaries would stand on their own requiring no reinforcement. If it "presupposed" anything, the fact that it was thought necessary to include point IV in the 1952 Declaration of Santiago surely presupposed that lateral maritime boundaries had *not* already been established.

3.95 The right-hand diagram (reproduced in this Reply in **Figure R-3.1**, at the middle of the page) shows a boundary scenario that is completely misleading. It is presented by Chile to show how Island A would have been treated under point IV of the Declaration of Santiago if an international maritime boundary had followed a directional bearing somewhat south of due West. But since in this case Island A is positioned completely within the "general maritime zone" of State A and the international maritime boundary with State B veers south of the 200-nautical-mile maritime zone surrounding Island A, there is

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[233] CCM, para. 2.82.

no reason to have any truncation of the maritime zone of Island A at all. The island can have its full 200-nautical-mile zone without encroaching upon the maritime zone of State B. Under these circumstances the only way in which Island A could possibly have its maritime zone truncated would be if State A decided to truncate its own island, a move that would defy all logic.

3.96 In the left-side diagram in the layout in the Counter-Memorial a lateral maritime boundary between State A and State B extends out to sea and crosses the maritime zone of Island A. In this situation the protective provision in the second sentence of point IV of the Declaration of Santiago would indeed have been triggered. The international maritime boundary delimitation would have followed the agreed SE-NW course from the terminus of the land boundary until it touched the 200-nautical-mile limit around Island A to the SE of Island A. At that point it would change course and follow the parallel of latitude within until it touched the 200-nautical-mile limit SW of Island A. The effect is shown more clearly in **Figure R-3.1** ("Left-side Diagram", at the bottom of the page).

3.97 State A would have the light-blue (mainland) and orange (island) zones: State B would have the dark-blue (mainland) zone. The delimitation line would describe an irregular course. The maritime area below the parallel line traversing Island A's 200-nautical-mile zone would be assigned to State B; but this would have happened even if the international maritime boundary had followed the parallel from where the land boundary between State A and State B meets the sea.

3.98 What Island A therefore saves in this scenario is the wedge-shaped maritime space located between *(a)* the prolongation of the SE-NW boundary projecting from the terminus of the land boundary and *(b)* the latitudinal line traversing Island A's 200 nautical-mile zone in accordance with the second sentence of point IV of the Declaration of Santiago. Chile is wrong to say that "there is no

reason to delimit the insular maritime zone of State A ... by using that parallel of latitude."[234] The reason to limit the insular maritime zone of State A by using the parallel of latitude is that it gives State A a larger maritime zone.

3.99 Point IV of the Declaration of Santiago means what it says, and it achieves what it set out to achieve. It would have been redundant had there been an established international maritime boundary along a parallel of latitude. If it presupposes anything, it presupposes that the international maritime boundary will not follow the line of latitude.

E. The Invitations to the 1952 Santiago Conference

3.100 Chile's entire case depends upon the proposition that an international maritime boundary was agreed between Chile and Peru in 1952 in the Declaration of Santiago. If it cannot establish that there was such an agreement in 1952, Chile's case fails, as Peru says it must. It is therefore necessary to understand what Peru and Chile thought they were doing at the 1952 Santiago Conference – particularly as the Declaration of Santiago contains no reference to the establishment of a boundary and Chile's case is that agreement on the international maritime boundary was necessarily implied in or presumed by the Declaration.

3.101 As has been noted, it is a matter of simple fact that the 1952 Declaration of Santiago contains no provision addressing the question of the delimitation of maritime zones generated by the mainland coasts of neighbouring States. That was not an oversight, or the result of obscurity in the phrasing of the Declaration. Neither the Santiago Conference nor the Declaration of Santiago

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[234] CCM, para. 2.82.

was intended to address the question of the delimitation of maritime zones generated by the mainland coasts of neighbouring States.

3.102 Chile argues that the purpose of the 1952 Declaration of Santiago was evidenced by the terms of the invitations to the 1952 Santiago Conference issued by Chile. No provisional agenda for the conference was sent to Peru; nor do the Official Minutes of the conference make any reference to an agenda[235]. Chile has, therefore, to rely upon the terms of the invitations themselves.

3.103 Chile points out that its invitation to Ecuador to attend the 1952 Conference referred to "the determination of the Territorial Sea" (*la fijación del Mar Territorial*) as one of the objectives of the conference[236]. The suggestion appears to be that Ecuador was invited to a conference which it knew would address questions of delimitation. The invitation in these terms was addressed to Ecuador, not to Peru, and cannot now be prayed in aid by Chile. Indeed, it was not until it received the Counter-Memorial that Peru discovered that Chile had made different representations to Peru and to Ecuador as to the purpose of the 1952 Santiago Conference – a discovery that Peru views with some dismay and concern.

3.104 In any event, the suggestion that the invitation (i.e., the invitation to Ecuador) made clear to Peru that maritime boundaries would be negotiated at the 1952 Santiago Conference is not correct. The Official Letter No. 04938 of 27 June 1952, from the Minister of Foreign Affairs of Chile to the Chilean Ambassador in Ecuador, stated the terms in which the Ecuadorean Government would be invited to the conference in the following terms:

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235 The Official Letter No. (M): 5-4/166 of 11 July 1952, from the Minister of Foreign Affairs of Peru to the Ambassador of Peru to Chile noted that "The Government of Chile has not set the date for this meeting, nor has it proposed yet its Agenda. It would be convenient, in order to study it." **PR, Annex 3**.

236 CCM, paras. 2.53-2.54.

> "The Government of Chile, convinced of the necessity of protecting its industry and the existence of whales in our maritime zones, considers that the time has come to call a conference in which Ecuador, Peru and Chile would take part, in order to study the measures deemed necessary to modify the prohibitions that threaten the economy of the aforementioned countries, while at the same time maintaining in force the regulations concerning the protection of whales in order to avoid their decrease or extinction in this part of the Continent.
>
> The participation of Ecuador in this conference is of great importance given the significant quantity of sperm whales existing in its maritime zone, particularly in the zone of the Galápagos Islands, and [because] the attached provisional agenda states that the determination of the Territorial Sea is set as one of the objectives of the meeting."[237]

These terms were reflected in the Chilean invitation Note to Ecuador, dated 7 July 1952[238].

3.105 The first thing to note about the invitation to Ecuador is the focus on the importance of whale stocks. The invitation gives no hint that delimitation of maritime boundaries was to be discussed. Indeed, it would have been remarkable if Chile had invited Ecuador to a conference to discuss Ecuador's maritime boundary with Peru, particularly as it was not until twelve days after the invitation to Ecuador that Chile invited Peru to the conference. What the reference to the "determination of the Territorial Sea" does point to is the importance of determining the *extent* of the maritime zone. That is, of course, precisely what the Declaration of Santiago did.

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237 **CCM, Annex 111**.

238 Note No. 468/51 of 7 July 1952, from the Ambassador of Chile to the Minister of Foreign Affairs of Ecuador. The provisional agenda is set out in this Note to Ecuador and explains what is meant by "determination of the Territorial Sea" (*fijación del mar territorial*). The intention appears to have been to indicate the need to give force and stability to the 200-mile claim. It does not indicate an intention to address questions of delimitation. See **CCM, Annex 59**.

3.106 The terms of Chile's invitation to Peru are more pertinent in the present case. That invitation, dated some two weeks later, 10 July 1952, read, in full, as follows:

> "Your Excellency,
>
> On behalf of my Government, I have the honour to invite Your Excellency's Government to attend the celebration of a Conference oriented to conclude agreements regarding the problems caused by whaling in the waters of the South Pacific and the industrialization of whale products.
>
> The Governments of Peru, Ecuador and Chile will participate in it.
>
> Everything seems to point out the need for our countries to study the measures that should be adopted in defence of their fishing industry in the face of the well-founded claims by businessmen of the three countries as well as the restrictive dispositions of the 1946 Washington Convention [sc., on Whaling], modified later in the Congresses of London, Oslo and Cape City.
>
> The Conference could be celebrated between 4 and 9 August and it would convene that the three participating countries include in their delegations a member versed in International Law, given the repercussion that its agreements would very probably have on the matters of that order that have already originated declarations by the Presidents of Peru and Chile.
>
> I avail myself of this opportunity to reiterate to Your Excellency the securities of my highest and most distinguished consideration."[239]

3.107 It will be observed *(a)* that the focus is on whaling, *(b)* that there is no mention of "the determination of the Territorial Sea", *(c)* that there is no mention of the

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[239] Note No. 86 of 10 July 1952, from the Embassy of Chile to the Minister of Foreign Affairs of Peru. **PM, Annex 64**.

negotiation of international maritime boundaries, *(d)* that there is no mention of negotiation of anything else, but rather of the need to "study" the measures that should be adopted in defence of the fishing industry, and *(e)* that the only particular expertise referred to was that of an international lawyer and that no mention is made of cartographers or hydrographers. Those are not the terms of an invitation to settle definitive international maritime boundaries for all present and future maritime zones.

3.108 The purpose of the 1952 Santiago Conference was the reaffirmation and co-ordination of the 200-mile maritime claims as against third States, notably in the light of the objections of the United Kingdom[240] and United States[241] to seaward expansions of maritime spaces. The purpose was not to raise and settle lateral international maritime boundary issues between Chile, Peru and Ecuador.

3.109 Finally, it should be remarked that Chile's suggestion in its Counter-Memorial that the 1952 Declaration of Santiago was in some sense a "legalization" of the situation brought about by the unilateral claims made by Chile and Peru in 1947[242] is puzzling. The 1947 claims – the Chilean "Proclamation" of 23 June 1947[243] and the Peruvian Supreme Decree No. 781 of 1 August 1947[244] – were unilateral measures adopted by Chile and by Peru respectively. Whatever domestic legal status they had in Chilean or Peruvian law was determined by those legal systems. Their validity in *international* law was, as is well-known, controversial at that time (and, indeed, admitted by the States concerned)[245].

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240 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. **PM, Annex 61**.

241 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. **PM, Annex 62**.

242 CCM, para. 1.7.

243 Presidential Declaration Concerning Continental Shelf of 23 June 1947. **PM, Annex 27**.

244 Supreme Decree No. 781 of 1 August 1947. **PM, Annex 6**.

245 See, e.g., the statement made by the Chilean Foreign Minister in 1954, quoted in CCM at para. 2.182.

But no agreement between Chile, Peru and Ecuador could give greater legal validity under international law to those claims than the claims already had, although the 1952 Declaration of Santiago could increase their *political* weight by signalling the solidarity of the three States on the 200-mile question. But that can scarcely be what Chile means by "legalization".

3.110 It is paradoxical (at best) for Chile to claim that the unilateral measures of 1947 could in some way be "legalized" by an instrument which represented itself as a statement in the form of a policy declaration, and which was moreover not subject to ratification or other formal procedures for the adoption of legal instruments, or even registered with the United Nations[246] until many years later[247].

3.111 What Chile understands by the term "legalized", and how Chile thinks that the 1952 Declaration of Santiago "legalized" the 1947 claims, is unclear. But in any event the question is irrelevant. Whatever effect the Declaration of Santiago may have had on the legal status of the 1947 claims it cannot affect the fact that neither the Chilean declaration nor the Peruvian Supreme Decree No. 781, nor the Declaration of Santiago itself, made any reference to the lateral boundaries of the 200-mile zone or to boundaries with neighbouring States.

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246 An act that has no dispositive significance in relation to the status of the instrument. The United Nations registered in its 'Treaty Series' the unilateral declaration made by President Nasser on the conditions under which the Suez Canal was open to international shipping. That declaration cannot possibly be a 'treaty' as a matter of law.

247 These points are developed in paras. 3.166–3.168 below.

F. The Stated Purposes of the 1952 Declaration of Santiago

3.112 The purpose of the 1952 Declaration of Santiago was set out explicitly in its introductory sentences, which read (in full) as follows:

> "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.
>
> In view of the foregoing considerations, 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, formulate the following Declaration:"[248]

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

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[248] 1952 Declaration of Santiago. **PM, Annex 47**.

> aprovechamiento de ellos a fin de obtener las mejores ventajas para sus respectivos países.
>
> 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 insustituibles de subsistencia y de recursos económicos que les son vitales.
>
> Por las consideraciones expuestas, los Gobiernos de Chile, Ecuador y Perú, decididos a conservar y asegurar para sus pueblos respectivos, las riquezas naturales de las zonas del mar que baña sus costas, formulan la siguiente declaración:"

3.113 Nothing in these introductory sentences, which lead into the actual declaration, indicates any interest in settling maritime boundaries. Nothing in the opening speeches at the conference indicates any such interest. Nor does anything in the closing speeches at the conference. What is indicated is the intention to extend the jurisdiction of the three States over the exploitation of the natural resources of the maritime zones adjacent to their coasts. The concern was with extending the jurisdiction of the three States vis-à-vis third States, not with delimiting jurisdiction between the three States. The concern was with the seaward limit, not with lateral boundaries.

3.114 That is not surprising. While the pressure on whaling from distant-water whaling fleets faced Chile, Peru and Ecuador with a serious problem, if that pressure could be removed there were adequate resources within the newly-declared zone to supply the whaling fleets of the three States. Similarly, in the early 1950s coastal fish stocks were healthy and fish were plentiful.

3.115 The "conservation" need, therefore, was to protect the resources relied upon by South American fishing industries from depredation by distant-water whaling and fishing fleets. The obvious mechanism was that adopted by the United

States in the two Truman Proclamations of 28 September 1945, concerning natural resources of the continental shelf and fisheries on high seas[249]. Indeed, the effect of those Proclamations in displacing foreign fishermen from the United States west-coast waters and inducing them to move their fishing effort southwards, was a major factor leading to the formulation of the Declaration of Santiago[250].

3.116 This explains the precise language of the Declaration of Santiago, which has been set out in paragraph 3.63 above. The Declaration is entitled "Declaration on The Maritime Zone" (*Declaración sobre Zona Marítima*) in the singular: the title refers to a maritime *zone*, not to maritime *zones* in the plural. This, too, points towards the fact that the objective of the States was to create an area for the conservation, protection and exploitation of resources (and in particular, whales) vis-à-vis third States, and not to delimit three separate maritime zones between them. This is confirmed by the statement of Mr. Cristóbal Rosas Figueroa, who participated in the 1952 Conference[251].

3.117 Similarly, Tobías Barros, a prominent Chilean political figure who was Minister of Defence and one of the promoters of the 1952 Conference, highlighted, in his Memoir as Secretary-General of the Permanent Commission for the South Pacific in 1966, that the tripartite instruments exclusively responded to the need of protecting the whaling resources[252]. This explains the presence of

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249 Proclamation 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, and Proclamation 2668, Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas, of the same date. **PM, Annex 88**.

250 See PM, paras. 4.34-4.35.

251 Statement of Mr. Cristóbal Rosas. **Appendix A** to this Reply.

252 "The General Secretariat ascribes this issue a significance that does not require any explanation. Suffice it to recall that *the tripartite Agreements* that gather us – and that have somehow contributed to the creation of a new law, and to the destruction of old-fashioned concepts and principles –*arose almost exclusively from the need to preserve our whaling wealth. We were*

representatives of the whaling industry in the 1952 Conference and the joint action of the three South Pacific countries to protect such resources[253].

3.118 There is no indication whatever in the Declaration of Santiago that it amounted to, or was intended to amount to, an agreement on international maritime boundaries between the three States or between any two of them.

G. Subsequent Representations of the Purposes of the 1952 Declaration of Santiago

3.119 Had the 1952 Declaration of Santiago established an international maritime boundary between Peru and Chile there would surely have been reference to it in the years that followed. But there was not. The Declaration was

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close witnesses of the farsighted intervention that the representatives of the whaling industry in our countries had, together with diplomats and technicians, at the genesis of those Agreements. It will always be appropriate to recall that the cause – old, albeit not dated – that gave rise to the fair claim by the South Pacific coastal States over the marine resources concerned the lack of results obtained from the international agreements and organizations in control and direction of the pelagic whaling in our seas.

Practically speaking, pelagic whaling fleets conducted their activities in this zone of the South East Pacific at their convenience; driving the three countries to take on the joint and necessary defense of the conservation and exploitation of that wealth." Barros Ortíz, Tobías: "Memoria del Secretario General". In: *Comisión Permanente del Pacífico Sur, Documentos de la IXa. Reunión Ordinaria*, Paracas, Ica, Perú, 10-14 de enero de 1966, [S.i.: s.n.], p. 10 (emphasis added).

253 Precisely, in October 1952, Chilean General Tobías Barros and a representative from the Chilean whaling industry, Fernando Guarello, travelled to Ecuador to express to the new President José María Velasco Ibarra the importance for the three countries of the South Pacific to undertake actions to defend the resources in the sea adjacent to their coasts from predatory actions by foreign fleets, which motivated the August Conference in Santiago. President Velasco Ibarra expressed his coincidence with the suggestions proposed by the Chilean mission, pointing out that the very serious problem of conservation of the marine resources of the South American Republics was the only issue discussed with such representatives. See Official Letter No. 5-12-Y/269 of 13 October 1952, from the chargé d'affaires a.i. of Peru to Ecuador to the Minister of Foreign Affairs of Peru. **PR, Annex 4**, and the Official Letter No. 5-12-A/152 of 17 October 1952, from the chargé d'affaires a.i. of Peru to Ecuador to the Minister of Foreign Affairs of Peru. **PR, Annex 5**. See also **PR, Annexes 82** and **83**.

consistently described in terms of the bold but limited aims described above.

3.120 The Declaration of Santiago was submitted for approval to the Chilean Congress, along with the other instruments concerning the South Pacific also signed in 1952, by means of a Presidential Message dated 26 July 1954[254]. In that message, no mention was made to the fact that the Declaration had established any lateral limits to Chile's 200-mile zone or that an international maritime boundary with Peru had been agreed. It is inconceivable that such an important development would have gone unmentioned in the Presidential Message submitting the Declaration to the Congress if Chile believed at the time that it had concluded what it now claims to be "a comprehensive and complete boundary between the Parties."[255]

3.121 On 23 September 1954, Chile enacted Supreme Decree No. 432 approving the Declaration of Santiago. The decree was then published in the Official Gazette on 22 November 1954[256]. Remarkably, the version of the decree published in Chile omitted points IV, V and VI of the Declaration. In other words, the very provision of the Declaration that Chile now relies on as establishing an international maritime boundary between the Parties (point IV) was *not included* in the original gazetted version of Supreme Decree No. 432[257]. Once again, it strains credibility that such a serious matter as an international boundary agreement would have been dealt with in such a cavalier manner

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254 Message from the Chilean Executive to the Congress for the Approval of the 1952 Agreements of 26 July 1954. **PM, Annex 92**.

255 CCM, para. 1.9.

256 Supreme Decree No. 432 of 23 September 1954, Approval of the Declarations and Conventions between Chile, Peru and Ecuador agreed at the First Conference on Exploitation and Conservation of the Marine Resources of the South Pacific. **PM, Annex 30.**

257 Equally, when the Ministry of Foreign Affairs of Chile published its 1952 Memoir, it did not include the full text of the Declaration of Santiago, i.e., the reference to the parallel in point IV was omitted. **PR, Annex 19**.

if the delimitation of the international maritime boundary between Peru and Chile had been one of the purposes of the Declaration of Santiago.

3.122 It is true that, the following year, Chile's Foreign Ministry wrote a note to the Director of the Official Gazette pointing out the omission and asking that the matter be rectified[258]. But that note not only did not mention that rectification was important because the omitted articles had established an international maritime boundary with Peru, it also mistakenly indicated that the "Declaration on the Maritime Zone" formed part of what was said to be an "Agreement on Conservation and Exploitation of Marine Resources of the South Pacific". No such Agreement existed. Once again, this haphazard treatment scarcely supports the proposition that the Declaration of Santiago had established Chile's international maritime boundary with a neighbouring State.

3.123 Neither the Declaration of Santiago nor Chile's Supreme Decree No. 432 made any reference to any map illustrating the course of an international maritime boundary between Chile and Peru, and no such map was produced by Chile at the time. This is in sharp contrast with Chile's practice when it subsequently did conclude a formal international maritime boundary agreement with Argentina in 1984: the Chile-Argentina Agreement included a map of the delimitation line as an integral part of the agreement[259]. As for the maritime areas lying off the coasts of Chile and Peru, it was only in the 1990s, some 40 years after the signature of the Declaration of Santiago, that Chile started to issue maps purporting to show an international maritime boundary between the two countries[260].

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258 Note No. 2890 of 25 March 1955, from the Minister of Foreign Affairs of Chile to the Director of the Chilean Official Gazette. **CCM, Annex 115**.

259 See Treaty of Peace and Friendship between Chile and Argentina, signed on 29 November 1984. **PM, Annex 53** and PM, Figure 5.1, p. 175 thereto.

260 See paras. 4.116-4.124, 4.142 (*g*) below.

3.124 Equally significant is the fact that Chile referred specifically to its 1984 international maritime boundary agreement with Argentina in a statement it made when it notified the United Nations of its ratification of the 1982 Convention on the Law of the Sea on 25 August 1997. As Chile stated at that time:

> "The Republic of Chile declares that the Treaty of Peace and Friendship signed with the Argentine Republic on 29 November 1984, which entered into force on 2 May 1985, shall define the boundaries between the respective sovereignties over the sea, seabed and subsoil of the Argentine Republic and the Republic of Chile in the sea of the southern zone in the terms laid down in articles 7 to 9."[261]

In contrast, Chile's statement made no reference to any international maritime boundary delimited with Peru, whether under the Declaration of Santiago or otherwise. These elements reinforce the fact that Chile did not act as if the Declaration of Santiago had delimited any international maritime boundary between the Parties, let alone a "comprehensive and complete" one.

3.125 The same pattern is evident in the practice of Peru. The communication dated 7 February 1955 by the Ministry of Foreign Affairs of Peru to the Peruvian Congress on the 1954 Conventions and the 1952 Declaration of Santiago stated that:

> "The declaration on the maritime zone, the basic document of Santiago, on account of its *simply declarative character*, goes no

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[261] Declaration made by Chile upon ratification of the 1982 United Nations Convention on the Law of the Sea of 25 August 1997. United Nations Division for Ocean Affairs and the Law of the Sea, *Law of the Sea Bulletin*, No. 35, 1997, p. 9. **PR, Annex 72**.

> further than proclaiming 'the extension of their sovereignty and jurisdiction over the sea' by all three countries as a norm of their international maritime policy"[262].

3.126 The Report of the Foreign Affairs Committee of the Peruvian Congress reiterated the point regarding the agreements and treaties signed by Peru, Chile and Ecuador in Santiago in August 1952 and in Lima in December 1954:

> "The most relevant document is the declaration on the Maritime Zone, as the Ministry of Foreign Affairs states in the Note attaching the said declaration, since *it is a declarative document and one that establish principles. This document defines the international maritime policy of the three signatory countries* in accordance with its legislative antecedents which are the grounds of the sovereignty and jurisdiction over the sea up to a distance of 200 nautical miles from their coasts. This principle, being solemnly reaffirmed by the contracting parties, is extensive to the insular territory, according to paragraph 4 of the declaration."[263]

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[262] Official Letter No. (M)-3-O-A/3 of 7 February 1955, from the Ministry of Foreign Affairs of Peru (emphasis added). (Spanish text: "La declaración sobre zona marítima, el documento básico de Santiago, por su carácter simplemente declarativo, no va más allá de proclamar por los tres países como norma de su política internacional marítima 'la extensión de su soberanía y jurisdicción sobre el mar'".). **PM, Annex 95**.

[263] Report of the Foreign Affairs Committee of the Congress of Peru on the Agreements and Conventions signed by Peru, Chile and Ecuador in Santiago, on 18 August 1952; and in Lima, 4 December 1954 (emphasis added). (Spanish text: "El documento más importante es la declaración sobre Zona Marítima, como lo expresa la nota de remisión de nuestra Cancillería, por tratarse de un documento declarativo y principista, que define la política internacional marítima de los tres Países signatarios, en concordancia con sus antecedentes legislativos que sostiene la soberanía y jurisdicción sobre el mar hasta las 200 millas marinas desde sus costas. Principio, que reafirmado solemnemente por las partes contratantes, se hace extensivo al territorio insular, según el punto 4 de la declaración."). **PM, Annex 96**. See also **PR, Annex 6**.

3.127 There is no mention of the establishment of a boundary. It is not credible that a Government could have concluded an international boundary with a neighbouring State – *two* boundaries, on Chile's view – dividing up tens of thousands of square kilometres of sea of crucial importance to the economic well-being of the State, without communicating the fact to its Congress, and without its Congress being aware of the fact.

3.128 There is, moreover, no suggestion that any Peruvian writers thought that an international maritime boundary might have been created by the Declaration of Santiago.

3.129 Furthermore, in response to the Notes sent by Denmark, the United States, the United Kingdom, the Netherlands, Norway and Sweden reserving their positions in relation to the Declaration of Santiago[264], Chile, Ecuador and Peru agreed to present a joint response and to maintain a common and supportive front on the issue[265]. The text of the response, which was approved by the three Governments, spelled out the nature and purposes of the Declaration of Santiago and made no reference to the fixing of any international maritime boundary between Peru and Chile[266].

3.130 For example, there is no indication in the records of the Second Conference on Exploitation and Conservation of the Marine Resources of the South Pacific, held in Lima in December 1954, that the representatives believed that international maritime boundaries had been agreed in 1952[267].

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264 PM, para. 4.82.

265 See Note No. (N): 6/17/14 of 12 April 1955, from the Minister of Foreign Affairs of Peru to the Ambassador of the United Kingdom. **PM, Annex 65**; and, Memoria del Ministro de Relaciones Exteriores (28 de julio de 1954 - 28 de julio de 1955). Lima, Talleres Gráficos P. L. Villanueva, 1955. **PM, Annex 98**, pp. 24-25.

266 *Ibid*., and see also Note No. (M): 6/3/29 of 12 April 1955, from the Minister of Foreign Affairs of Peru to the chargé d'affaires a.i. of the United States. **PM, Annex 66**.

267 See paras. 4.13-4.18 below.

3.131 Peru's Minister of Foreign Affairs, Dr. David Aguilar Cornejo, addressing the conference, said that:

> "The declaration of Santiago of 1952 represents the integration and solidarity of three nations that, overcoming individual acts, strengthen a common front as a superior stage in their international behaviour, returning to the old and well-known path of union and mutual aid, in defence of their national sovereignties and protection of noble and high interests."[268]

He made no mention of the declaration having established international maritime boundaries.

3.132 The limited purpose and nature of the Declaration of Santiago was further affirmed in 1956, in the course of a debate in the Sixth Committee of the United Nations General Assembly on the International Law Commission's report on the law of the sea.

3.133 The Peruvian representative made a long intervention, which attracted comments from the representatives of other States. The summary record of the debate reads:

> "27. In 1952, Peru, Chile and Ecuador had signed the Santiago Declaration, proclaiming a common maritime policy based on the need of guaranteeing to their peoples the necessary means of subsistence through the conservation of natural resources and the regulation of their exploitation.
> …

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[268] Opening Speech by David Aguilar Cornejo, Minister of Foreign Affairs of Peru in the Second Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific of 1954. (*Revista Peruana de Derecho Internacional*, Tomo XIV, No. 46, 1954, Julio-Diciembre, p. 268). (Spanish text: "La declaración de Santiago de 1952 representa la integración y solidaridad de tres naciones que al superar la acción individual robustecen un frente común como etapa superior de su actuación internacional, retornando al antiguo y conocido camino de la unión y la ayuda mutuas, en defensa de sus soberanías nacionales y en protección de nobles y altos intereses."). **PR, Annex 54**.

> 28. The exclusive jurisdiction which the coastal State enjoyed over the 'maritime zone' mentioned in the Santiago Declaration did not entail a right to prohibit the reasonable exploitation of the protected resources by nationals of other States. The Governments of Peru, Chile and Ecuador had indeed expressly stated that they had no intention of prejudicing the legitimate interests of other States, as long as the regulations designed to safeguard the marine fauna were duly observed. All that they wished to prevent was indiscriminate and excessive fishing, as such abuse of the living resources could cause irreparable damage."[269]

3.134 It may be thought that this statement does not sit altogether comfortably with the terms of the Declaration of Santiago and its references in point II to "exclusive sovereignty and jurisdiction". But this is precisely the point. There was agreement on the need to protect marine resources adjacent to the coasts of the signatory States but it is idle to pretend that the Declaration of Santiago set out some kind of developed sub-regional consensus on law of the sea matters.

3.135 This is clear from the account of the purposes of the States that formulated the Declaration of Santiago, given in the statement made in the Sixth Committee five days later by the representative of Ecuador. The report of his intervention reads as follows:

> "36. He then referred to the Santiago Declaration covering maritime zones, signed by the Governments of Chile, Ecuador and Peru on 18 August 1952. The purposes of those three Governments had been to ensure to their people a livelihood and

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[269] Statement by Peruvian Delegate, Mr. Edwin Letts, in the United Nations General Assembly Sixth Committee of 29 November 1956, 486th Meeting, UN Doc. A/C.6/SR.486. **PR, Annex 56**.

> means of economic development; to conserve and protect natural resources; and to ensure that the exploitation of resources outside the jurisdiction of the three States would not be detrimental to the interest of populations which, because of their geographical position, found in the sea their means of subsistence and drew from it irreplaceable economic resources.
>
> 37. …In claiming sovereign right over the maritime zone in question they remained within the bounds of their own clearly defined aim of conserving the living resources of the sea and of benefiting from such resources in a legitimate way. That maritime zone, thus, did not constitute a territorial sea, but was a creation *sui generis* which did not exclude the legitimate rights and interests of other States."[270]

3.136 The Chilean representative spoke later that month:

> "33. The countries on the Pacific coast of South America had been charged with violating the principle of freedom of the seas by taking measures to protect the living resources of the sea, but that principle was infringed only if the sea was rendered unusable as a means of communication among peoples. The existence of the territorial sea was not contrary to the principle of freedom of the seas, for all ships had the right of innocent passage. The greater or lesser breadth of the territorial sea did not affect its juridical character. President Truman's Declaration of 1947 [*sic*] and the Declaration by Chile, Ecuador and Peru in 1952, both of which recognized the right of innocent passage of ships of all States, did not therefore violate the principle of freedom of the seas."[271]

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[270] Statement by Ecuadorian Delegate, Mr. Escudero, in the United Nations General Assembly Sixth Committee of 4 December 1956, 489th Meeting, UN Doc. A/C.6/SR.489. **PR, Annex 57**.

[271] Statement by Chilean Delegate, Mr. Melo Lecaros, in the United Nations General Assembly Sixth Committee of 12 December 1956, 496th Meeting, UN Doc. A/C.6/SR.496. **PR, Annex 58**.

3.137 With the benefit of more than half a century of legal development one can see the confusion between innocent passage and freedom of the high seas, and between the territorial sea and zones of limited jurisdiction. What this underscores is the tentative, uncertain nature of the initiative taken within the Declaration of Santiago. The three States were feeling their way in a new area of international law. They were focused on the need to regulate the exploitation of marine living resources. Their acts were a very long way indeed from the routine claiming of extended national maritime zones defined according to well-established legal rules, and the tidying-up of matters by defining precise international maritime boundaries.

3.138 In the words of the Chilean representative:

> "36. The problem of conservation of the resources of the sea had now become a pressing one. It was tragic to see large foreign fishing fleets exhausting resources necessary for the livelihood of the coastal populations. It was deplorable that the measures taken by the coastal States to safeguard those resources should have been so little understood. … It was to be hoped that the rules established by Chile, Ecuador and Peru would be endorsed by international law through the adoption of a formula similar to that adopted at Mexico by the Inter-American Council of Jurists, to the effect that *coastal States had the right to adopt measures of conservation and supervision necessary for the protection of the living resources of the sea beyond territorial waters on condition that such measures did not discriminate against foreign fishermen.* Such a provision fulfilled the requirements for a true rule of international law, for it was necessary, it was useful and it was realistic.
>
> …
>
> 39. In the Declaration of Santiago of 1952, Chile, Ecuador and Peru had stated that it was the responsibility of Governments to prevent any exploitation of the resources of the sea which could be prejudicial to nations for which the sea constituted an irreplaceable means of subsistence. The three Governments had

> declared that, in view of the biological and geological factors affecting the conservation and development of the marine fauna and flora in the waters along their coasts, the former breadth of the territorial sea and of the contiguous zone was inadequate, and they had therefore proclaimed their sovereignty up to a minimum distance of 200 miles from the shore.
>
> 40. *The sole object of the Presidential declaration of 1947 and the agreement with Ecuador and Peru had been to protect the marine resources of the South Pacific.* At no time was it the intention of those Governments to encroach either on freedom of navigation or on the legitimate interests of other States, provided such other States respected the regulations designed to preserve the marine fauna."[272]

3.139 Perhaps most remarkable is the 1982 article *El XXX Aniversario de la Declaración de Santiago* by Joaquín Fonseca Truque[273], Deputy Secretary-General of Administration of the Permanent Commission for the South Pacific – the very body established at the 1952 Santiago Conference. The article gives an overview of the Declaration of Santiago, and one might expect that at least with the benefit of hindsight something as important as the establishment of international maritime boundaries would have been mentioned, had it been effected by the Declaration. But here again there is no hint or suggestion that the Declaration of Santiago had fixed the maritime boundaries of the participating States.

3.140 That position continues to hold. Since 1981, Peru, Chile, Ecuador, and Colombia[274] have held high level meetings regarding the Permanent Commission for the South Pacific. Most of those meetings have been

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272 Statement by Chilean Delegate, Mr. Melo Lecaros, in the United Nations General Assembly Sixth Committee of 12 December 1956, 496th Meeting, UN Doc. A/C.6/SR.496 (emphasis added). **PR, Annex 58**.

273 Fonseca Truque, Joaquín: "El XXX Aniversario de la Declaración de Santiago". (*Revista de la Comisión Permanente del Pacífico Sur en la Actualidad*, No. 12, 1982, pp. 47-53).

274 PM, footnote 15.

held at Foreign Minister level, and one was at Presidential level. In these meetings they approved Declarations on policy and objectives for the future of the Organization. Not one of those Declarations has made any reference to maritime boundaries between the member countries of the Permanent Commission. These declarations have continued to underline the importance of the "purposes and principles" established by the Declaration of Santiago in 1952[275].

H. Conclusion: The Peru-Chile International Maritime Boundary Was Not Agreed in the 1952 Declaration of Santiago

3.141 Chile's claim is that the international maritime boundary between Peru and Chile was agreed in the 1952 Declaration of Santiago[276]. That claim cannot be substantiated; and it is incorrect.

III. The Legal Status of the 1952 Declaration of Santiago

3.142 The text of the 1952 Declaration of Santiago and the circumstances of its adoption have been discussed in the preceding paragraphs, where it was shown that the Declaration did not purport to establish maritime boundaries. This conclusion is underlined by the legal status of the Declaration, which is the question addressed in this final section of the chapter.

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275 There are eight such declarations: 1. "Declaración de Cali" - (Cali, 24 January 1981); 2. "Declaración de Viña del Mar" - (Viña del Mar, 10 February 1984); 3. "Declaración de Quito" - (Quito, 10 December 1987); 4. "Declaración de Lima" - (Lima, 4 March 1993); 5. "Declaración de Santafé de Bogotá" - (Santafé de Bogotá, 4 August 1997); 6. "Declaración de Santiago 2000" - (Santiago de Chile, 14 August 2000); 7. "Declaración de los Presidentes de los Países miembros de la CPPS" (Ciudad de Panamá, 18 November 2000); and 8. "Declaración de Santiago 2002" - (Santiago de Chile, 14 August 2002). Available at: <http://www.cpps-int.org/plandeaccion/enero%202009/libro%20convenios.pdf> accessed 8 October 2010.

276 See para. 3. above.

3.143 This section will show that the Declaration of Santiago was not, when formulated on 18 August 1952, a legally-binding instrument, a treaty binding under international law. It was a policy declaration, albeit an important and solemn one. Leaving aside the fact that on its face it did not establish any international maritime boundary between Peru and Chile, it was not an international agreement capable even in principle of establishing such a boundary. That is clear from its content and its form, from the language used, and from its treatment by the declaring States.

3.144 In due course, over the years the Declaration of Santiago came to be treated by the declaring States as though it were a treaty. But this involved no change in its substance. Nothing that happened since 18 August 1952 has transformed this statement of the international maritime policy of the three States into something else. Subsequent developments, including domestic ratification and eventual registration with the Secretariat of the United Nations, did not add to, or in any way alter, the substantive content of what was a purely political instrument. In particular, nothing that has happened since 18 August 1952 has transformed the Declaration of Santiago into an international maritime boundary agreement.

3.145 Accordingly, the authorized opinion of Ambassador Juan Miguel Bákula – former Secretary-General of the Permanent Commission for the South Pacific who chaired the Peruvian delegation during some sessions of UNCLOS III – is very illustrative –

> "Obviously, the legislative approval did not modify the 'purely declarative' nature of the documents signed in Santiago de Chile and, therefore, none of the agreements approved implied an express definition of territorial sea or the determination of a breadth of 200 miles[277].

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[277] Bákula, Juan Miguel: *El Dominio Marítimo del Perú*. Lima, Fundación M. L. Bustamante de la Fuente, 1985, p. 96.

A. The Declaration of Santiago, when Originally Formulated, was not a Treaty

3.146 The Declaration of Santiago was not, when formulated on 18 August 1952, a treaty binding under international law[278]. This is clear from its actual text, from its form, from the particular circumstances in which it was drawn up, and from the manner in which the declaring States dealt with it thereafter.

1. Definition of "Treaty"

3.147 The Vienna Convention on the Law of Treaties defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation"[279]. It is accepted that the elements of this provision now represent customary international law[280]. The crucial element in the definition, including for present purposes, is that the instrument is "an international agreement ... governed by international law". This embraces the element of an intention to create rights and obligations under international law[281]. In deciding whether an instrument is a treaty, regard must be had "above all to its actual terms and

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278 See also the discussion in PM, paras. 4.62-4.87. The Memorial states at para. 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."

279 Vienna Convention on the Law of Treaties, Art. 2.1(a).

280 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 429, para. 263. Aust, Anthony: *Modern Treaty Law and Practice.* 2nd ed., Cambridge, etc., Cambridge University Press, 2007, p. 16.

281 For an account of the work of the International Law Commission and the Vienna Conference on this point, see Gautier, Philippe: "Article 2". In: Corten, Olivier and Pierre Kleinl, *Les Conventions de Vienne sur le Droit des Traités. Commentaire article par article.* Vol. 1, Bruxelles, Bruylant, 2006, pp. 60-63; see also Gautier, Phillippe: *Essai sur la définition des traités entre Etats. La pratique de la Belgique aux confins du droit des traités*. Bruxelles, Bruylant, 1993, pp. 328-331.

to the particular circumstances in which it was drawn up"[282], not from what the States concerned say afterwards was their intention.

3.148 The Court has had occasion to consider whether an instrument is or is not a legally binding treaty in a number of cases.

3.149 In the *Aegean Sea Continental Shelf* case, the Court was called upon to decide whether the Brussels Communiqué of 1975 was or was not a treaty[283]. In holding that it was not, the Court examined both the text of the Brussels Communiqué and "what light is thrown on its meaning by the context in which the meeting of 31 May 1975 took place and the Communiqué was drawn up."[284] The Court held that "it is in that context – a previously expressed willingness on the part of Turkey jointly to submit the dispute to the Court, after negotiations and by a special agreement defining the matters to be decided – that the meaning of the Brussels Joint Communiqué of 31 May 1975 has to be appraised."[285] The Court also looked to events subsequent to the Communiqué (negotiations between experts and diplomatic exchanges) to confirm its conclusion that the Communiqué did not include a commitment to submit the dispute to the Court[286].

2. The Actual Terms of the Declaration of Santiago

3.150 The actual terms of the Declaration of Santiago demonstrate beyond doubt that it was not intended to establish legally-binding obligations. It has all the hallmarks of a statement of policy. The first three paragraphs set out policy

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[282] *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 39, para. 96; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 121, para. 23.

[283] *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, pp. 38-45, paras. 94-107.

[284] *Ibid.*, p. 41, para. 100.

[285] *Ibid.*, p. 43, para. 105.

[286] *Ibid.*, para. 106.

considerations, in the light of which the three Governments "formulate the following Declaration" (*formulan la siguiente declaración*). The declaration itself consists of six points. Point I states that the former extension of the territorial sea and contiguous zone "are inadequate". In points II and III the three Governments proclaim "as a norm of their international maritime policy" (*como norma de su política internacional marítima*) that they each possess exclusive sovereignty and jurisdiction to a minimum distance of 200 nautical miles, which includes the seabed and subsoil. Point IV deals with the particular question of island territories, while point V concerns "innocent and inoffensive passage" (*paso inocente e inofensivo*). The final point, point VI, in particular, is explicit on the non-binding nature of the points contained in the Declaration of Santiago, since it looks forward to the conclusion in the future of "agreements or conventions" (*acuerdos o convenciones*) for the application of "the principles contained in this Declaration" (*los principios contenidos en esta Declaración*). Point VI reads as follows:

> "For the application of the principles contained in this Declaration, the Governments of Chile, Ecuador and Peru hereby announce their intention to sign agreements or conventions which shall establish general norms to regulate and protect hunting and fishing within the maritime zone belonging to them, and to regulate and co-ordinate the exploitation and development of all other kinds of products or natural resources existing in these waters which are of common interest."

3.151 Six such agreements were concluded at the 1954 Conference on Exploitation and Conservation of the Marine Resources of the South Pacific, held at Lima[287]. These included the Complementary Convention to the Declaration of Sovereignty on the Two-Hundred-Mile Maritime Zone (hereinafter "the

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[287] PM, footnote 111 at para. 3.31.

1954 Complementary Convention") and the Agreement on a Special Zone. But they did not include anything in the nature of a maritime delimitation agreement.

3.152 The clear understanding of the participants in the 1952 Declaration of Santiago that it contained only non-binding principles and looked forward to the conclusion of agreements and conventions, was evident on many occasions. For example, in 2000 the Foreign Ministers of Peru, Chile, Colombia and Ecuador adopted a Declaration, in which they "ratify their adhesion to the principles and validity of the purposes that inspired the Declaration of Santiago of 18 August 1952 and the creation of the Permanent Commission for the South Pacific, *as well as the Agreements, Conventions and Protocols adopted by the four countries in view of turning such principles and purposes into concrete commitments applying common policies regarding maritime matters*, particularly those related to the protection of the resources inside and outside their jurisdictions."[288]

3. Form of the Declaration of Santiago

3.153 While the form of an instrument is not in itself conclusive, it may well give a clear indication as to the intentions of the States concerned. "The law of treaties is extremely flexible and can accommodate departures from normal practice", yet "most treaties are drafted according to standard forms and processed according to long-established procedures."[289] As the Court has said,

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[288] Santiago, 14 August 2000 (emphasis added). (Spanish text: "Ratifican su adhesión a los principios y la vigencia de los propósitos que inspiraron la Declaración de Santiago del 18 de agosto de 1952 y la creación de la Comisión Permanente del Pacífico Sur, así como a los Acuerdos, Convenios y Protocolos que los cuatro países han adoptado para hacer de esos principios y propósitos, compromisos concretos para la aplicación de políticas comunes en materia marítima, particularmente las relativas a la protección de los recursos contenidos dentro y fuera de sus jurisdicciones."). Available at: <http://www.cpps-int.org/plandeaccion/enero%202009/libro%20convenios.pdf> accessed 8 October 2010.

[289] Aust, Anthony, *op. cit.*, p. 16.

"international agreements may take a number of forms and be given a diversity of names."[290]. Nevertheless, States do in practice commonly adhere to certain forms when they wish to conclude an agreement that is legally-binding under international law, not least when they are concluding a boundary treaty. In the present case, nothing whatsoever in the form of the instrument points to an intention to conclude a legally-binding instrument; indeed, everything points in the opposite direction –

(a) The title of the instrument is "Declaration on the Maritime Zone", not "Treaty" or "Agreement" or any of the other terms normally used for a legally-binding international agreement[291]. While the designation of an instrument is not conclusive, it may be an indication as to the intention of the States concerned[292].

(b) The operative words are "the Governments ... formulate the following Declaration:" (*los Gobiernos ... formulan la siguiente declaración:*), not "Have agreed as follows:".

(c) The three Governments making the Declaration are referred to in the text as "the countries making the Declaration"[293], not as "Parties".

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290 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 120, para. 23.

291 *Ibid.* Of course, occasionally a treaty may be entitled "Declaration", as was the case with the Maroua Declaration that was at issue in *Cameroon* v. *Nigeria* and the China-United Kingdom Joint Declaration on the Future of Hong Kong of 1984. But this is not common.

292 See, in this sense, Gautier, Philippe: "Article 2". In: Corten, Olivier and Pierre Kleinl, *op. cit.*, p. 53: "Cela dit, il n'en reste pas moins vrai que la dénomination d'un instrument peut dans certains cas apporter un éclairage sur la nature de l'instrument conclu, en tant qu'indice, parmi d'autres, de la volonté de ses auteurs. En pratique, l'on sera en effet moins enclin à reconnaître d'emblée la valeur juridique d'un acte intitulé 'déclaration d'intention' que face à un instrument dénommé 'accord' ou 'traité' par ces auteurs."

293 See points I and IV of the 1952 Declaration of Santiago. **PM, Annex 47**.

(d) The instrument does not consist of articles, but of six points.

(e) It contains no language of obligation ("shall") or provisions on entry into force ("final clauses"), etc.

(f) The instrument does not conclude with a testimonium ("In witness whereof ..."), but merely with four signatures, those of the "delegates" of the three countries taking part at the Conference, and that of the Secretary-General of the Conference.

(g) The delegates were not described as Plenipotentiaries, nor did they sign "For the Government of Chile/Ecuador/Peru".

3.154 In this regard, the Declaration of Santiago may be contrasted with legally-binding agreements concluded between Peru and Chile, and between Peru, Chile and other States. For example, the 1954 Complementary Convention concluded by the same three States just two years later[294]. The 1954 instrument is entitled, "Convention", it contains the operative words "THEY AGREE", it bears a solemn testimonium ("In witness whereof"), it records in its preamble that the representatives of the three States have been appointed Plenipotentiaries by the Presidents of their respective countries, and they signed "For the ... Government of". In short, the 1954 Complementary Convention follows in all formal respects what is to be expected in a treaty. Moreover, the final preambular paragraph of the 1954 Complementary Convention recalls point VI of the 1952 Declaration of Santiago ("[the three Governments] expressed their intention to subscribe agreements or conventions related to the application of the principles governing that sovereignty, for the purpose, in particular, of regulating and protecting hunting and fishing in the maritime zone that corresponds to them").

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[294] Complementary Convention to the Declaration of Sovereignty on the Two-Hundred-Mile Maritime Zone, signed on 4 December 1954. **PM, Annex 51**.

3.155 Similar formality is to be found in numerous boundary agreements, for example, the Treaty between Peru and Chile for the Settlement of the Dispute Regarding Tacna and Arica, signed on 3 June 1929[295], and the Treaty of Peace and Friendship of 29 November 1984 between Argentina and Chile, Articles 7 to 11 which settle the international maritime boundary between the two Parties[296].

4. Particular Circumstances in which the Declaration of Santiago Was Drawn Up

3.156 The particular circumstances in which the Declaration of Santiago was drawn up have been described above. It has been amply demonstrated that the circumstances were such that the purpose of the three States was to adopt a political stance vis-à-vis third States, not least the United States and the United Kingdom, who had challenged the unilateral declarations by Chile and Peru of 200-nautical-mile zones. There is nothing in the circumstances in which the Declaration of Santiago was drawn up to suggest an intention to undertake legally-binding obligations *inter se*. That was not the purpose of the exercise, though future agreements were foreshadowed in point VI of the Declaration.

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295 Treaty for the Settlement of the Dispute Regarding Tacna and Arica, with Additional Protocol, signed on 3 June 1929. **PM, Annex 45**.

296 Treaty of Peace and Friendship between the Government of the Republic of Chile and the Government of the Republic of Argentina, signed on 29 November 1984. Available at: <http://treaties.un.org/doc/Publication/UNTS/Volume%201399/volume-1399-I-23392_English.pdf> accessed 8 October 2010.

5. Subsequent Treatment of the Declaration of Santiago by the States Concerned

3.157 While it is clear that the 1952 Declaration of Santiago was not, and was not intended to be, a legally-binding instrument, but as a statement of maritime policy, over the years the Declaration came to be treated by the participants as though it were a treaty. This involved no change in its substance.

3.158 In the *Qatar* v. *Bahrain* case, the Court considered the possible effect of the subsequent conduct of Bahrain and Qatar, in particular the somewhat delayed registration with the Secretariat of the United Nations (in fact, only six months after the Minutes were drawn up), and of non-compliance with constitutional requirements for treaties. It did not find these points, as raised by Bahrain, compelling in the particular circumstances of that case[297]. Nevertheless, it is submitted that such subsequent conduct is not necessarily without significance in other circumstances, including those of the present case.

3.159 It was not until some two or three years later, in 1954-1955, that the participating States took any steps to submit the Declaration of Santiago to their Congresses, for domestic ratification in accordance with the constitutional provisions in force at the time in their respective countries. Until then the Declaration was treated as the purely political document that it was, nothing more and nothing less than a statement of international maritime policy, a matter for the Executive. And no steps were taken to register the Declaration with the Secretariat of the United Nations, as would have been required under Article 102 of the Charter of the United Nations had the Declaration been a treaty, until May 1976.

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[297] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 122, paras. 28-29.

3.160 Two aspects of the subsequent treatment of the 1952 Declaration of Santiago by the States concerned therefore need to be addressed, for any light that they may shed on the legal status of the Declaration: *(a)* the submission of the Declaration to their respective Congresses; and *(b)* registration with the United Nations Secretariat under Article 102 of the Charter of the United Nations.

B. The Declaration of Santiago Came to be Treated by the Participating States as a Treaty

1. Submission of the Declaration to the Respective Congresses

3.161 It was only some time after the formulation of the Declaration of Santiago that, as a direct result of challenges to the extended maritime zone from among others foreign whaling fleets, the three participating States submitted the Declaration to their respective Congresses[298] for domestic ratification. The aim was to give the Declaration "greater weight"[299]. "Ratification" by Congress may have given the Declaration of Santiago "the status of a treaty[300] in domestic political terms. But such domestic approval did not, in and of itself, directly affect the status of the instrument as a matter of international law. That this is so reflects the clear distinction between domestic "ratification", often by the Congress, and "the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty"[301].

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298 CCM, para. 2.58. Chile in 1954, Peru and Ecuador in 1955.

299 PM, para. 4.70.

300 This is the expression used in PM, para. 4.70.

301 Vienna Convention on the Law of Treaties, article 2.1(b) (definition of 'ratification'). See, *inter alia*, Jennings, Robert and Watts, Arthur (eds.): *Oppenheims's International Law*. Ninth Edition, Vol. I, London, etc., Longman, 1996, p. 1226. "Ratification is defined in the Vienna Convention ... must be distinguished from parliamentary or other domestic ratification (or approval) of a treaty: although such ratification may be connected with the international act of ratification, they are separate procedural acts carried out on different planes."; Rossenne, Shabtai: "Treaties,

As the International Law Commission said in the Commentary to article 2, paragraph 1 (b), in its final draft articles on the law of treaties:

> "The constitutions of many States contain specific requirements of internal law regarding the submission of treaties to the 'ratification' or the 'approval' of a particular organ or organs of the State. These procedures of 'ratification' and 'approval' have their effects in internal law as requirements to be fulfilled before the competent organs of the State may proceed to the international act which will establish the State's consent to be bound."[302]

In the *Nicaragua* v. *United States of America* case, although the Executive and Congress of Nicaragua had approved a proposal for ratification of the Protocol of Signature of the Statute of the Permanent Court, the International Court of Justice held as follows:

> "25. ... It may be granted that the necessary steps had been taken at the national level for ratification of the Protocol of Signature of the Statute. But Nicaragua has not been able to prove that it accomplished the indispensable step of sending its instrument of ratification to the Secretary-General of the League of Nations.
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> ...

Conclusion and Entry into Force". In: Bernhardt, Rudolf (ed.), *Encyclopedia of Public International Law*. Vol. IV, Amsterdam, etc., North-Holland, 2000, p. 934 "...it is a matter for the domestic authorities and the domestic constitution to determine how and whether the State will consent to be bound by the treaty. By itself, the domestic decision has no international legal effect. That will only result from the completion of one of the accepted international formalities ...."; Aust, Anthony, *op. cit.*, p. 103 "The most common misconception about ratification is that it is a constitutional process. It is not. … [I]t is an 'international' act carried out on the 'international' plane."

302 United Nations, Yearbook of the International Law Commission: Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session including the Reports of the Commission to the General Assembly (A/CN.4/SER.A/1966/Add.1), 1966, Vol. II, p. 189, Comment (9). Available at: <http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1966_v2_e.pdf> accessed 8 October 2010.

> 26. The Court therefore notes that Nicaragua, having failed to deposit its instrument of ratification of the Protocol of Signature of the Statute of the Permanent Court, was not a party to that treaty."[303]

3.162 It will be recalled that in the Counter-Memorial, Chile claims that "[t]he Peruvian Congress was under no misapprehension about the boundary-delimitation aspect of the Santiago Declaration."[304] This is simply not the case. The only "evidence" cited by Chile for its bold proposition is a newspaper report of a speech supposedly as delivered before the Peruvian Congress by Deputy Juan Manuel Peña Prado[305]. However, the Official Records of the Peruvian Congress for 5 May 1955 contain no such reference[306].

3.163 What is significant is that the Official Letter from the Ministry of Foreign Affairs of Peru addressed to the Congress together with the 1952 and 1954 instruments[307], the "Report" issued by the Foreign Affairs Committee of the Congress at the time of the approval of said instruments by the legislative branch[308], as well as other official documents that reflect the views of the Peruvian State at the time, contained no reference to maritime boundaries.

3.164 Likewise, there is no evidence whatever (and Chile has produced none) in the records of the Chilean Congress of the session at which the 1952 instruments

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303 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 404, paras. 25-26.

304 CCM, paras. 2.59, 2.60.

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

306 Records of the Second 1954 Extraordinary Legislature of the Peruvian Congress. Second Session held on 5 May 1955. **PR, Annex 7**.

307 Official Letter No. (M)-3-O-A/3 of 7 February 1955, from the Ministry of Foreign Affairs of Peru to the Peruvian Congress. **PM, Annex 95**.

308 Report of the Foreign Affairs Committee of the Congress of Peru on the Agreements and Conventions signed by Peru, Chile and Ecuador in Santiago, on 18 August 1952; and in Lima, 4 December 1954. **PM, Annex 96**.

were approved that the Chilean Congress considered that the Declaration of Santiago had delimited an international maritime boundary between Peru and Chile. In particular, Senator Correa, who was charged with securing the approval of the 1952 instruments before the Chilean Senate, made no such reference. On the contrary, in his speech before the Congress he stated that the Declaration of Santiago:

> "… proclaimed as an international maritime policy for the three nations the exclusive sovereignty and jurisdiction that they each possess over the sea, seabed, and subsoil lying within a zone of 200 nautical miles measured from their coasts. This declaration agrees with those that, between 1945 and the following years, were issued by almost every President in the continent, as well as by the International Juridical Committee at Rio de Janeiro and the Tenth Interamerican Conference that was held in Caracas this year."[309]

3.165 At the time of the domestic ratification of the 1952 Declaration of Santiago in 1954-1955, there was no exchange between Peru, Chile and Ecuador of instruments of ratification. It was only much later, through subsequent concordant practice, including joint registration of the Declaration of Santiago with the Secretariat of the United Nations in 1976, that the States concerned came to treat the Declaration as a treaty in their international relations.

2. Registration of the Declaration of Santiago under Article 102 of the Charter of the United Nations in 1976

3.166 The 1952 Declaration of Santiago was eventually registered under Article 102 of the Charter of the United Nations on 12 May 1976, some 24 years after its

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[309] Senate Records of Debates of the Congress of Chile. Twenty-First Ordinary Session, held on 10 August 1954. **PR, Annex 20**.

formulation[310]. It has been published in the *United Nations Treaty Series*[311] The Declaration of Santiago was initially submitted for registration with the Secretariat of the United Nations on 3 December 1973 by the three States concerned under cover of a note listing a considerable number of instruments that, unlike the Declaration, were undoubtedly treaties *ab initio*.

3.167 It is well established that the registration, or non-registration, of an instrument under Article 102 of the Charter is in no way conclusive as to its status. "[R]egistration does not confer on [an instrument] any status which it does not already have."[312]

3.168 On the other hand, registration with the Secretariat of the United Nations may be evidence that the registering State intend to treat an instrument as a treaty[313]. That is so in the instant case, even though primary reason for registration may well have been a desire further to enhance the political weight of the Declaration in the context of the hard-fought negotiations on the 200-nautical-mile maritime zone at UNCLOS III (1973-1982).

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310 It has been suggested that a treaty may not be invoked before an organ of the United Nations if has been registered, but not "as soon as possible" after its entry into force: Knapp, U. and Martens, E.: "Article 2". In: Simma, Bruno (ed.), *The Charter of the United Nations, A Commentary*. Second Edition, New York, Oxford University Press, 2002, Vol. II, p. 1290; Jacque, Jean-Paul: "Article 2". In: Cot, Jean-Pierre, Alain Pellet and Mathias Forteau (eds.), *La Charte des Nations Unies. Commentaire article par article*. 3rd. Edition, Paris, Economica, 2005, pp. 2132-2133.

311 1952 Declaration of Santiago. **PM, Annex 47**.

312 Aust, Anthony, *op. cit*., pp. 344-345 (footnote ommited). See also the Secretariat note reproduced in *Repertory of the practice of the UN Organs*, Supp 5, Vol. II, para 12; Hutchinson, D.N.: "The Significance of the Registration or Non-Registration of an International Agreement in Determining Whether or Not it Is a Treaty". In: Davidson, Scott (ed.), *The Law of Treaties*. Aldershot, etc., Ashgate/Dartmouth, 2004, pp. 257-290.

313 *Ibid*., p. 345.

C. The Declaration of Santiago Was and Is Not an International Maritime Boundary Agreement

3.169 The preceding sections have shown that, when it was formulated in August 1952, the Declaration of Santiago was not intended by its authors to be a legally-binding agreement. Only years later did the participating States come to deal with the Declaration as a treaty in their international relations. But these subsequent developments, including domestic ratification and eventual registration with the Secretariat of the United Nations, did not add to, or in any way alter, the substantive content of what *ab initio* was a purely political instrument. In particular, nothing that has happened since 18 August 1952 has transformed the Declaration of Santiago into an international maritime boundary agreement. The present section addresses this question, further to what has already been said in the Memorial[314].

1. State Practice in the Conclusion of International Maritime Boundary Agreements

3.170 When two States wish to conclude an agreement determining an international maritime boundary between themselves the almost invariable practice is to do so expressly and in the clearest possible terms. Precise co-ordinates are spelt out, and a map is often included, if only for illustrative purposes.

3.171 The agreements collected in the five volumes of *International Maritime Boundaries*[315] published so far under the auspices of the American Society of International Law offer ample illustration of this. Virtually all of the

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[314] PM, para. 4.81.

[315] Charney, J. I., Alexander, L. M. (eds.), *International Maritime Boundaries*, Vols. I and II (1993); Charney, J. I., Alexander, L. M. (eds.), *International Maritime Boundaries*, Vol. III (1998); Charney, J. I., Smith, R. W. (eds.), *International Maritime Boundaries*, Vol. IV (2002); Colson, D. A., Smith, R. W. (eds.), *International Maritime Boundaries*, Vol. V (2005). Vol. VI is under preparation, and is expected to be published in 2010.

agreements reproduced in the five volumes are bilateral, and entirely clear in their intention to establish a maritime delimitation. Indeed, the exception is the Declaration of Santiago, which is erroneously described in *International Maritime Boundaries*[316] in a way that repeats errors already to be found in the United States State Department publication *Limits in the Seas*[317].

3.172 The contrast between the Declaration of Santiago and a typical international maritime boundary agreement is apparent if one compares it to the Colombia-Ecuador Agreement concerning delimitation of marine and submarine areas and maritime co-operation, signed at Quito on 23 August 1975, which is cited by Chile in its Counter-Memorial[318]. This bilateral agreement clearly announces in its title that it is an "Agreement", and that it concerns "delimitation of marine and submarine areas". Its object and purpose is expressly stated in its preamble: "that it is expedient to delimit their respective marine and submarine areas". The preamble records that Plenipotentiaries have been appointed for this purpose, and the operative words are "Who have agreed". Article 1 provides that the Parties have "agreed" to designate a certain line "as the boundary between their respective marine and submarine areas, which have been established or may be established in the future." Article 3 refers to areas "up to a distance of 200 miles", not the open-ended reference in the 1952 Declaration of Santiago to "not less than 200 nautical miles". The Agreement was subject to ratification, and it was provided that it would enter

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316 Chile-Peru. Report Number 3-5. In: Charney, J. I. and Alexander, L.M.: *International Maritime Boundaries*, Dordrech, etc., Martinus Nijhoff Publishers, 1993, Vol. I, pp. 793-800, but see Corr.1, Add.1 *inter alia* reporting Peru's communication to the United Nations Secretary-General of 9 January 2001 (**PM, Annex 78**), which, the editors acknowledge, "calls into question the existence of a binding maritime boundary delimitation between the two states"(*International Maritime Boundaries*, Vol. IV, p. 2639).

317 See paras. 4.69-4.73 and 4.142 (*i*) below.

318 Agreement concerning delimitation of marine and submarine areas and maritime co-operation, signed on 23 August 1975 (996 UNTS 239). Available at: <http://treaties.un.org/doc/Publication/UNTS/Volume%20996/volume-996-I-14582-English.pdf> accessed 8 October 2010.

into force "on the date of the exchange of ratification, which shall take place at Bogotá". The Agreement was "signed in duplicate, both texts being equally authentic."[319] It was promptly registered with the Secretariat of the United Nations, under Article 102 of the Charter of the United Nations, by the two Parties on 17 February 1976.

2. Irrelevance of the Attitude of Third States, the Secretariat of the United Nations and Authors

3.173 It goes without saying that, contrary to the assertions of Chile in its Counter-Memorial, the views of third States, the Secretariat of the United Nations, or authors can have no effect on either the nature or the content of an instrument. It is indicative of Chile's difficulty in finding any convincing evidence whatsoever that the 1952 Declaration of Santiago established a lateral international maritime boundary that it has had recourse to such unconvincing materials[320].

3.174 Chile seeks to draw comfort from the attitude of third States. Chile's strained attempt to present Colombia's 1975 Agreement with Ecuador as acceptance that the 1952 Declaration of Santiago established a boundary along the parallel[321] is wholly unpersuasive. But even if that were Colombia's view, it would be immaterial. Colombia was in 1952, and remained until 1979, a third State so far as concerns the Declaration of Santiago. The same is true of the United States, China, and the "several States in pleadings before the Court" referred to by Chile. The attitude of third States towards an instrument formulated by Peru and Chile is of no probative value as to its status or content.

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319 See Article 11 of the Agreement concerning delimitation of marine and submarine areas and maritime co-operation, signed on 23 August 1975 (996 UNTS 239). Available at: <http://treaties.un.org/doc/Publication/UNTS/Volume%20996/volume-996-I-14582-English.pdf> accessed 8 October 2010.

320 CCM, paras. 2.223-2.262.

321 CCM, paras. 2.225-2.227.

3.175 Chile likewise seeks to place some weight on a 1991 publication of the United Nations Secretariat[322], and on another one from 2000[323]. But the fact that the Secretariat of the United Nations, in these two publications, may have mistakenly treated the Declaration of Santiago as an international maritime boundary agreement (starting, like others, from the original error of the Office of the Geographer of the United States State Department publication *Limits in the Seas*)[324], cannot alter the fact that it is not: the actions of the Secretariat of the United Nations in such a matter do not have evidential weight, and obviously cannot affect either the form or substance of an instrument between States.

3.176 It is immaterial that the learned author[325] of the relevant reports in the unofficial publication *International Maritime Boundaries* (mistakenly) treats the Declaration of Santiago as if it were a treaty. His views, and those of other authors cited by Chile[326], may be traced back to the United States State Department publication *Limits in the Seas*, and lack legal significance.

3.177 Chile implies that the Peruvian authors were unanimous in considering the existence of an agreed maritime boundary between Peru and Chile in the parallel of latitude[327]. Nevertheless, it provides only one example in the whole section "C. Publicists". Chile has chosen not to mention the most distinguished Peruvian authors, among them, Foreign Ministers, diplomats and professors of international law which have extensively written on Peru and the law of the sea and have not expressed any view in that sense.

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322 United Nations Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea – Maritime Boundary Agreements (1942-1969)*, 1991. **CCM, Annex 241**.

323 United Nations, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, *Handbook on the Delimitation of Maritime Boundaries*, 2000. **CCM, Annex 242**.

324 See paras. 4.69-4.73 and 4.142 (*i*) below.

325 Eduardo Jiménez de Aréchaga.

326 CCM, paras. 2.237-2.262.

327 CCM, para. 2.262.

3.178 It is striking that Chile deliberately fails to mention that the most representatives Peruvian figures contemporaneous to the Declaration of Santiago, such as Dr. Alberto Ulloa, who chaired the Peruvian Delegation to the 1952 Conference and was one of the main drafters of the Declaration of Santiago, and Mr. Enrique García Sayán[328], Minister of Foreign Affairs at the time of the 1947 Peruvian claim, never referred to the existence of maritime boundaries with Chile.

3.179 Likewise, Chile fails to cite Peruvian experts on this matter, who have consistently sustained the absence of a maritime boundary treaty between Peru and Chile, as well as the need for the maritime delimitation between both countries to be done in accordance with international law and to lead to an equitable result.

3.180 Among renowned authors in the field of the law of the sea that have highlighted the absence of a maritime boundary treaty between Peru and Chile, Rear Admiral Guillermo Faura, Professor Eduardo Ferrero Costa, Ambassador Juan Miguel Bákula, Ambassador Alfonso Arias-Schreiber, diplomat Marisol Agüero Colunga and Ambassador Manuel Rodríguez Cuadros stand out. For example, Eduardo Ferrero Costa, former Minister of Foreign Affairs, consistently remarked, before and after the 1986 Bákula Memorandum, the

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328 Particularly relevant are the following texts: Ulloa, Alberto: "Régimen Jurídico del Mar". (*Academia Interamericana de Derecho Comparado e Internacional. Cursos Monográficos*. Vol. VII, La Habana, Cuba, 1959, pp. 11-87); and "IIIa. Reunión del Consejo Interamericano de Jurisconsultos de México.- Discursos del Representante del Perú, doctor Alberto Ulloa". (*Revista Peruana de Derecho Internacional*. Tomo XVI, No. 49, 1956, Enero-Junio, pp. 70-89). The views of Mr. García Sayán can be found, among others, in the following works: García Sayán, Enrique: "La Doctrina de las 200 millas y el Derecho del Mar". (*Derecho*, Pontificia Universidad Católica del Perú, No. 32, 1974, p. 12-27); "Progresión de la Tesis de las Doscientas Millas; síntesis de la conferencia del Dr. Enrique García Sayán". (*Revista de la Academia Diplomática del Perú*, No. 2, 1971, Julio-Setiembre, pp. 60-61); *Derecho del Mar. Las 200 millas y la posición peruana*. Lima, [s.n.], 1985.

lack of a maritime boundary agreement between Peru and Chile. He asserted the need to negotiate such an agreement, in view of the developments produced in the law of the sea in the late seventies[329].

3.181 On this matter, remarks made by Marisol Agüero Colunga and Ambassador Manuel Rodríguez Cuadros are particularly illustrative.

According to Marisol Agüero Colunga:

> "... it cannot be assumed that there is an agreement between the three countries on the delimitation of their 200-mile maritime zones drawn from their continental coasts; this would imply an agreement on a treaty on maritime boundaries, and the Declaration of Santiago is neither an international treaty nor does it properly deal with the maritime boundaries among the signatory States."[330]

Likewise, Ambassador Manuel Rodríguez Cuadros, former Peruvian Minister of Foreign Affairs states that:

> "The maritime zone established by the Declaration of Santiago excludes *ipso jure* all lateral delimitation hypotheses by the parallel of latitude, since its application would amputated from Peru a significant portion of its sea area, thereby preventing the object and purpose thereof of possessing 200 miles, established by the Declaration, from its realization …

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329 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.

330 Agüero Colunga, Marisol: *Consideraciones para la Delimitación Marítima del Perú*. Lima, Fondo Editorial del Congreso de la República, 2001, p. 265.

> Since no reference is made to any criterion or norm for the delimitation of the continental sea in the frontier zones where the maritime projections of the Parties overlap, the Declaration left this matter to be settled by the application of the International Law, which, as we have seen, was driven towards the criterion of the equidistant line.
>
> However, the existence of special circumstances in the area of the maritime frontier between Peru and Ecuador – the presence of the Ecuadorean islands of Puná, Santa Clara, de la Plata, among others – raised the express need to prevent the projection of the two hundred miles of Peru from leaving under Peruvian sovereignty such Ecuadorean islands or from limiting the maritime projection of such islands. In order to solve this problem, article IV of the Declaration establishes as an exception a delimitation clause based on the line of the parallel, only and exclusively in the event of the presence of islands belonging to one State situated to a distance lesser than the maritime projection of another State."[331]

3.182 The inescapable conclusion is that a consideration of the form and treatment of the Declaration of Santiago is entirely consistent with the fact that it was initially conceived as a statement of the international maritime policy of the three participating States. Nothing suggests that the Declaration, or any part of it, was intended to operate as an international maritime boundary: all the indications are against that view. And in any event, whatever its formal legal status the actual provisions declared by the countries concerned could not be changed by its subsequent registration and treatment as a treaty.

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[331] Rodríguez Cuadros, Manuel: *Delimitación marítima con equidad. El caso de Perú y Chile*. Lima, Ediciones Peisa, 2007, pp. 152-153.

IV. Does Chile Prove Its Case?

3.183 In this case Chile argues, expressly and unequivocally, that the international maritime boundary was established by agreement in the 1952 Declaration of Santiago. Chile says: "[t]he Parties have already delimited their maritime boundary by agreement, in the Declaration on the Maritime Zone (the *Santiago Declaration*)."[332] Peru denies that. The Declaration was not intended to constitute, and did not constitute, an agreement establishing an international boundary.

3.184 The onus lies on Chile to prove its central claim that Peru entered into an agreement with Chile in 1952, which remains in force and definitively fixes the international maritime boundary between them for all purposes. Peru has explained in detail in its Memorial why it denies that "the Parties have already delimited their maritime boundary by agreement" and some aspects of that explanation have been revisited in this chapter. The essential points are:

(a) That the Declaration of Santiago does not say that it is establishing any maritime boundaries between the States that made it.

(b) That the Declaration of Santiago was not intended to establish any maritime boundaries between the States that made it.

(c) That the Declaration of Santiago was not intended in 1952 to be a binding treaty and was not treated as such at that time in the constitutional processes of the States Parties.

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[332] CCM, para. 1.3.

3.185 In the *Nicaragua* v. *Honduras* case the Court said, in words that go directly to the core of the present case:

> "The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed. 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."[333]

3.186 In particular, the Court should not infer an agreement on a full and permanent international maritime boundary from the limited practice of the two States. As the Arbitral Tribunal observed in the *North Atlantic Coast Fisheries* Case –

> "... a line which would limit the exercise of sovereignty of a State within the limits of its own territory can be drawn only on the ground of express stipulation, and not by implication from stipulations concerning a different subject-matter"[334].

3.187 It is accordingly submitted that Chile has failed to prove that an international maritime boundary was established in the 1952 Declaration of Santiago, and that Chile's case must therefore fail.

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

[334] *The North Atlantic Coast Fisheries Case (Great Britain,United States)* Award, 7 September 1910, RIAA, Vol. XI, p. 187.

CHAPTER IV

PRACTICE AFTER THE 1952 DECLARATION OF SANTIAGO

I. Introduction

4.1 Chile has pinned its case to the proposition that an international maritime boundary was established by agreement between Peru and Chile in the 1952 Declaration of Santiago. Nonetheless, in Chapters II and III of its Counter-Memorial Chile refers to events after 1952 and seeks to discern in them signs of an acknowledgment and confirmation of the alleged "1952 boundary".

4.2 Clearly, events after 1952 cannot change what the 1952 Declaration of Santiago says. Nor does Chile seek to argue that they do. Rather, Chile presents these later events as "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", under Article 31(3)*(b)* of the Vienna Convention on the Law of Treaties[335]. They are, according to Chile, relevant because of the light that they cast upon *what Peru and Chile did in 1952*. It is therefore necessary for Peru to respond to Chile's submissions concerning post-1952 events.

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[335] CCM, para. 4.29.

II. The Six 1954 Agreements

4.3 Chile seeks to argue, using the *travaux préparatoires* of the 1954 Agreement on a Special Zone, that there was an understanding among the signatory States that, contrary to what point IV of the Declaration of Santiago actually says, point IV was intended to apply to mainland coasts and imposed the parallel of latitude as the maritime boundary. That is incorrect.

4.4 Chile's Counter-Memorial refers throughout to "the 1954 Lima Agreement", as if Chile, Ecuador and Peru had gathered for the sole purpose of adopting that instrument. In fact, it was only one of the six agreements concluded at the Second Conference on Exploitation and Conservation of the Marine Resources of the South Pacific. The other agreements were: (1) the Complementary Convention to the Declaration of Sovereignty on the Two-Hundred-Mile Maritime Zone; (2) the Convention on the System of Sanctions; (3) the Convention on Measures on the Surveillance and Control of the Maritime Zones of the Signatory Countries; (4) the Convention on the Granting of Permits for the Exploitation of the Resources of the South Pacific; and (5) the Convention on the Ordinary Annual Meeting of the Permanent Commission for the South Pacific (for Whaling Activities)[336].

4.5 The 1954 Agreement on a Special Zone is thus one of a range of fishery-related measures which, as Chile acknowledges[337], were focused on the defence of the 200-nautical-mile claim that was the subject of the Santiago Declaration – although the 1954 Agreement on a Special Zone does not expressly refer to the Declaration of Santiago. The Agreement on the Special Zone is not

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[336] These agreements appear as **PR, Annexes 33**, **34**, **35**, **36** and **37**.

[337] CCM, paras. 2.182-2.183.

even the most important among the 1954 agreements: as Chile notes, "[t]he main instrument being prepared at the 1954 Inter-State Conference was the Complementary Convention."[338] As was explained in the Memorial, the purpose of the 1954 Complementary Convention was to reinforce regional solidarity in the face of opposition from third States to the 200-nautical-mile claims[339]. In 1954, as in 1952, the primary focus was on maintaining a united front on the part of Chile, Ecuador and Peru towards third States, rather than upon the development of an internal legal régime defining their rights *inter se*.

4.6 One might gain the impression from the Counter-Memorial that the 1954 Conference was a planned stage in the systematic development of a legal régime that had begun with the 1947 unilateral claims. Hindsight is a powerful tool for imposing rationality and order upon the sequence of practical responses to the demands of the moment that make up the political life of a State. The fact is that there was no master-plan in 1947, in 1952, in 1954, or at any time thereafter. The idea of a 200-nautical-mile zone had been adopted as a way of addressing the problems caused by the depredations of foreign fishing vessels; and that basic idea was applied in a series of specific measures aimed at particular aspects of the fishing and whaling problem[340].

4.7 Today a State may claim an exclusive economic zone, knowing what that claim entails and knowing that it implies a need eventually to define the limits of its exclusive economic zone as against the zones of neighbouring States

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338 CCM, para. 2.190. The 1954 Complementary Convention appears as **PM, Annex 51**. Paradoxically, Chile did not ratify it.

339 PM, paras. 4.90-4.94.

340 In fact, the 1954 Conference was convened within the context of the challenge posed by foreign fleets, such as the Olympic whaling fleet owned by Aristotle Onassis. See PM, paras. 4.82-4.87.

– although even now such defined limits are usually negotiated over long periods, and usually years after the initial claim is made. But sixty years ago the South American States were feeling their way in uncertain, uncharted waters, without the benefit of the clarity brought by later developments on the law of the sea.

4.8 Chile seeks to extract from the minutes of the 1954 Conference proof of an acknowledgement that international maritime boundaries had been implicitly established by point IV of the Declaration of Santiago in 1952. The text of point IV, the circumstances of its drafting, and the aims of the signatories of the Declaration of Santiago have been analysed in detail in Chapter III above[341]. That analysis makes it clear that there was no intention on the part of the authors of the Declaration of Santiago to agree upon one or more international maritime boundaries in 1952. The premise on which Chile's arguments using the 1954 *travaux préparatoires* rests is incorrect; and on this ground alone those arguments must fail. There are, however, other reasons that indicate why Chile's account is incorrect; and for the sake of completeness those reasons are canvassed here.

4.9 The purpose of the 1954 Agreement on a Special Zone was limited. As was made clear in the text of the Agreement, and as is accepted by Chile[342], the sole purpose was to avoid "innocent and inadvertent violations of the maritime frontier between adjacent States … [by] small vessels manned by crews with insufficient knowledge of navigation or not equipped with the necessary instruments"[343]. The 1954 Agreement on a Special Zone had nothing to do

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341 See Chapter III, paras. 3.61-3.118 above.

342 CCM, paras. 2.198. The suggestion in para. 2.180 of CCM that the 1954 Agreement on a Special Zone "dealt solely with issues connected to the lateral delimitation" of the maritime zones of the participants in the Declaration of Santiago is inaccurate.

343 Agreement on a Special Zone. **PM, Annex 50**.

with the seabed or subsoil, or with navigation or any other use of the water column apart from fishing.

4.10 The 1954 Agreement on a Special Zone was not even addressed to all fishing vessels, but only to those fishing vessels "with insufficient knowledge of navigation or not equipped with the necessary instruments" – and then only of such vessels "of either of the adjacent countries"[344]. It did not even purport to apply to Ecuadorean vessels fishing in the waters off the endpoint of the Peru-Chile land boundary or to Chilean vessels in the waters off the endpoint of the Peru-Ecuador land boundary.

4.11 It is common ground that the 1954 Agreement on a Special Zone established no new boundary or frontier, and that it did not purport to change the legal character of the 1952 Declaration of Santiago. Nor could the conclusion of the Agreement on a Special Zone affect the answer to the question whether Chile is correct in maintaining that in 1954 its maritime boundary with Peru had already been established by the 1952 Declaration of Santiago.

4.12 Chile asserts that in Peru it was "well understood" that the 1954 Agreement on a Special Zone was premised on the fact that Peru had a maritime boundary with Chile following the parallel of latitude[345]. It cites only one piece of evidence in support of that proposition: a presentation by Pedro Martínez de Pinillos, a geographer, made to an association of graduates of an institute related to a Peruvian university. Mr. Martínez de Pinillos did not represent the Government, had not consulted the Government, and did not give an accurate statement of the Government position[346]. Nor is there any evidence that he even consulted a lawyer on this question.

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344 See the first preamble clause and Article 2 of the 1954 Agreement on a Special Zone. **PM, Annex 50**.

345 CCM, paras. 2.213-2.215.

346 *Ibid*.

4.13 Chile also refers to the minutes of the first session of the 1954 Conference concerning the 'dividing line of the jurisdictional sea', arguing that they "record the agreement between Chile, Ecuador and Peru that the Santiago Declaration had already delimited their maritime boundaries."[347] But the 1954 minutes[348] record no such thing.

4.14 What the 1954 minutes actually say is that the parties "deemed the matter on the dividing line of the jurisdictional waters (*la línea divisoria de las aguas jurisdiccionales*) settled"[349]. There is no mention of what Chile refers to in its Counter-Memorial as the "maritime boundaries". The reference is to "jurisdictional waters".

4.15 What, precisely, was "settled" and when was it settled? The Ecuadorean representative initiated the debate in the 1954 Conference, proposing a provision that would clarify the concept of the dividing line of the jurisdictional waters. The Agreement was conceived as establishing the zone "between the two countries" (*entre los dos países*)[350] – Peru and Ecuador, the proposing States – contrary to the impression given in the Counter-Memorial, that refers to a zone between "adjacent States"[351]. Peru ratified the Agreement in 1955 and Ecuador in 1964. It seems clear that the focus was on the waters between Peru and Ecuador, although the buffer zone arrangement was in fact also applied in the waters between Peru and Chile. The minutes do not reveal what the Ecuadorean delegate specific concern was in initiating the debate. All that is clear is that the issue arose because the Ecuadorean representative insisted

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347 CCM, para. 1.33.

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

349 *Ibid*., p. 3.

350 1954 Agreement on a Special Zone, Article 1. **PM, Annex 50**.

351 CCM, para. 2.179.

that "[a]rticle 4 of the Declaration of Santiago was aimed at establishing the principle of delimitation of waters *regarding the islands*"[352]. This was itself an interesting insight into what Ecuador considered had and had not been agreed in 1952.

4.16 The Peruvian and Chilean representatives are recorded as saying that they "believe that Article 4 of the Declaration of Santiago is clear enough". But what was clear? It will be recalled that the 1952 Declaration of Santiago contains in point IV a provision concerning the limits of maritime zones around islands[353]. It contains no reference to maritime boundaries. Nor does it contain a reference to the limitations upon the maritime zones generated by mainland coasts.

4.17 It is evident that in 1954 the representatives were focusing on a number of practical issues concerning the regulation of fisheries arising in the wake of the 1952 Conference. It is evident that one of the 1954 agreements concerned the establishment of a 'zone of tolerance' for certain small fishing vessels. It is obvious that such a zone had to be measured in some way that enabled small fishing vessels to determine where they were in relation to the zone of tolerance. And, as was noted in the Memorial[354], positions in relation to lines of latitude are the only positions that can easily be determined at sea by local fishermen using basic equipment. Practical expediency determined that the Special Zone should be defined by reference to a line of latitude.

4.18 Peru and Chile are neighbouring States. Each has its own fishing communities. Those communities have a sense of what "their" fishing grounds are. With a land

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352 Minutes of the First Session of Commission I of the 1954 Inter-State Conference, 2 December 1954 at 10.00 a.m., p. 3 (emphasis added). **CCM, Annex 38**.

353 See para. 3.69 above.

354 PM, para. 4.101.

border lying in the corner of a concave coastline it was practically inevitable that disputes would arise as to which fishing grounds were "Peruvian" and which were "Chilean" as in fact they arose, especially in the context of the development of the artisanal fishing activities near the land boundary area. A means of averting such friction was desirable. The use of the line of latitude, discernible by small, ill-equipped fishing vessels, was not only an obvious solution: it was the *only* practical solution. The 1954 Agreement on a Special Zone, ratified by Chile in 1967, put in place a practical régime for policing fisheries based on the line of latitude. Mr. Llosa and Mr. Cruz Ocampo, representing Peru and Chile respectively in the 1954 Conference, may have thought that the Declaration of Santiago had already indicated, in some way, that the use of a parallel of latitude was an acceptable basis for arrangements concerning the policing of fisheries: but that belief cannot convert the fisheries policing line into an international maritime boundary.

4.19 Chile makes a number of other points concerning the interpretation of the 1954 agreements. It offers an alternative explanation of the meaning of the reference in the 1954 agreement on a Special Zone to the parallel "between the two countries"[355]. It appears to suggest (wrongly) that Peru acknowledges that a Peru-Ecuador maritime boundary was set by the Declaration of Santiago and/or the 1954 Agreement on a Special Zone[356]. It refers to the mention of the term 'maritime zone' in another of the 1954 agreements[357], but without any explanation of why that mention should be thought to entail the existence of a defined international maritime boundary.

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355 CCM, paras. 2.202-2.205.

356 CCM, para. 2.208. There is no dispute over the maritime boundary between Peru and Ecuador; but that is not because the maritime boundary was established by the 1952 or 1954 instruments. Peru has stated that there are no boundary problems with Ecuador and that by virtue of what is expressly stated in the second part of point IV of the Declaration of Santiago the parallel of latitude from the point at which the land boundary reaches the sea is only applicable to Peru and Ecuador, due to the presence of islands near the land border of both countries. See Chapter III, para. 3.81 above.

357 CCM, para. 2.211.

4.20 Chile states that it was "publicly understood in Peru in the 1950s that Peru had agreed a maritime boundary with Chile following a parallel of latitude"[358] and cites in support the views of one geographer expressed at a conference in 1956[359]. It ignores the complete absence of any official record in Chile or Peru of the establishment or existence of such an international maritime boundary at this time, and the explanations (discussed in Chapter III above[360]) to the statements by representatives of Chile and Peru in 1956 emphasizing the very limited purpose of the 1952 Declaration of Santiago. It ignores the fact that Chilean legislation such as the 1953 Decree with Force of Law No. 292, the Fundamental Law of the Directorate General of Maritime Territory and Merchant Marine[361], which was adopted *after* the Declaration of Santiago, defined the limits of Chilean jurisdiction without any reference to the existence of lateral maritime boundaries.

4.21 Chile summarizes the publications of third States and publicists[362] that refer to the parallel as a maritime boundary – although, as is shown below, those references all copy one source: the *Limits in the Seas* report, complete with its mistaken reference to the coordinates of the parallel[363]. It refers to the domestic treaty processes concerning the 1954 Agreement on a Special Zone, without offering an explanation as to why something as important as an international boundary could have gone unremarked and unratified[364].

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358 CCM, para. 2.215.

359 See para. 4.12 above.

360 See paras. 3.132-3.138 above.

361 Decree with Force of Law No. 292 of 25 July 1953, Fundamental Law of the Directorate General of Maritime Territory and Merchant Marine. **PM, Annex 29**.

362 See CCM, paras. 2.224-2.229, 2.237-2.262.

363 See paras. 4.69-4.74 below.

364 See also PM, 4.104 and 4.114.

4.22 None of these attempts to infer an international maritime boundary agreement from selected oblique references to zones or parallels can conceal the yawning hole at the heart of Chile's case: there is *no evidence whatever* in official governmental papers from Chile and Peru that in 1952 an international boundary agreement had been agreed between them.

III. Events after 1954

A. Practical Arrangements and Specific Purpose Regions

4.23 In Chapter III of its Counter-Memorial, Chile refers to post-1954 practice and events which, it says, "confirm the Parties' contemporaneous understanding that their maritime zones had been delimited fully and definitively"[365] by the 1952 Declaration of Santiago[366].

4.24 It is not necessary to address the details of this practice – although Peru should not be taken to accept the accuracy of Chile's account – because the critical point is that, according to Chile, the accumulation of instances in which the parallel of latitude was used by Chile and Peru in the context of marine activities is evidence that the international maritime boundary was agreed between them in 1952 and that both States clearly understood this to be the case.

4.25 Peru's point is that there is a fundamental flaw in this reasoning. There was agreement upon the use of the line for the purposes of fisheries policing: the parallel was applicable in the context of the sea areas off the Peru-Ecuador

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365 CCM, para. 3.3.

366 CCM, para. 3.1.

land boundary, and a similar practice in fact operated in the sea areas off the Peru-Chile land boundary[367]. But no amount of practice concerning fisheries policing[368] can convert the line on which the zone of tolerance was based into a permanent, all-purpose international maritime boundary applicable to the sea, seabed and subsoil and superjacent airspace.

4.26 Chile will no doubt say that it also refers to other, non-fisheries activities that also employed the parallel, such as the operations of the Chilean Navy[369] and the authorization of marine scientific research[370]. But this again misses the point. There is a difference between the use of a line in the sea for limited purposes and agreement upon a permanent international maritime boundary.

4.27 Chile also raises the question of the erecting of the light towers in 1968-69[371]. The coastal lights have limited significance, as is apparent as soon as their physical characteristics are considered. The lights were intended to be visible from sea out to a range of about 11 miles[372]. The only vessels to which they would have had any value as markers were small coastal fishing vessels.

4.28 This was indicated by the language used in correspondence, including the diplomatic correspondence where the Chilean representative refers to the express purpose of the construction of the light towers: it was "in order to act as a warning to fishing vessels that normally navigate in the maritime frontier

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367 PM, para. 4.105.

368 CCM, paras. 3.7-3.18.

369 CCM, para. 3.4.

370 CCM, paras. 3.115-3.119.

371 CCM, paras. 3.19 *ff.*

372 Chile makes the silly point that Peru "suggests ... that the lighthouses should have been visible from a distance of 200 nautical miles ... This would have required installations of some 10,000 metres in height", CCM, para. 3.36. That is not Peru's point. The point is that the light towers were not intended to have any function except to help near-shore fishermen to determine their position. See PM, paras. 4.122 y 4.123 and PM, Figure 4.3.

zone."[373] That view has been maintained by Chile[374]. It is also confirmed by the statement of Ambassador Javier Pérez de Cuéllar, who was Secretary-General of the Ministry of Foreign Affairs at the time[375], and by the thorough account of the circumstances which led to the erection of the light towers, contained in a Memorandum dated 24 January 1968, sent by the Head of Peru's Borders Department to the Secretary-General of Peru's Ministry of Foreign Affairs[376]. The informality of the episode, the absence of any indication in either the language or the technical procedures employed of any intention to delimit a precise maritime boundary, and the express words used, all point clearly to the fact that the sole purpose of the 1968 lights was to show near-shore fishermen where the land boundary between Peru and Chile lay and whose coasts they were alongside.

4.29 The concern was not to mark a permanent maritime border but to signal the whereabouts of the line used for fisheries policing[377]. As Chile itself states, the "lighthouses were constructed as a practical solution for a specific purpose."[378] No "broader understanding"[379] over an already-agreed, permanent and definitive maritime boundary for all purposes can be inferred from the episode concerning the coastal lights. They were another instance of the two States finding a practical solution to a gap that had become apparent in the arrangements for policing coastal fisheries.

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373 Note No. 242 of 29 August 1968, from the Embassy of Chile to the Ministry of Foreign Affairs of Peru. **PM, Annex 75**.

374 See the Aide-mémoire of 25 January 2002 from the Ministry of Foreign Affairs of Chile to the chargé d'affaires of Peru, transcribed in a message of the same date from the Ministry of Foreign Affairs of Chile to the Chilean Embassy in Peru. **CCM, Annex 100**.

375 Statement of Mr. Javier Pérez de Cuéllar. **Appendix B** to this Reply.

376 Memorandum No. (J)-11 of 24 January 1968, from the Head of Borders Department to the Secretary-General of the Ministry of Foreign Affairs of Peru. **PR, Annex 10**.

377 See paras. 4.82, 4.141 and 4.142 (*b*) and (*c*).

378 CCM, para. 3.6.

379 *Ibid*.

4.30 Chile tries to give the practice a significance that it simply does not have. When the question of the limits of search and rescue regions arose in the International Maritime Organization (IMO), Argentina suggested to the IMO that the boundary between the Argentine and Chilean regions should be the Cape Horn meridian "as this meridian constitutes the boundary between the Atlantic and Pacific Oceans"[380]. Chile responded, pointing out that "[t]he delimitation of search and rescue regions, in accordance with the provisions of paragraph 2.1.7 [of the Annex to the International Convention on Maritime Search and Rescue, 1979[381]], is not related to and shall not prejudice the delimitation of any boundary between States", adding that "[t]he determination of a supposed limit between the Pacific and Atlantic Oceans as a basis for establishing areas of responsibility implies a view which clearly exceeds both the letter and the spirit of the 1979 Convention"[382]. Peru shares that view, and is surprised that in its Counter-Memorial[383] Chile cites its own legislation (not even Peru's legislation) on maritime search and rescue as evidence of the existence of an international boundary.

4.31 In paragraphs 3.78 to 3.86 of the Counter-Memorial Chile attempts to argue that "[t]he lines in the sea which are used to determine points of entry [under the Peruvian maritime notification system (SISPER)] are the limits of the sovereignty and jurisdiction of Peru and Chile, including their lateral boundary."[384] This is not correct. The purpose of SISPER is, as its preamble

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380 International Maritime Organization, *Information on National Search and Rescue Facilities.* Statement by the Government of Argentine of 16 August 1984, document SAR.3/Circ.3/Rev.2, annex 4, p. 12.

381 International Convention on Maritime Search and Rescue, 27 April 1979, UNTS 23489.

382 International Maritime Organization, *Information on National Search and Rescue Facilities.* Statement by the Government of Chile, date illegible, document SAR.3/Circ.4, annex 1, pp. 32-33.

383 CCM, para. 3.59.

384 CCM, para. 3.78.

makes clear[385], to let coastal authorities know where merchant ships and ships or vessels conducting authorized activities (research, fishing, oceanography exploration, etc.) are, so that they could promptly be helped by the Peruvian maritime authorities in the event of an emergency or accident at sea. It enables Peru to fulfil its international obligation to safeguard life at sea, established in SAR Convention of 1979. SISPER was not conceived as an instrument to enforce Peruvian jurisdiction on passing ships[386].

4.32 As Chile rightly points out, Peru's 1987 Regulation of Captaincies and Maritime, Fluvial and Lacustrine Activities refers to "the frontier boundary between Peru and Chile"[387]. But the suggestion that this indicates a reversal of Peru's position on the non-existence of the maritime boundary is utterly implausible. Chile relies upon "[t]he terms used in Peru's legislation", which it says "are self-explanatory and unqualified."[388] The Regulation that Chile refers to defines a Peruvian Maritime District -Maritime District No. 31- and reads as follows:

> "Jurisdiction: from the provincial limit between Caraveli and Camaná (Parallel 16 25' South) to the frontier boundary between Peru and Chile".[389]

Spanish text reads as follows:

> "Jurisdicción: desde el límite provincial entre Caraveli y Camaná (Paralelo 16 25' Sur) hasta el límite fronterizo entre Perú y Chile".

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385 See Directoral Resolution No. 0313-94/DCG of 23 September 1994, Approving the Peruvian Positioning and Security Information System Issued by the Ministry of Defence. **PR, Annex 13**.

386 *Ibid*., see Appendix 1 to Annex 6.

387 CCM, para. 4.32. See also Supreme Decree No. 002-87-MA of 11 June 1987 approving the Regulation of Captaincies and Maritime, Fluvial and Lacustrine Activities. **CCM, Annex 174**.

388 CCM, para. 4.32.

389 Article A-020301, point f.1 of Supreme Decree No. 002-87-MA of 11 June 1987 approving the Regulation of Captaincies and Maritime, Fluvial and Lacustrine Activities. **CCM, Annex 174**.

The plain meaning of the Regulation is that when it refers to the "frontier boundary", it alludes to the land boundary between Peru and Chile. It defines the limits of the districts in terms of the stretch of coastline that each district covers. Chile misinterprets this point.

4.33 The 1987 Regulation was adopted in June 1987, months after Peru had spelled out to Chile in the clearest and simplest of terms that the two States had not yet agreed upon a definitive international boundary – a fact which, alone, should make it clear that the phrase quoted by Chile could not refer to an international maritime boundary between the two States, because Peru and Chile had not agreed upon a boundary in the intervening months. But the daily routine of law enforcement, harbour supervision, and so on in the locality cannot be suspended until such time as the two Governments do reach agreement upon a definitive boundary. The expectation was no doubt that the long-standing *modus operandi* with Peru's southern neighbour would continue in relation to policing the waters off that coast. It would have been reasonable to assume, given the satisfactory operation of the arrangement concerning fisheries, that if other law-enforcement actions were confined to the area north of the parallel there would be no confrontation with Chile. Peru made clear its view that there was no boundary and took reasonable steps to maintain maritime policing in a non-provocative manner. It is an instance of what the Court has called the "concern not to aggravate the situation pending a definitive settlement of the boundary."[390]

4.34 Chile attempts to discern implicit recognition of the existence of a maritime boundary even when its own practice at the time contradicts the position that it now adopts. To take another example, Chile now suggests that the *modus*

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[390] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 54. para 35. Cf., *ibid.*, pp. 54-55.

operandi for dealing with illegal drug-trafficking, in 2002, "indicates both Parties' understanding that a maritime boundary was in place."[391] Chile's position at the time was, however, rather different.

4.35 Chile suggested that the Navies of Peru and Chile conclude an agreement providing for action against suspected offenders "in their respective waters of jurisdictional responsibility" (itself a term that falls some way short of a reference to maritime territory), including a 'non-pursuit' provision requiring the discontinuation of pursuits when ships entered the waters of the other State[392]. Peru broadly agreed with Chile's proposals on condition that a disclaimer be included, as point No. 5:

> "5) General Consideration
>
> The content of this document shall not prejudice, affect or amend the positions of our respective States as regards the nature, boundaries or scope of their zones under national jurisdiction, or their positions with respect to the international instruments addressing these matters."[393]

Chile responded that such a disclaimer was unnecessary:

> "1) Although the new document submitted by the Peruvian Navy delegation did include some of the proposals made by the Chilean Navy, in general terms, there were no observations to the text, *except for point No. 5*, which was included in the last amendment made by the Peruvian Navy.

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391 CCM, para. 3.108.

392 Final Minutes of Understanding of the Eleventh Bilateral Meeting between the Commanders of the Frontier Naval Zones of Chile and Peru, 16 August 2002. **CCM, Annex 28**. It is notable that the provision would not have been confined to non-pursuit into the *territorial sea* of the other State, which is all that international law would have required. That fact underlines the essentially pragmatic nature of the proposal.

393 See Final Minutes of Understanding of the XII Bilateral Meeting of the Commanders-in-Chief of the Frontier Naval Zones of Chile and Peru from 21 to 25 July 2003. **PR, Annex 88**.

…

3) *The agreement does not address the nature of the boundaries or the scope of the jurisdictional zones*, so it cannot prejudge, affect or amend them. Moreover, each jurisdictional zone is determined by the domestic laws of each country.

4) The agreements between the Naval Zones are only intended to increase co-operation in terms of maritime operations, without making *any reference to treaties or boundary issues*; for this reason, signing an agreement at the Naval level, with the provision set forth under point No. 5 "general considerations", *is beyond the authority of the Chilean Navy since such issue is a matter of bilateral politics and therefore an exclusive prerogative of the Ministry of Foreign Affairs of Chile*."[394]

In fact, the 'non-pursuit' provision was never agreed upon[395].

4.36 Chile also argues that in 2000, the High Commands of the Armed Forces of Chile and Peru considered the need to have a procedure for exchanging information on the control of maritime traffic exercised "within the waters under the jurisdiction of each country"[396]. Once again, Chile only mentions the initial discussions on the issue. Chile does not mention that in 2002, the Chilean authorities submitted the proposal "Basis of a Bilateral Agreement between the Chilean Navy and the Peruvian Navy for the exchange of information on maritime traffic control", suggesting that the area for the maritime traffic

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394 Letter No. 2230/25 of 3 September 2003, from the Chief of the General Staff of the Chilean Navy to the Chief of the General Staff of the Peruvian Navy (emphasis added). **PR, Annexes 89** and **90**.

395 Discussions between the Peruvian and the Chilean Navy for establishing a common strategy on co-ordinated operations to deal with illegal drug-trafficking were definitely cancelled. Bilateral co-operation on this matter is carried out until now solely for the exchange of information. See Minutes of the IV Meeting of the General Staffs and the XIX Bilateral Intelligence Meeting between the Chilean Navy and the Peruvian Navy from 15 to 16 June 2006. **PR, Annex 91**.

396 CCM, para. 3.107.

control would be the SAR areas under responsibility of each country[397]. The proposal was adopted on that basis and the measure is being applied by both countries since 2003[398]. As Chile has recognized, the delimitation of search and rescue areas shall not prejudice the delimitation of any boundary between the States[399].

4.37 Chile also claims that Peru uses the parallels of latitude 3°24' S and 18°21' S "as the lateral limits of its airspace" and that "Peru does so both in its internal law and under the Convention on International Civil Aviation of 1944"[400]. However, neither the Peruvian Constitution, nor any domestic Peruvian law, nor the Chicago Convention refers to any parallel of latitude as the lateral boundary of Peru.

4.38 Peru's Political Constitution of 1993 affirms that the State has sovereignty and jurisdiction over its airspace up to the limit of 200 nautical miles, without prejudice to the freedom of international communications and in compliance with the law and treaties which Peru has ratified[401]. The Constitution of 1993

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397 Minutes of the III Meeting between Representatives of the Maritime Authorities of Chile and Peru, of 16-18 April 2002. Annex A: "Proposal for the implementation of Understandings IV and VI approved during the XII Roundtable Discussions between the Senior Commanders of the Armed Forces of Chile and Peru (November 1998) and dealt with at the First Meeting of the Maritime Authorities of both countries", "Point 1: Bases of a Bilateral Agreement between the Chilean Navy and the Peruvian Navy for the exchange of information on maritime traffic control". **PR, Annex 86**.

398 Fax No. 5 of 27 January 2003 from the Directorate General of the Maritime Territory and Merchant Marine of the Chilean Navy (Directemar) to the General Director of Captaincies and Coastguards of the Peruvian Navy, officially accepting the agreements recorded in the Minutes of the IV Meeting between the Representatives of the Maritime Authorities of Chile and Peru. **PR, Annex 87**.

399 See para. 4.30 above.

400 See CCM, para. 3.109.

401 Article 54 of the Political Constitution of Peru of 1993. **PM, Annex 19**.

modified the treatment of airspace as featured in the Constitution of 1979[402], in order to facilitate Peru's accession to the 1982 Convention on the Law of the Sea[403].

4.39 In this context, among the most important treaties ratified by Peru is the Convention on International Civil Aviation, signed in Chicago on 7 December 1944, which serves as the basis for the determination of the limits of FIRs (Flight Information Regions) within the International Civil Aviation Organization (ICAO) system. In the Lima FIR zone, Peru is responsible for aeronautical information services, and for providing assistance and security for air navigation. Aircraft report their entry and exit from the Lima FIR zone, the limits of which are established in the light of technical considerations relating to the tasks and services proffered and without prejudice to the limits of the spaces that fall under the sovereignty and jurisdiction of the Peruvian State[404].

4.40 Chile seeks to assimilate the Lima FIR to Peruvian airspace, without taking into account the fact that these concepts differ not only in their juridical nature but also in their geographical extent. The Lima FIR extends to the west up to the 90° meridian, which in some places is more than 800 nautical miles from the Peruvian coast. Furthermore, the points of entrance (IREMI and PAGUR) mentioned in an overflight authorization referred to by Chile[405]

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402 When dealing with airspace, the Constitution of 1979 did not include an express reference to the freedom of international communications.

403 See CCM, para. 2.170. See also the Minutes of the 1993 Democratic Constituent Congress where appears that the incorporation in the Constitutional text of the express reference to the "freedom of international communications" when referring to the airspace, had the purpose of facilitating Peru's accession to the 1982 Convention on the Law of the Sea. Records of the 1993 Constituent Congress Regarding the Manner in Which the Maritime Domain was Addressed in the Text of the Constitution. **PR, Annex 12**.

404 See PM, footnote 197.

405 See CCM, para. 3.112.

are points of entrance to the Lima FIR, and *not* to Peruvian airspace. Peru has consistently referred to the Lima FIR and not to international limits in the context of overflight authorizations. This has been done taking into consideration Peruvian obligations under the Chicago Convention.

4.41 Chile takes an incident that occurred on 24 April 1992 out of context, presenting it as if a United States aircraft circulating miles off the Peruvian shore had been intercepted[406]. In fact, an unidentified United States C-130 airplane was seen overflying the Alto Huallaga forest, in Peruvian territory, and it was thought that the plane might be crewed by drug smugglers. The Peruvian security system was activated, and when the plane crossed the Andean mountain range and headed towards the shore in the direction of the frontier with Ecuador, its position was verified by radar and passed to the Peruvian air base in Talara. Two Peruvian aircraft activated the international procedures for the interception of unidentified aircraft – including repeated unsuccessful attempts at communication with the aircraft. It was only when the C-130 had landed that it was established that it was a United States aircraft, with a crew in the service of that country's Government. It was later discovered, the C-130's flight plan only included the trip to and from Panama and Guayaquil. Destinations in Peru were not included in the itinerary — even less, zones as sensitive to national security as the Alto Huallaga, where interdictions were being implemented against suspected drug traffickers.

4.42 There are several important points to be made in relation to Chile's accumulation of factual references to the parallel.

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406 CCM, para. 2.171. See also **CCM, Annexes 221** and **309**.

4.43 *First*, there is no dispute that fisheries policing was conducted with reference to the line, as was agreed in 1954. The important point is that Peru had thereby accepted a practical solution to an immediate fisheries problem, not agreed upon a permanent international maritime boundary for all purposes[407].

4.44 *Second*, the parallel was used on occasion for certain non-fisheries purposes in the unilateral practice of Chile and Peru. But that does not at all imply acceptance of the line as an international maritime boundary. The context in which the fisheries line was used for certain non-fisheries purposes needs to be borne in mind. The non-fisheries uses were all non-exploitative uses of the seas: no question of foregoing rights to resources arose from the location of the line used for such purposes. There was already a line for policing fisheries, which was operating satisfactorily. And it is natural that decisions should be taken that would not provoke a confrontation with neighbouring States: using the same line was the least contentious option.

4.45 *Third*, the examples that Chile adduces from the years after 1986 must be seen in the light of the Bákula Memorandum[408]. That Memorandum precluded any possibility that Chile could have considered that applications of the fisheries policing line could be regarded as evidence of the existence of an agreed international maritime boundary.

4.46 *Fourth*, even in this post-1954 period there is not a single international or domestic legal instrument that stipulates that there is an agreed international maritime boundary between Peru and Chile.

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407 Supreme Resolution No. 23 of 12 January 1955, the Peruvian 200-Mile Maritime Zone. **PM, Annex 9**. Cf., CCM, para. 4.30.

408 See PM, para. 4.132. Ambassador Bákula's presentation is further addressed in paras. 4.47-4.52.

B. The 1986 Bákula Memorandum: Peru Invites Chile to Agree an International Maritime Boundary

4.47 While the fisheries policing arrangements had proved broadly serviceable, Peru has since the mid-1980s been asking Chile to negotiate and agree to an international maritime boundary between the two States. The visit to Chile by Ambassador Bákula in 1986 is the clearest indication of Peru's position; and it was an indication given directly and explicitly to Chile. In the midst of the tentative and equivocal evidence adduced by Chile the 1986 Bákula Memorandum stands out as an explicit, unequivocal, written assertion, uncontradicted by Chile at the time, that no international maritime boundary between Peru and Chile had been agreed.

4.48 The Bákula Memorandum is crystal-clear in its significance. It says:

> "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.
>
> The definition of new maritime spaces, as a consequence of the approval of the [1982 United Nations] 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 competence 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."[409]

4.49 That statement is perfectly clear. Almost a quarter of a century ago Peru spelled out, in a bilateral communication addressed directly to Chile, the need for "the formal and definitive delimitation" of their marine spaces. It distinguished, as it had done during the preceding period, between "the formal and definitive delimitation of the marine spaces" of the two States and, on the other hand, *ad hoc* arrangements for specific purposes, such as the 1954 fisheries policing tolerance zone.

4.50 Chile's response is to say that "… when Peru first proposed to Chile, in 1986, to renegotiate the existing 'maritime demarcation', Peru did so on the (wrong)

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[409] See Diplomatic Memorandum annexed to Note 5-4-M/147 of 23 May 1986, from the Embassy of Peru to the Ministry of Foreign Affairs of Chile. **PM, Annex 76**.

assumption that the maritime zones newly recognized in UNCLOS called for the existing delimitation to be revisited –not on the basis that there was no agreed maritime boundary in place"[410] and that "[in 1986] Peru acknowledged that there was a boundary in place, which Peru wished to renegotiate."[411]

4.51 As is evident from the text of the Bákula Memorandum quoted above, Chile's account of the events of 1986 is inaccurate. Peru did *not* acknowledge that there was a boundary in place: it called for negotiations (not 'renegotiations') on "the formal and definitive delimitation" of the maritime boundary. Indeed, the active participation of Peru (represented by, among others, Ambassador Bákula) in the extended negotiations at UNCLOS III on maritime delimitation would have been an inexplicable waste of negotiating capital and effort had this not been the case[412]. Peru did *not* assume in the Bákula Memorandum that the 1982 Convention on the Law of the Sea required this action: it pointed out that the 1982 Convention on the Law of the Sea gave added urgency to the solution of an existing problem. And Chile did *not* respond to the Bákula Memorandum by saying that there was no need for a formal and definitive delimitation because there was already such a boundary in existence: Chile said that "studies on this matter shall be carried out"[413].

4.52 Nothing in the Bákula Memorandum, or in Chile's reaction to it, suggested that Peru accepted that there was already in existence in 1986 a definitive and permanent maritime boundary for all purposes. On the contrary, it was the very purpose of the Bákula Memorandum to invite Chile to join in negotiations with a view to reaching agreement on such a boundary.

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410 CCM, para. 1.24 (footnote omitted).

411 CCM, para. 1.39.

412 See para. 19 above.

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

C. The Permanent Commission for the South Pacific (CPPS): The Jurisdiction of the State Does Not Presuppose Delimited Maritime Zones

4.53 Chapter III of Chile's Counter-Memorial contains a Section entitled "Acknowledgement of the Delimited Maritime Zones within the context of the Permanent Commission of the South Pacific (CPPS)"[414]. In that Section, Chile tries to demonstrate that the three participating States in the 1952 Declaration of Santiago have "consistently taken the position that they have separate maritime zones, and that those zones are delimited by parallels of latitude."[415] This assertion, based exclusively on assumptions, is incorrect.

4.54 In referring to the context of the negotiation history of the 1955 Protocol of Accession to the Declaration on "Maritime Zone" of Santiago[416], Chile is forced to admit that this instrument "does not explicitly address any maritime-delimitation issues."[417] It has to be noted, however, that this assertion suggests that the Protocol could have addressed such "maritime-delimitation issues" implicitly, even if the text of this instrument provides no hint whatsoever of doing any such thing[418].

4.55 Chile purports to find the reasons for which the States omitted any reference to maritime delimitation issues to be of "special interest in this case"[419], by claiming that: "[t]he positions taken by Chile and Peru on Article IV of the Santiago Declaration during the preparation and then the negotiation of the text of the Accession Protocol confirm their understanding that Article IV

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414 CCM, Chapter III, Section 5, paras 3.120-3.137.

415 CCM, para. 3.120.

416 This Protocol was adopted on 6 October 1955 and never ratified.

417 CCM, para. 3.121.

418 See Protocol of Accession to the Declaration on "Maritime Zone" of Santiago. **PM, Annex 52**.

419 CCM, para. 3.121.

of the Santiago Declaration had fully delimited the maritime zones of the original three States parties."[420]

4.56 According to Chile, point IV of the Declaration of Santiago was excluded from the Protocol of Accession because it "was deemed to be inoperative so far as possible new parties were concerned"[421] and "a paragraph noting that each acceding State had the right to determine both the seaward extension and the manner of the delimitation of its own maritime zone in accordance with its particular circumstances" was included instead[422]. The grounds for Chile's interpretation of the reasons not to include point IV of the Declaration of Santiago in the Protocol of Accession lay in the fifth paragraph of the Protocol, which Chile quotes as a footnote[423]. As may be seen, the fifth paragraph of the Protocol refers to geographic and biological characteristics of the maritime zones, but does not mention the existence of any maritime boundary:

> "Paragraph VI of the Declaration of Santiago is not matter of accession, due to the fact that it is determined by the geographic and biological similarity of the coastal maritime zones of the signatory countries. Therefore, it shall not be considered to have a general nature for all Latin American countries."[424]

It is impossible to see how could paragraph fifth of the Protocol of Accession demonstrate that "Article IV of the Santiago Declaration had fully delimited the maritime zones of the original three States parties."

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420 CCM, para. 3.122.

421 CCM, para 3.123.

422 *Ibid.*

423 CCM, footnote 698.

424 Protocol of Accession to the Declaration on "Maritime Zone" of Santiago, signed on 6 October 1955. **PM, Annex 52**.

4.57 The paragraph which, according to Chile, was included "instead" of point IV of the Declaration of Santiago is the fourth paragraph. It reads as follows:

> "The three Governments declare that the adhesion to the principle stating that the coastal States have the right and duty to protect, conserve and use the resources of the sea along their coasts, shall not be constrained by the assertion of the right of every State to determine the extension and boundaries of its Maritime Zone. Therefore, at the moment of accession, *every State shall be able to determine the extension and form of delimitation of its respective zone whether opposite to one part or to the entirety of its coastline*, according to the peculiar geographic conditions, the extension of each sea and the geological and biological factors that condition the existence, conservation and development of the maritime fauna and flora in its waters."[425]

This paragraph clearly refers to the right to each State to set the extension of its maritime zone out to the sea and to determine its outer limit by applying the method the State deems convenient for that end.

4.58 Chile then refers to a document by Peru that it alternatively designates as a "note"[426] or "Memorandum"[427], but that was, in fact, a non-paper that bears no signature and contains nothing other than a number of talking points with Ecuadorean authorities[428]. The Counter-Memorial cites the following part in which the talking points indicate that Peru:

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425 *Ibid.* (Emphasis added).

426 CCM, para. 3.124.

427 CCM, footnote 700.

428 See Memorandum of 23 June 1955 from the Peruvian Embassy in Ecuador to the Government of Ecuador **CCM, Annex 70**.

> "…is inclined to delete paragraphs IV and VI, which establish the frontier between the countries – inapplicable in other locations – and the intention of signing agreements that are also fundamentally connected to the situation of neighbourship of our countries."[429]

What can be clearly understood from this is that Peru's "acknowledgement" refers to the fact that the provision contained in point IV of the Declaration of Santiago which refers to the parallel of latitude is only applicable to the situation between Peru and Ecuador, due to presence of islands in the vicinity of their land frontier[430]. Obviously, no such situation exists between Chile and Peru.

4.59 In the context of the history of the negotiation of the Protocol of Accession, and in order to leave no doubts regarding the supposed Peru's and Chile's "acknowledgement" of point IV of the 1952 Declaration of Santiago, it is appropriate to refer to the Official Letter of 11 July 1955, by which the Peruvian chargé d' affaires to Chile informed the Peruvian Minister of Foreign Affairs that:

> "The Chilean Government thinks it is not convenient to expressly reserve paragraph 4 of said Declaration, which in fact only applies the delimitation between the maritime zones of the signatories to the case of islands."[431]

This document is self-explanatory: the understanding between Peru and Chile concerning point IV of the Declaration of Santiago was that this provision is

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429 *Ibid.* (Spanish text: "… se inclina a suprimir los párrafos IV y VI, que establecen la frontera entre los países – inaplicable en otros lugares – y el propósito de suscribir convenios de aplicación que también están fundamentalmente relacionados con la situación de vecindad de nuestros países.").

430 See PM, para. 4.77.

431 Official Letter No. 5-4-Y/68 of 11 July 1955 from the chargé d'affaires a.i. of Peru to the Peruvian Minister of Foreign Affairs. **PR, Annex 8**.

only applicable to the maritime zones of the islands. As has been pointed out, it is not applicable to Peru and Chile.

4.60 Notwithstanding this, Chile contends that the text of "key agreements"[432] reflects a common understanding among the CPPS member States that their maritime zones had already been delimited.

4.61 Chile says that "[t]he CPPS Member States … have on many occasions acknowledged the importance of the Santiago Declaration, and reiterated their commitment to co-operate in the protection and conservation of marine resources and the marine environment, as well as in the fields of science and technology."[433] Peru fully agrees with this statement but it has no bearing on maritime delimitation matters.

4.62 The Counter-Memorial cites five agreements adopted within the CPPS framework that establish regulations applicable to the member State's maritime zones. However, none of these instruments make any mention whatsoever to the subject of lateral maritime boundaries or to a parallel of latitude[434].

4.63 Chile correctly notes that the CPPS State Members "indicated their understanding that each of them has its own maritime zone within which it is to take measures to implement and enforce the agreed rules on those subject matters"[435]. Nevertheless, according to Chile, the texts of the agreements entered into under the auspices of the CPPS "reflects a shared understanding

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432 CCM, para. 3.120.

433 CCM, para. 3.127.

434 CCM, paras. 3.129-3.132. The first of the instrument cited in the Counter-Memorial (Convention on Measures on the Surveillance and Control of the Maritime Zones of the Signatory Countries) has not been ratified by Chile.

435 CCM, para. 3.127.

by the State Parties and the CPPS that those States' maritime zones had already been delimited."[436]

4.64 This inference is ungrounded. The fact that an agreement is to be applied within the maritime zones of the State Parties does not mean – as Chile asserts – that the maritime zones have already been delimited. If Chile's inference were true, it would result in the position that countries that have not entered into a treaty for the establishment of maritime boundaries are not meant to have maritime zones because these have not been delimited. This is purely circular reasoning.

4.65 Chile also argues that "[s]ome of [the] texts, adopted in the name of the CPPS rather than those of its member States, again indicate the organization's understanding that each member State is to exercise exclusive jurisdiction within a defined maritime area. None of the member States has disputed this understanding."[437] This is mere question-begging, as Peru explained above.

4.66 Chile refers to some resolutions adopted within the framework of the CPPS, none of which mentions lateral maritime boundaries between the member States. Nevertheless, Chile infers with no grounds that the references to maritime zones of the member States in those texts constitute recognition of the existence of maritime boundaries between Peru and Chile.

In the same way, Chile makes recourse to some recommendations from the Secretary-General of the CPPS on legislative and economic measures to be taken by each of member States in relation to the protection of marine resources, which, again, contain no mention to maritime boundaries between the member States. It is worth noting that, in accordance with the CPPS

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436 CCM, para. 3.128.

437 CCM, para. 3.133.

regulations, the competence of the Secretary-General in relation to the agreements, protocols, declarations, resolutions and other CPPS instruments is circumscribed to watch over their application. The Secretary-General has no competence whatsoever on the interpretation of those instruments[438].

4.67 Finally, Chile quotes a statement made by Mr. Enrique García Sayán in his capacity as the Secretary-General of the CPPS, to demonstrate that he "recognized that, under the Santiago Declaration, each of the States parties possessed a separate maritime zone, rather than sharing a condominium in the maritime area along their coasts"[439].

4.68 Peru has not, however, asserted any such thing as the existence of a condominium over the seas adjacent to the CPPS member States. What Peru has noted is that, for certain purposes relating to the protection of species, it has been agreed that the CPPS – and not each of the participant States to the Declaration – would serve as the competent authority over the maritime zone referred to by the 1952 Declaration of Santiago. This is reflected in **Figure R-4.1** which reproduces a map published by the CPPS when its headquarters were in Chile. That is the case, e.g., of the Regulation of Permits for the Exploitation of the Resources of the South Pacific[440] quoted by Chile, and the Regulations for Maritime Hunting Operations in the Waters of the South Pacific[441].

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438 Article 19 of the Statute on the Competences and Structure of the Permanent Commission for the South Pacific. Available at: <http://www.cpps-int.org/plandeaccion/enero%202009/libro%20convenios.pdf> accessed 8 October 2010. In this regard, see Fax F-330 of 27 January 2000, from the President of the Peruvian Section of the Permanent Commission for the South Pacific (CPPS) to the Secretary-General of such Organization. **PR, Annex 74**.

439 CCM, para 3.137.

440 CCM, para. 3.130. See also Regulation of Permits for the Exploitation of the Resources of the South Pacific, signed on 16 September 1955. **CCM, Annex 5**.

441 See Regulations for Maritime Hunting Operations in the Waters of the South Pacific, signed on 18 August 1952. **PM, Annex 49**.

This does not contradict the existence of jurisdictional maritime zones under the authority of each State, as confirmed by quotations from Mr. García Sayán wherein he states that "each country has its own maritime zone *in front* of its coastline"[442]. Peru's position is that Peru and Chile have each their own maritime domain, and that the maritime domains of both countries have to be delimited by means of a treaty, in accordance to international law. Chile has not only misinterpreted Peru's position: in Section 5 of Chapter III of its Counter-Memorial Chile does not point to any agreement on lateral boundaries.

IV. Third-Party Cartographic Material

4.69 Many maps have been put before the Court[443]; and several show a parallel between Peru and Chile. It is suggested that the Court should draw the inference that map-makers around the world have recognized the parallel as the boundary. The reality is entirely different. The great majority of the maps derive from a single source, slavishly copied.

4.70 The various examples cited by Chile in support of its proposition that the parallel was recognized as the international maritime boundary are based on a single, erroneous, analysis by the Office of the Geographer of the United States Department of State[444]. In its 1979 publication *Limits in the Seas Series: No. 86*[445] (LIS # 86), the Geographer misrepresents point IV of the Declaration of Santiago in the following manner:

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442 Cited in CCM, para. 2.100.

443 CCM, paras. 2.228 *ff*, 3.144 *ff.*

444 The United States (Department of State), The United States of America (Department of Defence), People's Republic of China, certain publicists and certain United Nations publications. CCM, paras. 2.228 *ff.*

445 Office of the Geographer of the United States Department of State, *Limits in the Seas, No 86: Maritime Boundary: Chile-Peru*, July 1979, p. 2. **CCM, Annex 216**.

LA COMISIÓN PERMANENTE DEL PACÍFICO SUR

(Red Internacional del Libro, Santiago de Chile, 1993, p. 33)

"This publication was requested and directed by the Permanent Commission for the South Pacific (CPPS), while it had its headquarters in Chile from 1990-1993" **(Inside Cover Panel).**

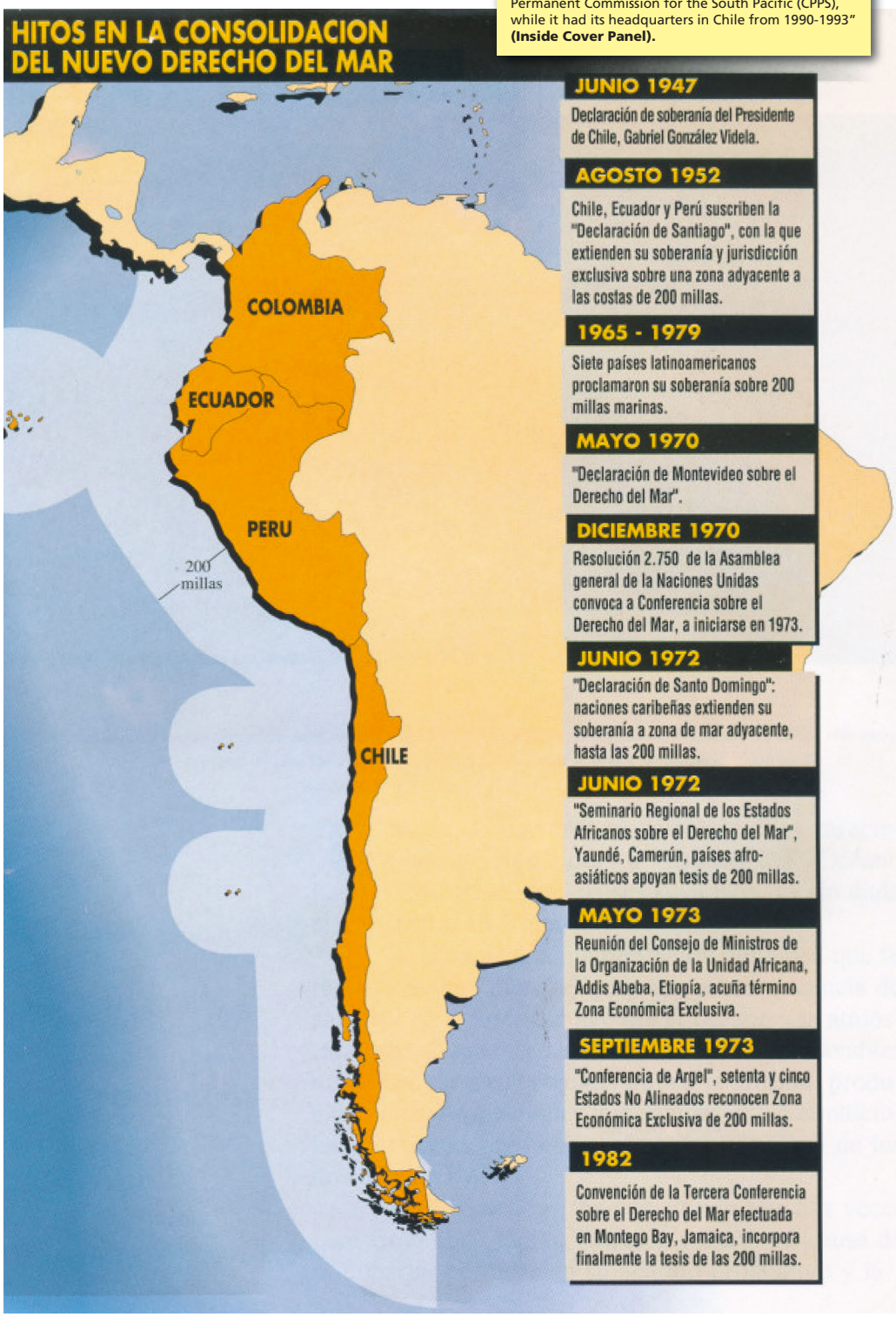

Figure R-4.1

> "In Article IV the maritime boundaries between the states are proclaimed to be the 'parallel of latitude drawn from the point of which the land frontier between the two countries reaches the sea.'"[446]

4.71 As has been shown above, point IV of the Santiago Declaration does no such thing. Point IV is concerned with the maritime zones around island territories, and contains no provision fixing maritime boundaries off the mainland[447].

4.72 Moreover, the *Limits in the Seas* pamphlet contains a distinctive numerical (perhaps typographical) error. In the "Analysis" section of LIS # 86, the Geographer briefly mentions the confusion concerning the starting point of the purported maritime boundary, referred to as being "... located slightly to the north of the land boundary terminus." The Geographer then goes on to state that "[t]he maritime boundary extends along the 18°**23**'03" parallel of South latitude, which coincides with the parallel of latitude on which the Peru-Chile land boundary marker No. 1 has been placed." (Emphasis added) This factual statement is also incorrect. What the Geographer meant to refer to was the 18°**21**'03" S parallel of South latitude. Using the latitude stated in LIS # 86, the Chile-Peru maritime boundary would have emanated from a point on the Chilean coast two nautical miles south of the boundary marker, midway between the Río Lluta and Boundary Marker (*Hito*) No. 1.

4.73 That erroneous reference to the 18°**23**'03" parallel of South latitude can be traced through almost all of the maps that purport to show the "maritime boundary" between Peru and Chile following that parallel. Subsequent maps repeat the same error. There is no great body of third-party recognition of the

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446 Office of the Geographer of the United States Department of State, *Limits in the Seas, No 86: Maritime Boundary: Chile-Peru*, July 1979, p. 2. **CCM, Annex 216**.

447 See paras. 3.68-3.99 above.

boundary: there is simply a certain number of maps mechanically copied from the 1979 Geographer map, errors and all.

4.74 One may recall the words of the *Island of Palmas* award:

> "Any maps which do not precisely indicate the political distribution of territories, and in particular the Island of Palmas (or Miangas) clearly marked as such, must be rejected forthwith, unless they contribute –supposing that they are accurate– to the location of geographical names. Moreover, indications of such a nature are only of value when there is reason to think that the cartographer has not merely referred to already existing maps –as seems very often to be the case– but that he has based his decision on information carefully collected for the purpose."[448]

V. Chile's Practice Evidencing the Absence of an Agreed Maritime Boundary

4.75 The Chilean Counter-Memorial also presents a highly selective treatment of Chile's own conduct with respect to its argument that the 1952 Declaration of Santiago established a maritime boundary between the Parties. Significantly, Chile ignores much of its own practice relating to the Declaration, which is incompatible with such a proposition, as well as its internal legislation, which does not give rise to any Chilean entitlements in the sea north of Point Concordia and does not support the existence of a delimited maritime boundary with Peru dating from 1952.

4.76 In addition, Chile fails to address the fact that when it genuinely intended to enter into a final and binding maritime boundary agreement – as with

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[448] Island of Palmas case (Netherlands, United States), Award, 4 April 1928, RIAA, Vol. II, p. 852.

Argentina in 1984 – it did so in a clear and detailed delimitation agreement (with an attached map and confirmed by a corresponding supreme decree), unlike its practice with respect to Peru. Moreover, Chile passes over in silence the fact that for over forty years after the Declaration of Santiago, it issued no map purporting to depict an existing boundary with Peru extending out to sea until it abruptly changed its maps in a self-serving manner in the 1990s.

4.77 These aspects of Chile's conduct further undermine its thesis that the Declaration of Santiago delimited a maritime boundary between the Parties. Each of them will be discussed in turn below.

A. The Declaration of Santiago Could Not Have Delimited a Maritime Boundary along the Parallel of *Hito No. 1* in any Event

4.78 As noted in Chapter III, prior to 1952 Chile's maritime zones were limited to those set out in Article 593 of the Chilean Civil Code[449]. Article 593 provided for a three-mile territorial sea in the "*adjacent* sea … measured from the low-water mark"[450]. Under that law (as would be expected), maritime areas had to be "adjacent" to Chile's coast in order for them to be deemed to constitute Chilean territorial waters.

4.79 When the Declaration of Santiago was adopted in 1952, it provided for a 200-mile zone in addition to the more limited zones set out in Chile's Civil Code. However, under point II of the Declaration of Santiago, the Parties' proclamation of exclusive sovereignty and jurisdiction over the sea "along the coasts of their respective countries" to a minimum distance of 200 nautical miles from those coasts, presupposed that such areas had to lie adjacent

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449 See paras. 3.23-3.24 above.

450 Chilean Civil Code of 1855. **PM, Annex 25** (emphasis added).

to ("along") their coasts"[451]. Under both the Chilean Civil Code and the Declaration of Santiago, therefore, Chile only possessed a legal entitlement to maritime areas to the extent they lay "adjacent" to, or "along", its coast.

4.80 In Chapter II, Peru showed that Chile's coast ends at Point Concordia pursuant to the 1929 Treaty of Lima. North of that point lies Peruvian territory. Given that the parallel of latitude passing through Boundary Marker (*Hito*) No. 1 intersects the coast at a point situated north of Point Concordia, the maritime areas lying off the stretch of coast between Point Concordia and the point where the parallel of latitude passing through *Hito No. 1* meets the sea are adjacent to Peru's coast, not to that of Chile. Such areas cannot, therefore, form part of Chile's territorial sea under Article 593 of its Civil Code; nor can they be considered to lie "along" Chile's coast so as to form part of Chile's 200-mile zone proclaimed in the Declaration of Santiago. It follows that such areas could not have been delimited by the Declaration of Santiago along the parallel of latitude passing through *Hito No. 1* because such a line would have delimited exclusively Peruvian waters. This can be seen by reference to **Figure R-4.2**.

4.81 That figure shows the land boundary between the Parties as delimited pursuant to the 1929 Treaty of Lima and the 1930 work of the Joint Commission. The boundary reaches the coast at Point Concordia where the 10-kilometre radius arc drawn from the bridge over the river Lluta meets the sea. Chile's maritime boundary claim along the parallel of latitude passing through *Hito No. 1* is also depicted on the figure. That parallel meets the sea at a point on the coast which lies north of Point Concordia and thus within Peruvian territory.

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[451] 1952 Declaration of Santiago. **PM, Annex 47**.

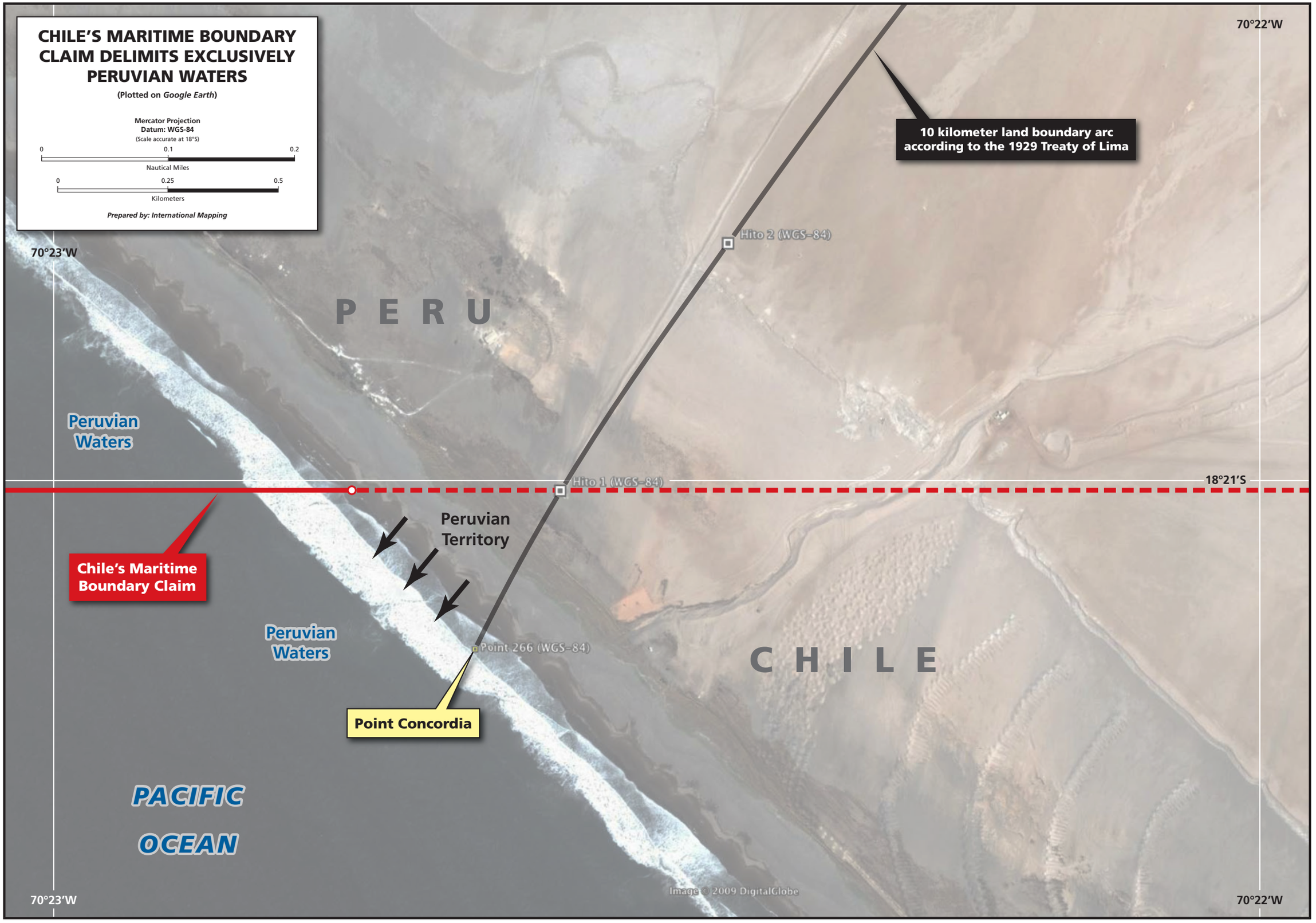
CHILE'S MARITIME BOUNDARY CLAIM DELIMITS EXCLUSIVELY PERUVIAN WATERS
(Plotted on Google Earth)
Mercator Projection
Datum: WGS-84
(Scale accurate at 18°S)
0
0.1
0.2
Nautical Miles
0
0.25
0.5
Kilometers
Prepared by: International Mapping
70°23'W
70°22'W
10 kilometer land boundary arc according to the 1929 Treaty of Lima
Hito 2 (WGS-84)
PERU
Peruvian Waters
Hito 1 (WGS-84)
18°21'S
Peruvian Territory
Chile's Maritime Boundary Claim
Peruvian Waters
Point 266 (WGS-84)
CHILE
Point Concordia
PACIFIC OCEAN
Image © 2009 DigitalGlobe
70°23'W
70°22'W

Figure R-4.2

4.82 By positing a maritime boundary that follows the parallel of latitude passing through *Hito No. 1*, Chile not only claims maritime areas that are adjacent to Peru's coast (not to its own coast), it also deprives a stretch of Peru's coast of any maritime entitlements whatsoever. Quite apart from the fact that Chile's thesis cannot be reconciled with a State's rights to the maritime areas lying off its coasts under international law, such a result was never contemplated in the 1952 Declaration of Santiago. Nor could it have arisen under the 1954 Agreement on a Special Zone or the 1968-1969 light towers arrangements. In short, there is nothing to suggest that the Parties to the present proceedings ever intended to establish a maritime boundary which commenced along a stretch of coast that was exclusively part of Peru's territory, or which deprived Peru's coast of its legal entitlements to the maritime areas lying off that coast.

4.83 This situation did not change when Chile enacted new maritime legislation in 1986[452]. Chile's 1986 law amended Article 593 of the Civil Code, and added a new article 596 providing for a 12-mile territorial sea, a 24-mile contiguous zone and a 200-mile exclusive economic zone in the "adjacent sea… measured from [Chile's] baselines". Chile's baselines, which in the relevant area are "normal" baselines constituted by the low-water mark of its coast, cannot extend north of Point Concordia under the 1929 Treaty of Lima.

4.84 It was only in 2000 that Chile purported to change its baselines. As noted in Peru's Memorial, on 21 September 2000 Chile deposited a list of co-ordinates for its baselines, together with a chart, with the United Nations[453]. According to that list, Chile identified the co-ordinates of Point 1 of its Normal Baselines as the following: 18°21'00" S 70°22'40" W WGS84[454]. These co-ordinates

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452 Law No. 18.565 of 13 October 1986 Amendment to the Civil Code Regarding Maritime Spaces. **PM, Annex 36**.

453 PM, para. 2.21.

454 List of Geographical Co-ordinates Deposited by Chile with the Secretary-General of the United Nations on 21 September 2000. **PM, Annex 110**.

are remarkable in three respects, which can be seen by reference to **Figure R-4.3** hereto. *First*, they do not lie on the low-water mark of the coast, but rather some distance inland. *Second*, they are situated to the north of Point Concordia and thus within Peruvian territory in accordance with the 1929 Treaty of Lima. *Third*, they do not coincide with the co-ordinates of Boundary Marker No. 1, and thus they contradict Chile's own thesis that *Hito No. 1* is the seaward terminus of the land boundary. Given that neither the baselines nor the chart bore any relation to reality, including to what the Parties agreed in 1929-1930, Peru promptly protested by a Note addressed to the Secretary-General of the United Nations on 9 January 2001[455].

4.85 What is clear is that there are no sea areas lying adjacent to the stretch of coast where the parallel of latitude passing through Boundary Marker No. 1 intersects the coast that can be deemed to form part of Chile's maritime areas or be subject to a previously delimited boundary with Peru.

B. The 1964 Chilean Ministry of Foreign Affairs Legal Advisor Report No. 138: The Presumption of a Non-agreed Maritime Boundary

4.86 In 1964, the Advisory Office of the Chilean Ministry of Foreign Affairs was requested by the Chilean Borders Directorate to provide an opinion regarding the delimitation of the frontier between the Chilean and Peruvian territorial seas[456]. The fact that the Advisory Office of the Foreign Ministry was asked to examine the question of maritime boundaries in itself shows that the Chilean Government was not at all sure at the time whether there was a pre-existing boundary.

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455 Note No. 7-1-56/005 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 18º21'00", Referred to by the Government of Chile as the Maritime Boundary between Chile and Peru. **PM, Annex 78**.

456 Report No. 138 of 15 September 1964 issued by the Head of the Legal Advisory Office of the Ministry of Foreign Affairs of Chile, Raúl Bazán Dávila, upon request of the Borders Directorate. **PR, Annex 21**.


CHILE'S ERRONEOUS POINT 1
ON ITS 2000 BASELINE
(Plotted on Google Earth)
10 kilometer land boundary arc
according to the 1929 Treaty of Lima
Point 1 on Chile's 2000 normal baselines:
located on dry land in Peru's territory
Parallel of latitude passing
through Hito No. 1
Hito 1 (WGS–84)
PERU
Terminus of the land boundary
according to Chile
Point 266 (WGS–84)
Point Concordia
CHILE
Dry
Sand
Wet
Sand
Backshore
Swash
Zone
Surf
Zone
Foreshore
Shore
Breaker
Zone

Figure R-4.3

4.87 In order to give its opinion, the Advisory Office indicated that it was first necessary to investigate whether there was a "specific agreement" between the two countries concerning their maritime frontier. The Advisory Office then examined the terms of the 1952 Declaration of Santiago as to which it stated that, "although it does not constitute an express agreement to determine the lateral limit of the respective territorial seas, it starts by assuming that this limit coincides with the parallel that passes through the point at which the land frontier reaches the sea."[457]

4.88 The Advisory Office sought to justify its opinion by referring to point IV of the Declaration of Santiago. As has been shown in the previous chapter, point IV in no way established a maritime boundary between Peru and Chile[458]. Moreover, the fact that the Advisory Office recognized that there was no "express agreement" on delimitation sits uncomfortably with Chile's confident assertion in these proceedings that the Declaration of Santiago effectuated a "comprehensive and complete boundary between the Parties."[459]

4.89 Equally inconsistent with Chile's current position is the Advisory Office's frank acknowledgement that it could not say where the alleged maritime boundary agreement derived from. In the words of the Opinion:

> "This Advisory Office has not been able to establish, with the available background, when and how this agreement was reached. However, it may, in fact, be *presumed* that this agreement predates and determines the signing of the Declaration on the Maritime Zone of 18 August 1952."[460]

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457 *Ibid*., (Spanish text: "aunque no constituye un pacto expreso para determinar el deslinde lateral de los respectivos mares territoriales, parte del entendido de que ese deslinde coincide con el paralelo que pasa por el punto en que la frontera terrestre toca el mar.").

458 See paras. 3.82-3.99 above.

459 CCM, para. 1.9.

460 Report No. 138 of 15 September 1964 issued by the Head of the Legal Advisory Office of the Ministry of Foreign Affairs of Chile, Raúl Bazán Dávila, upon request of the Borders Directorate. (Spanish text: "Cuándo y cómo se pactó tal acuerdo, no ha logrado establecerlo esta Asesoría con los antecedentes disponibles. Cabe, sí, presumir que él precede y condiciona la firma de la Declaración sobre Zona Marítima de 18 de Agosto de 1952."). (Emphasis added) **PR, Annex 21**.

4.90 This statement is remarkable on two accounts. *First*, the Advisory Office could not establish when and how a delimitation agreement with Peru came about. Such an admission scarcely supports the proposition that there was a clear legal instrument reflecting the Parties' intention to agree an issue as important as the delimitation of their maritime boundaries. *Second*, the Opinion presumed that any such agreement must have pre-dated the Declaration of Santiago and did not arise out of the Declaration itself. As shown earlier, there is no such agreement. Certainly, the Parties' separate 1947 claims could not be construed as constituting a delimitation agreement, and Chile does not argue as much. Indeed, the notion that a maritime boundary agreement was in existence prior to 1952 is fundamentally at odds with Chile's position set out in its Counter-Memorial, where it is asserted that it was the 1952 Declaration of Santiago that established the maritime boundary, not any prior agreement[461].

C. Chile's Legislation Subsequent to the Declaration of Santiago

4.91 Chile's Counter-Memorial ignores the fact that none of Chile's legislation enacted after 1952 filed by the Parties makes any reference to the Declaration of Santiago having delimited a maritime boundary between them.

4.92 Chilean law related to jurisdiction of the Chilean maritime authority in the north of the country does not mention any maritime boundary with Peru. Decree No. 292 of 1953, adopted after the Declaration of Santiago, defined the jurisdiction of the Directorate General of Maritime Territory and Merchant Marine without any reference to the existence of lateral maritime boundaries[462]. Chile's 1987 Supreme Decree (M) No. 991 stipulated that the

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461 CCM, para. 1.3.

462 Decree with Force of Law No. 292 of 25 July 1953, Fundamental Law of the Directorate General of Maritime Territory and Merchant Marine. **PM, Annex 29**.

jurisdiction of the Maritime Governor's Office of Arica includes the area "from the Chile-Peru international political limit on the North as far as the parallel 19°13'00" S. (Punta Camarones) to the south"[463]. While a parallel is used to separate the Arica district from the Iquique district in the south, there is no reference to a parallel or a maritime boundary in the north of Chile. The same decree does, however, refer expressly to the "maritime boundary" with Argentina, when establishing the jurisdiction of the Captaincy of Port of Punta Delgada[464]. From this account, it is clear that when the decree mentions the "international political boundary on the North", it refers to the land border with Peru. Nothing here asserts the existence of an international maritime boundary along the parallel[465].

4.93 In 1959, for example, Chile's Ministry of Agriculture issued Decree No. 130 concerning the regulation of permits for foreign fishing vessels operating within Chilean territorial waters (which, at the time, still had a breadth of

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463 Supreme Decree (M) No. 991 of 26 October 1987, Establishing the Jurisdiction of the Maritime Gobernations of the Republic and Establishing the Harbour Authorities and their Respective Jurisdictions. **PM, Annex 37**.

464 The jurisdiction of the Captaincy of Port of Punta Delgada, that operates within the jurisdiction of the Maritime Governors Office of Punta Arenas, "comprises the Magellan Strait from the imaginary line that unites Punta Harry and Cabo San Vicente, up to the international maritime boundary to the East." Chile's Supreme Decree (M) No. 991 of 26 October 1987, Establishing the Jurisdiction of the Maritime Gobernations of the Republic of Chile and Establishing the Harbour Captaincies and their Respective Jurisdictions. **PR, Annex 24**.

465 Similarly, there is no reference whatever to a lateral maritime boundary, or to a parallel of latitude, in Peru's law on the maritime authority's jurisdiction in the south of the country. Peru's Regulation of Captaincies and of National Merchant Navy approved by Supreme Decree No. 21 of 31 October 1951 (**PR, Annex 2**) stated that the jurisdiction of the Captaincy of the Major Port of Ilo "shall include the coastline, from Punta Yerba Buena in the North, to Concordia (10 km, North of the Arica-La Paz Central Railway) in the South". The 1987 Regulation on Captaincies and Maritime, Fluvial and Lacustrine Activities stipulated that the jurisdiction of the Major Port of Ilo covers "the Departmental Limit between Arequipa and Moquegua to the North up to the frontier with Chile to the South" (**CCM, Annex 174**); and the Regulation of the Law on the Control and Surveillance of Maritime, Fluvial and Lacustrine Activities of 2001, establishes the jurisdiction of the Captaincy of the Port of Ilo in exactly the same terms. (**CCM, Annex 192**).

three miles)[466]. While that decree authorized the Ministry of Agriculture to grant permits to foreign vessels to fish in Chile's territorial waters, it made no reference to the Declaration of Santiago or to the existence of a previously agreed maritime boundary with Peru. To the contrary, no lateral limits at all were identified with respect to Chile's territorial waters.

4.94 This was followed by a further Decree (No. 332) issued by Chile on 4 June 1963, which granted to the Ministry of Agriculture the authority to issue fishing permits to foreign flag vessels within Chile's "200-mile zone established by the Declaration on Maritime Zone of 18 August 1952"[467]. Despite the fact that the decree did refer to the Declaration of Santiago, it made no reference to that instrument having established any lateral limits to Chile's 200-mile zone with Peru.

4.95 On 18 July 1963, Chile issued another Decree (No. 453) relating to the licensing of fishing factory ships within its 200-mile zone[468]. Once again, the decree referred to the Declaration of Santiago in general terms, but it did not indicate that the Declaration had delimited any maritime boundary with Peru within which permits could be granted.

4.96 Notwithstanding these inconsistencies, Chile's Counter-Memorial argues that its understanding of the maritime boundary with Peru was made known to mariners through the issuance of official *Sailing Directions* (*Derroteros de la Costa*). In support of this proposition, Chile points to an edition of the Chilean *Sailing Directions* published in 1980 which states that the maritime boundary was the parallel of *Hito No. 1*[469].

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466 Decree No. 130 of 11 February 1959: Regulation on Permits for Fishing by Foreign Vessels in Chilean Territorial Waters. **CCM, Annex 117**.

467 Decree No. 332 of 4 June 1963, Appointment of the Authority which Grants Fishing Permits to Foreign Flag Vessels in Chilean Jurisdictional Waters. **PM, Annex 31**.

468 Decree No. 453 of 18 July 1963, Regulation of Permits for the Exploitation by Factory Ships in the Specified Zones. **PM, Annex 32**.

469 CCM, para. 3.68 and SHOA, Derrotero de la Costa de Chile, Vol. I: From Arica to Chacao Canal, 6th ed., 1980. **CCM, Annex 133**.

4.97 It was only 28 years after the signature of the 1952 Declaration of Santiago that the Chilean *Sailing Directions* were changed to suggest that there was a maritime boundary lying along the parallel of Boundary Marker No. 1. No explanation was given as to the genesis of this "boundary", and no reference was made to the Declaration of Santiago.

4.98 The 1980 edition of the *Sailing Directions* was also internally inconsistent. Under the heading "International Boundary", the *Directions* referred once again to the land boundary established by the 1929 Treaty, and to the fact that the starting-point of that boundary lay at Point Concordia on the coast. The reference to the maritime boundary being the parallel of Boundary Marker No. 1 appears under a different heading entitled "Hito Concordia". What the *Sailing Directions* fail to explain is how a maritime boundary could have as its starting-point a place on the coast *north* of Point Concordia – the starting-point of the land boundary – in Peruvian territory.

4.99 It is impossible to argue after the Bákula Memorandum that the practice of Chile and Peru could imply agreement upon the existence of a maritime boundary. Nonetheless, Chile attempts to support its case by reference to its post-Bákula practice. For example, Chile quotes its Decree No. 408 of 1986, which refers to "the parallel which constitutes the northern maritime boundary"[470]. That phrase did not appear in the decree's immediate predecessor, Decree No. 94

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[470] Chile's Decree No. 408 of 17 December 1986, on the Prohibition of Use of Fishing Equipment for Dragging and Fencing in the Indicated Area and Repealing the Specified Decree, CCM para. 3.61 and **CCM, Annex 134**. Cf., Chile's Supreme Decree (M) No. 991 of 26 October 1987, Establishing the Jurisdiction of the Maritime Gobernations of the Republic and Establishing the Harbour Authorities and their Respective Jurisdictions, referred to in CCM, para. 3.63; Chile's Supreme Decree No. 453 of 3 May 1989 Creating the Fourth Naval Zone, referred to in CCM, para. 3.62; Chile's Law No. 18,892 (as amended), General Law on Fisheries and Aquaculture, consolidated text published in Decree No. 430 of 21 January 1992, referred to in CCM, para. 3.66.

of 1985, which referred simply to "18°28'16" S.L", described as a "geographic point"[471]. The Bákula Memorandum, in which Peru drew Chile's attention to the absence of any agreed maritime boundary[472], was delivered shortly after the 1985 decree and before the 1986 one.

4.100 Chile itself underlines the importance of distinguishing between different kinds of boundary line. It refers to the lack of protest from Peru concerning Chile's 1987 Decree No. 991 referring to the "international political limit" between the two States. Nevertheless, while the 1987 decree refers to the Treaty establishing the maritime boundary with Argentina and to the map attached to that treaty, it makes no reference to a maritime boundary with Peru or to the Declaration of Santiago[473]. Chile argues that "[i]t would have been obvious to Peru that 'international political boundary' meant something different from a physical or geographical boundary"[474].

4.101 No-one could reasonably have thought that the term "international political boundary" meant a physical boundary: but just as Peru should have seen (and did see) the difference between legal and physical boundaries, it is necessary to see the difference between permanent all-purpose international maritime boundaries and boundaries adopted for limited purposes and/or for limited times. In fact, Chile's Decree No. 991 was adopted soon after the Bákula Memorandum[475] in which Peru had made quite clear its view that there was no agreed international maritime boundary with Chile, and Chile had undertaken to examine the question. A protest was unnecessary and not to be expected.

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471 Chile's Decree No. 94 of 11 April 1985, On the Prohibition of the Use of Trawling and Fence Fishing Gears in the Indicated Areas and Abolishing the Decree that It Indicates. **PR Annex 23**.

472 See paras. 4.47-4.52 above.

473 Chile's Supreme Decree (M) No. 991 of 26 October 1987, Establishing the Jurisdiction of the Maritime Gobernations of the Republic of Chile and Establishing the Harbour Captaincies and their Respective Jurisdictions. **PR, Annex 24**.

474 CCM, para. 3.63.

475 See paras. 4.47-4.52 above.

4.102 Even when some of Chile's more recent decrees began to indicate a jurisdictional limit in the north along a parallel of latitude, they did not state that such a parallel was the result of any specific boundary agreement with Peru. In contrast, when it came to the southern limits of Chile's jurisdiction, the 1984 boundary treaty between Chile and Argentina was often expressly mentioned.

4.103 An example of this rather striking difference in treatment may be found in Chile's Decree No. 704 of 29 October 1990 relating to the organization of the Chilean Navy's search and rescue operations[476]. While the Chilean Counter-Memorial has elected not to translate the relevant passage, Article 1 (1) of the decree set out below illustrates the point:

> "1. The Maritime Area of national responsibility, for the purposes of this regulation, includes all the waters under national maritime jurisdiction and those of the Pacific Ocean laying between the former and the parallel 18°20'08" South to the North, meridian 120° West to the West, Antarctic Territory to the South, and the waters of the Drake Passage, including all the waters located West of the Line that joins together points A, B, C, D, E and F of Chart No. 1 of the Treaty of Peace and Friendship with the Argentine Republic, enacted by Supreme Decree (Ministry of Foreign Affairs) No. 401 of 1985, and the waters South of the parallel 58°21'1" South that are West of the meridian 53°00'00" West up to the Antarctic territory."

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476 Chile's Decree No. 704 of 29 October 1990, Amending Decree (M) No. 1.190 of 1976 that Organises the Maritime Search and Rescue Service of Chile's Navy. (Spanish text: "1. El Área Marítima de responsabilidad nacional, para los efectos del presente reglamento, comprende todas las aguas bajo jurisdicción marítima nacional, y las del Océano Pacífico, comprendidas entre aquellas y el paralelo 18°20'08" Sur por el Norte, meridiano 120° Weste (sic) por el Weste (sic), Territorio Antártico por el Sur y las aguas del Paso Drake, comprendiendo todas las aguas que quedan al Weste (sic) de la Línea que une los puntos A, B, C, D, E y F de la Carta No. 1 del Tratado de Paz y Amistad con la República de Argentina, promulgado por Decreto Supremo (RR.EE.), No. 401, de 1985, y las aguas que, quedando al sur del paralelo 58°21'1" Sur, se encuentren al Weste (sic) del meridiano 53°00'00" Weste (sic) y hasta el Territorio Antártico."). **PR Annex 26**.

4.104 As can be seen, the northern limit of the area to which the decree applies is recorded as being the parallel 18°20'08" without any indication of the provenance of that line. In the south, however, the article refers explicitly to the map attached to the 1984 Chile-Argentina boundary agreement (including the chart attached to that agreement), and to the specific turning points of the boundary line depicted on that chart as the limits of the decree's application.

4.105 The 1990 decree also refers to the fact that 1985 Chilean Supreme Decree No. 401 had expressly enacted the Chile-Argentine boundary agreement into law[477]. Significantly, no reference is made to Chile's 1954 supreme decree (promulgating the Declaration of Santiago) having provided for a boundary line with Peru. Had Chile considered that the Declaration of Santiago established a final and binding maritime boundary with Peru, there would have been no reason not to refer to this fact in the 1990 decree.

4.106 The Chilean Counter-Memorial also seeks to find support in a General Law on Fisheries and Aquaculture promulgated in 1991, which Chile contends "acknowledges the northern limit of Chile's maritime zone"[478]. The instrument in question only referred generally to "the northern boundary of the Republic" without giving any indication of what that "northern boundary" was. In contrast, the southern limit of the area to which the law applied was clearly indicated by a parallel of latitude having specific co-ordinates (41°28.6' S). In this respect, the 1991 law is no more helpful to Chile's case than another law that it refers to (Supreme Decree No. 453 of 3 May 1989) creating a Fourth Naval Zone for the operations of the Chilean Navy. Once again,

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477 Chile's Decree No. 401 of 6 May 1985, Promulgating the Treaty of Peace and Friendship between the Government of the Republic of Chile and the Government of the Republic of Argentina. **PR, Annex 22**.

478 CCM, para. 3.66.

that instrument only refers to the jurisdiction of the Navy extending to "the northern international boundary" without any further precision on the origin or location of that boundary[479].

D. Chile's Conduct with Respect to the Chile-Argentina Boundary Agreement

4.107 This review of Chile's post-1952 practice shows that Chile's conduct is incompatible with its argument that the 1952 Declaration of Santiago established a maritime boundary between the Parties. As will be seen in this section, Chile's practice with respect to Argentina was entirely different. There, unlike the situation between Peru and Chile, clear evidence exists showing the intention of the parties to delimit and map their maritime boundary in a final and binding manner.

4.108 Chile's Counter-Memorial asserts that "all land- and maritime-boundary questions which have concerned Chile have been resolved either by agreed recourse to arbitration or directly by international treaties."[480] The impression Chile seeks to convey by this statement is that the maritime delimitation with Peru has been resolved in the same manner as its only other maritime delimitation dispute – the boundary between Chile and Argentina.

4.109 Any such impression is entirely false. The evidence shows that when Chile genuinely intended to enter into a final and binding maritime boundary agreement, it did so by means of a detailed delimitation agreement specifying

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479 CCM, para. 3.62 and **Annex 136** thereto. See Chile's Supreme Decree No. 991 of 26 October 1987, referred to at CCM para. 3.63, establishing the maritime jurisdiction for the governship of Arica, which also refers to the "Chile-Peru international political limit on the North" without any further precision. **PM, Annex 37**.

480 CCM, para. 1.59.

the course of the boundary with identified co-ordinates (including its starting and end points), and including a map showing the course of the boundary. This is what occurred when Chile agreed its maritime boundary with Argentina in 1984. Nothing of the kind ever occurred with respect to a maritime boundary between Chile and Peru.

4.110 As discussed in Peru's Memorial, on 29 November 1984, Chile and Argentina concluded a treaty that established the maritime boundary between them[481]. That agreement fixed the course of the boundary by means of a series of six co-ordinates connected by loxodromes. The agreement went on to define a specific endpoint of the boundary out to sea, and the Parties annexed a map to the agreement illustrating the boundary. That map was stipulated to form an integral part of the Treaty[482]. The Treaty then provided (in Article 14) that the Parties gave mutual recognition to each other's baselines. And it concluded by stating:

> "The boundaries indicated in this Treaty shall constitute a final and irrevocable confine between the sovereignties of the Argentine Republic and the Republic of Chile.
>
> The Parties undertake not to present claims or interpretations which are incompatible with the provisions of this Treaty."

Spanish text reads as follows:

> "Los límites señalados en este Tratado constituyen un confín definitivo e inconmovible entre las soberanías de la República Argentina y de la República de Chile.

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481 PM, paras. 5.6-5.7. See also Treaty of Peace and Friendship between Chile and Argentina, 29 November 1984. Available at: <http://treaties.un.org/doc/Publication/UNTS/Volume%201399/volume-1399-I-23392-English.pdf> accessed 8 October 2010.

482 See Article 17 of the Treaty and PM, Figure 5.1 at p. 175 thereto, where the Treaty map is reproduced.

> Las Partes se comprometen a no presentar reivindicaciones ni interpretaciones que sean incompatibles con lo establecido en este Tratado."

4.111 The Treaty with the map was then promptly enacted into Chilean law by means of Supreme Decree No. 401, and the agreement was registered with the United Nations by both parties on 17 June 1985.

4.112 Neither the Declaration of Santiago nor the Agreement on a Special Zone bears any resemblance to the delimitation treaty concluded between Chile and Argentina. Neither instrument stated that it was a boundary agreement; neither defined a boundary line in terms of co-ordinates, starting-points and endpoints; neither said anything about baselines; neither had any map attached to it illustrating a boundary; and neither indicated that there were boundary lines that constituted definitive and unmovable boundaries. Unlike the Chile-Argentina Agreement, which was registered with the United Nations the year after it was concluded, the Declaration of Santiago was only registered with the United Nations 24 years after its signature, in 1976[483]. The 1954 Agreement on a Special Zone was not registered until 2004, some 50 years after its conclusion and well after Peru had requested negotiations concerning the Parties' maritime delimitation. Even then, Chile's registration of the 1954 Agreement on a Special Zone was done unilaterally and without notice to the other Parties to the agreement, contrary to the procedures of the Permanent Commission for the South Pacific[484]. Once again, this shows that Chile did not comport itself in a manner consistent with the prior existence of an agreed maritime boundary with Peru.

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483 1952 Declaration of Santiago. **PM, Annex 47**.

484 PM, para. 4.114 and the Agreement Relating to a Special Maritime Frontier Zone, **PM, Annex 50**.

4.113 In 1986 – shortly after the Parties registered the Chile-Argentine Treaty with the United Nations – Chile issued a revised nautical chart covering the area off Tierra del Fuego (No. 1300) in order to illustrate the course of the delimitation line on the chart[485]. In contrast, Chile's nautical charts relating to the area in the vicinity of the land boundary with Peru continued to show no maritime boundary until 1994, 42 years after the conclusion of the Declaration of Santiago. Moreover, as noted in Chapter III, in 1997 when Chile notified its ratification of the 1982 Convention on the Law of the Sea to the United Nations, Chile issued a statement specifically referring to its maritime boundary agreement with Argentina, but made no similar mention of any maritime boundary with Peru[486].

4.114 Once again, all of this is passed over in silence in Chile's Counter-Memorial. Yet the facts are clear, and they provide a compelling indication that Chile did not consider that either the 1952 Declaration of Santiago or the 1954 Agreement on a Special Zone had established a maritime boundary between the Parties.

E. The Absence of a Maritime Boundary on Chile's Maps

4.115 Peru's Memorial pointed out that for over 40 years after the 1952 Declaration of Santiago was signed, Chile never issued a single official map indicating that a maritime boundary existed between the Parties[487]. No map depicting a boundary was published after the 1947 Proclamation; no map showing a boundary appeared after the 1952 Declaration of Santiago or the 1954

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485 See PM, Figure 5.22 at page 187.

486 See para. 3.124 above.

487 PM, paras. 5.11-5.32.

Agreement on a Special Zone; and no map was prepared illustrating the course of a boundary following the conclusion of the 1968-1969 light tower arrangements.

4.116 Chile has undoubtedly scoured its files to find an official map depicting a maritime boundary with Peru in response to Peru's Memorial. It has been unsuccessful. All that Chile is able to furnish is a figure in Volume VI of its Counter-Memorial (Figure 8) illustrating what it labels as the "seaward extent of maritime zones of Chile and Peru at the time of the Santiago Declaration". However, this is a manufactured graphic generated by Chile solely for purposes of this case. Throughout the 1950s, 1960s, 1970s and 1980s, Chile issued no map showing a dividing line along a parallel of latitude.

4.117 As Peru has demonstrated, official nautical charts issued by Chile in 1966, 1973, 1979 and 1989 all were conspicuous in failing to depict any maritime boundary with Peru[488]. Indeed, to the extent that Peru has been able to locate any Chilean map showing some kind of boundary extending out to sea during this period, there is only a 1980 Physical and Touristic Map published by an entity called DIRCATEC, which is reproduced as **Figure R-4.4**. It shows a boundary line extending a short distance out to sea in a direction roughly perpendicular to the general direction of the coast similar to the equidistance line. It may be noted that the same kind of perpendicular line is also depicted on a map issued by the Institute Geographic National of France in 2007 prior to the institution of these proceedings, reproduced as **Figure R-4.5**.[489]

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[488] See **Figure R-2.13** in Vol. III to this Reply, and PM, Figures 5.19 (p. 183), 5.20 (p. 185) and 5.23 (p. 189).

[489] The area in dispute also appears on a map prepared by the Flanders Marine Institute published in 2009. Available at: <http://www.vliz.be/vmdcdata/marbound> accessed 8 October 2010. (**Figure R-4.6** in Vol. III).

4.118 Moreover, the large-scale charts issued by Chile for the Arica area in 1966, 1973 and 1989 also depicted the land boundary extending past Boundary Marker No. 1 in a southwest direction along the boundary arc up to the point where the 10-kilometre arc reached the sea, as agreed by the Parties in the 1929 Treaty of Lima and the 1930 Identical Instructions to the joint Commission. As discussed in Chapter II, these maps completely undermine Chile's claim that Boundary Marker No. 1 is the terminus of the land boundary[490].

4.119 It was only in 1992, some six years after Peru had indicated in diplomatic correspondence that it was appropriate for the Parties to address the question of concluding a formal and definitive delimitation of their maritime spaces, that Chile began to show the parallel of latitude as a kind of boundary on some of its maps. Even then, Chile's position was ambiguous and inconsistent. The first such map showing a line drawn along the parallel was a map produced by the Chilean Hydrographic Office in 1992[491]. It was a very small-scale map purporting to illustrate Chile's claim to a "Presential Sea" (*Mar Presencial*). There is a thin red line extending seawards between Peru and Chile on that map, but its purpose is not explained on the map.

4.120 As for Chile's nautical charts, they only started to change in 1994, when a dotted line began to appear offshore between Peru and Chile on nautical Chart 1000[492]. No explanation was given as to the provenance of this line in the legend to the chart, or why Chile felt it necessary to change its maps. The scale of the chart was also too small to be able to make out the course of the land boundary in the area where it meets the sea.

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490 See paras. 2.60-2.61 above.

491 PM, para. 5.25 and PM, Figure 7.3 (p. 113) to Vol. IV thereto.

492 PM, Figure 5.24 at p. 191.

PHYSICAL AND TOURISTIC MAP OF CHILE: 1980

Figure R-4.4

AMÉRIQUE DU SUD: 2007

(Published by: Institut Geographique National de France)

Figure R-4.5

4.121 Chile further amended its charts in 1998 when it issued a new, and larger-scale, chart (No. 1111) covering the Port of Arica area[493]. This chart not only purported to show a maritime boundary extending along a parallel of latitude, it changed the course of the land boundary from what had hitherto been depicted on earlier Chilean charts. Instead of following the 10-kilometre radius arc up to the coast, the 1998 chart erased the part of the land boundary that Chile had previously drawn along the arc between *Hito No. 1* and the coast. In other words, Chile recognized that it could only justify its maritime boundary claim by altering the land boundary provided for in the 1929 Treaty of Lima that had been previously depicted on its own maps and charts. For ease of reference, Chile's 1998 Chart is reproduced here as **Figure R-4.7**. It was formally protested by Peru[494]. When Chile thereafter deposited charts with the United Nations in 2000 referring to the parallel 18°21'00" as the maritime boundary between Peru and Chile, Peru also promptly registered its objection[495].

4.122 Even then, Chile's mapping practice continued to be inconsistent. In 2003, for example, Chile's Hydrographic Service published a catalogue of its nautical charts together with a map showing their coverage. The map in question appears in **Figure R-4.8**. In the south, the 1984 maritime boundary with Argentina is clearly shown by means of a dashed line. In the north, however, there is no similar boundary line extending seaward of the Peru-Chile land boundary.

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493 PM, Figure 5.25 at p. 81 to Vol. IV thereto.

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

495 See 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 18º21'00", referred to by the Government of Chile as the maritime boundary between Chile and Peru. **PM, Annex 78**, and PM, Figure 2.6 (p. 19) in Vol. IV thereto.

4.123 Despite the fact that these developments were canvassed in Peru's Memorial, Chile's Counter-Memorial has chosen not to address them. Chile offers no explanation as to why it issued no maps for over 40 years showing the existence of a maritime boundary with Peru if that boundary had been delimited in 1952. Nor does Chile explain why it unilaterally decided to amend its maps in the 1990s (after Peru had proposed boundary negotiations) to show a purported boundary, or why it felt compelled in 1998 to change the course of the land boundary in a manner that was at odds with the provisions of the 1929 Treaty of Lima.

4.124 These are further examples of Chile's tendency to ignore elements of its own conduct that are incompatible with its case. Chile's conduct in this respect is highly revealing. The evidence discussed above shows that Chile did not act in a way consistent with the claim advanced in its Counter-Memorial that there is an agreed maritime boundary with Peru dating from the signature of the 1952 Declaration of Santiago. Nor did Chile at any time prior to 1998 purport to show the land boundary either stopping at Boundary Marker No. 1 or continuing past that point along a parallel of latitude. In short, Chile's map evidence attests to the fact that Chile did not consider that it had a delimited maritime boundary with Peru. It was only in recent years that Chile began to alter its cartography in a self-serving way in an effort to manufacture a case that a maritime boundary already existed.

RADA Y PUERTO DE ARICA: 1998

(Chilean Nautical Chart 1111)

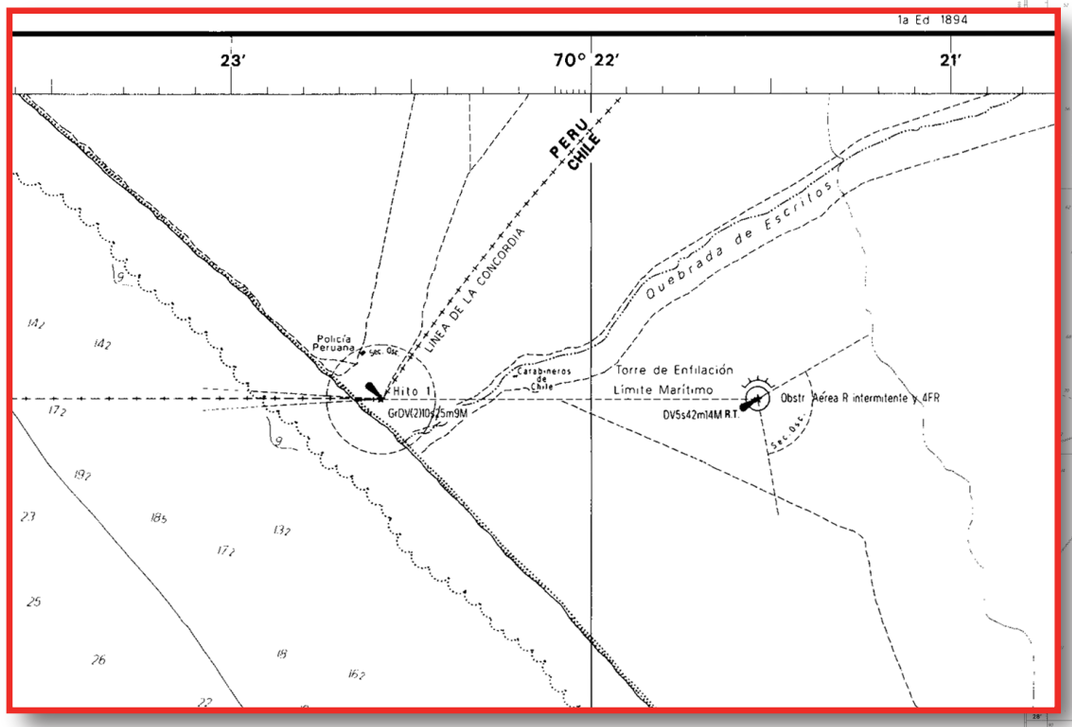

Figure R-4.7

CHILE'S HYDROGRAPHIC SERVICE CATALOGUE: 2003

(Available at www.shoa.cl, accessed August 2010)

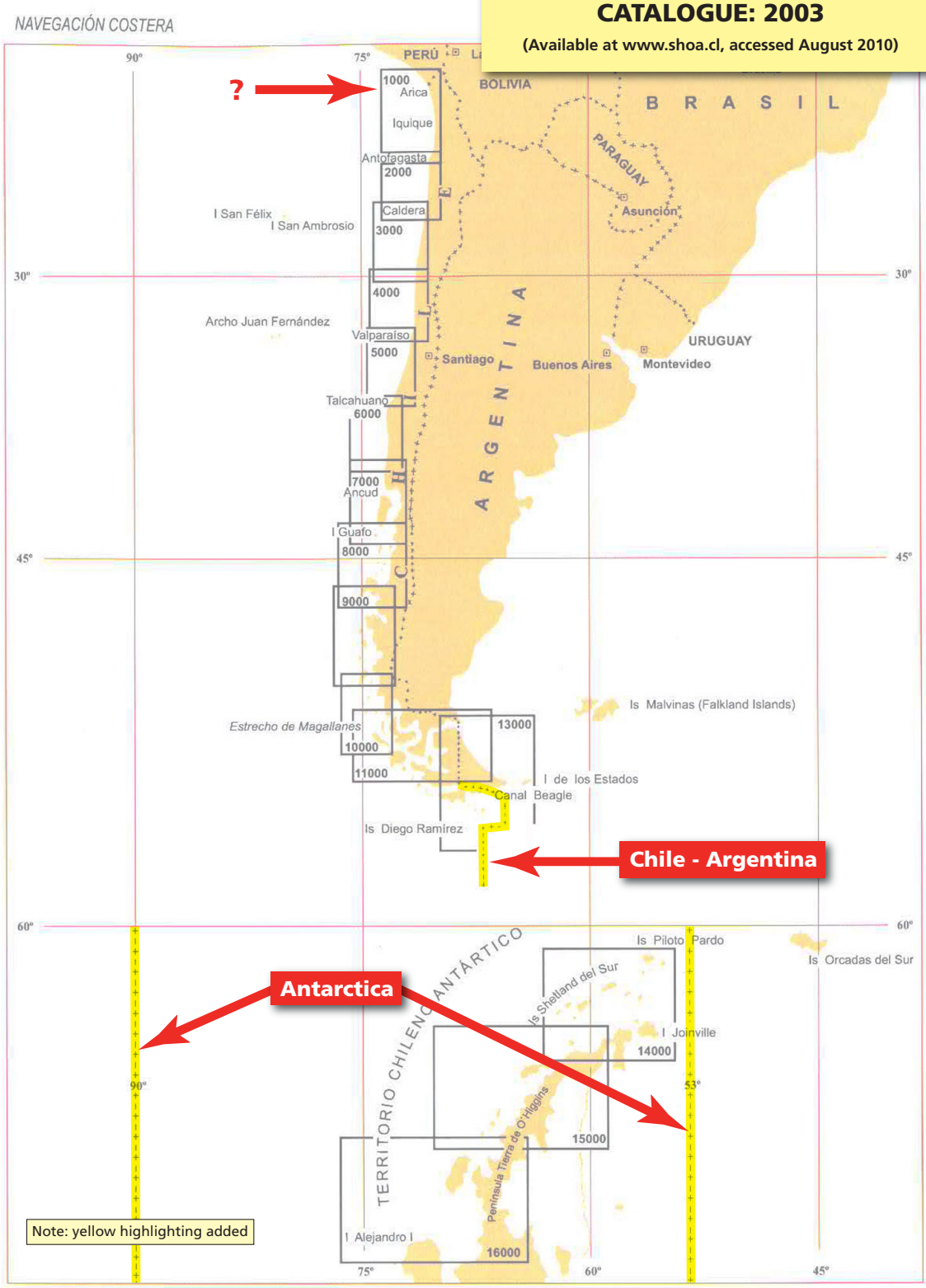

Figure R-4.8

VI. Peru's Maps

4.125 Unlike Chile, which avoided discussing its own maps in its Counter-Memorial, Peru's Memorial addressed the official cartography of both Parties[496]. There, it was noted that Peru has not published any official map depicting a maritime boundary between itself and Chile[497]. To illustrate the point, Peru produced a number of maps published by the Military Geographic Institute of Peru in the 1950s and 1960s which showed no maritime boundary[498], as well as a map published by the Ministry of Defence and the National Geographic Institute in the 1989 *Atlas of Peru*, which also depicted no maritime boundary.[499]

4.126 Chile's Counter-Memorial does not dispute the fact that there are no official Peruvian maps indicating a pre-existing maritime boundary between the Parties. Instead, Chile asserts that there are numerous depictions of the southern boundary of Peru's maritime zone published by "private entities" (mostly for secondary schools) which received the authorization of Peru's Ministry of Foreign Affairs[500].

4.127 Relying on these privately prepared maps, Chile cites the Court's Judgment in the *Frontier Dispute* case for the proposition that such maps can be said to represent "a physical expression of the will of the State", and thus to constitute a recognition on Peru's part of the existence of a maritime boundary[501].

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496 PM, paras. 5.10-5.32.

497 PM, para. 5.10.

498 PM, Vol. IV, Figures 5.3 (p. 37), 5.4 (p. 39) and 5.5 (p. 41).

499 PM, Vol. IV, Figure 5.6 (p. 43).

500 CCM, para. 3.144. and Vol. VI, Figures 43-63.

501 CCM, para. 4.43, citing *Frontier Dispute, Judgment, I.C.J. Reports 1986*, pp. 582-583, paras. 53, 56.

Chile also refers to the Commission's Award in the *Eritrea-Ethiopia* boundary case to support the contention that such maps represent admissions against interest by Peru – i.e., "when the State adversely affected has itself produced and disseminated it, even against its own interest"[502].

4.128 These arguments miss the mark. In the first place, of the twenty-six school texts that Chile annexes to its Counter-Memorial, only five include the "authorization" of the Peruvian Ministry of Foreign Affairs, and four of those five were published by the same author[503]. The captions on these maps show the author's graphical interpretation of Peru's 1947 supreme decree, not any international boundary agreed under the 1952 Declaration of Santiago. In contrast, as shown on Figure 38-1 in Chile's Counter-Memorial, the author set out the specific boundary instruments which had established Peru's land boundaries with Ecuador, Colombia, Brazil, Bolivia and Chile shown on the map. These were the "international boundaries" to which the approval of Peru's Foreign Ministry related.

4.129 Moreover, in referring to a number of privately prepared maps that have received the Foreign Ministry's "authorization" under Supreme Decree No. 570 of 1957[504], Chile overlooks the fact that Peruvian Ministerial Resolution No. 458 issued shortly thereafter (on 28 April 1961) expressly stipulates that any such authorization –

> "… does not imply, in any way, the approval of concepts and commentaries relating to the historic and cartographic material, which are of exclusive responsibility of their authors."[505]

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502 CCM, para. 4.43, citing the *Decision regarding delimitation of the border between Eritrea and Ethiopia*, Award, 13 April 2002, RIAA, Vol. XXV, p. 116, para. 3.28.

503 Figures 37-40 in Vol. VI to CCM.

504 Peru's Supreme Decree No. 570 of 5 July 1957. **PM, Annex 11**.

505 Peru's Ministerial Resolution No. 458 of 28 April 1961, Issued by the Ministry of Foreign Affairs of Peru. **PR, Annex 9**.

4.130 The maps referred to by Chile cannot, therefore, be deemed to represent official maps issued by Peru, or to reflect the Government's position as to the accuracy of what they depict. As the Ministerial Resolution notes, elements produced by private authors remain the exclusive responsibility of the author.

4.131 It follows that Chile's assertion that privately published maps represent "a physical expression of the will of the State" is completely misplaced. Chile fails to point out that the Court, in the *Frontier Dispute* case, carefully qualified what it said about maps that could be said to fall into this category. The relevant passage from the Court's Judgment, which Chile omits to cite, reads as follows:

> "This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts."[506]

4.132 As has been seen, the Parties did not annex to the official text of the 1952 Declaration of Santiago (or the 1954 Agreement on a Special Zone) any map which formed an integral part of those agreements. Thus, there are no such maps that could be said to reflect the "physical expressions of the will of the State or States concerned". In contrast, as has also been shown, Chile and Argentina did annex such a map to their boundary agreement, and that map was stated to form an integral part of the agreement. In that instance, there clearly exists a map evidencing the expression of the will of the Parties. Nothing of the kind exists as between Chile and Peru.

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[506] *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 582, para. 54.

4.133 Nor can privately issued maps be construed as constituting "admission against interest" on the part of Peru. In the passage quoted by Chile from the Commission's Award in the *Eritrea-Ethiopia* case, the Commission made it clear that it was referring to maps which the State adversely affected "has itself produced and disseminated"[507]. Here, there are no maps produced and disseminated by Peru showing a maritime boundary between the Parties.

4.134 To the extent there are any maps which may be said to reflect "admission against interest" in this case, they are the official charts published by Chile during the 40 years following the Declaration of Santiago, discussed earlier in this chapter, all of which showed no maritime boundary.

4.135 Peru's official cartography, in contrast, has remained consistent. This is evident not only from the maps produced in Peru's Memorial, but also by a number of additional maps published by official sources over the last 40 years. Three examples of this practice may be cited here.

4.136 **Figure R-4.9** is a reproduction of a "Political Map of Peru" prepared by the Peruvian National Institute for Planification in 1970 and published in the Peruvian *Atlas* for that year. It does not display any maritime boundary with Chile. To the contrary, Peru's maritime domain extends well south of the terminal point on the land boundary and south of any putative parallel of latitude passing through Boundary Marker No. 1[508].

4.137 **Figure R-4.14** is a map published by Peru's Ministry of Fisheries in 1973 which depicts Peru's 200-mile limit and the area of the principal concentration of certain fish species. It, too, extends south of the land boundary with Chile and does not show a maritime boundary.

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507 CCM, para. 4.43.

508 A Hydrographic Map published the same year shows the same thing (**Figure R-4.10** in Vol. III). Moreover, there are also numerous examples of privately published maps that do not depict a boundary, contrary to the impression Chile seeks to convey. See **Figures R-4.11**, **R-4.12** and **R-4.13** in Vol. III.

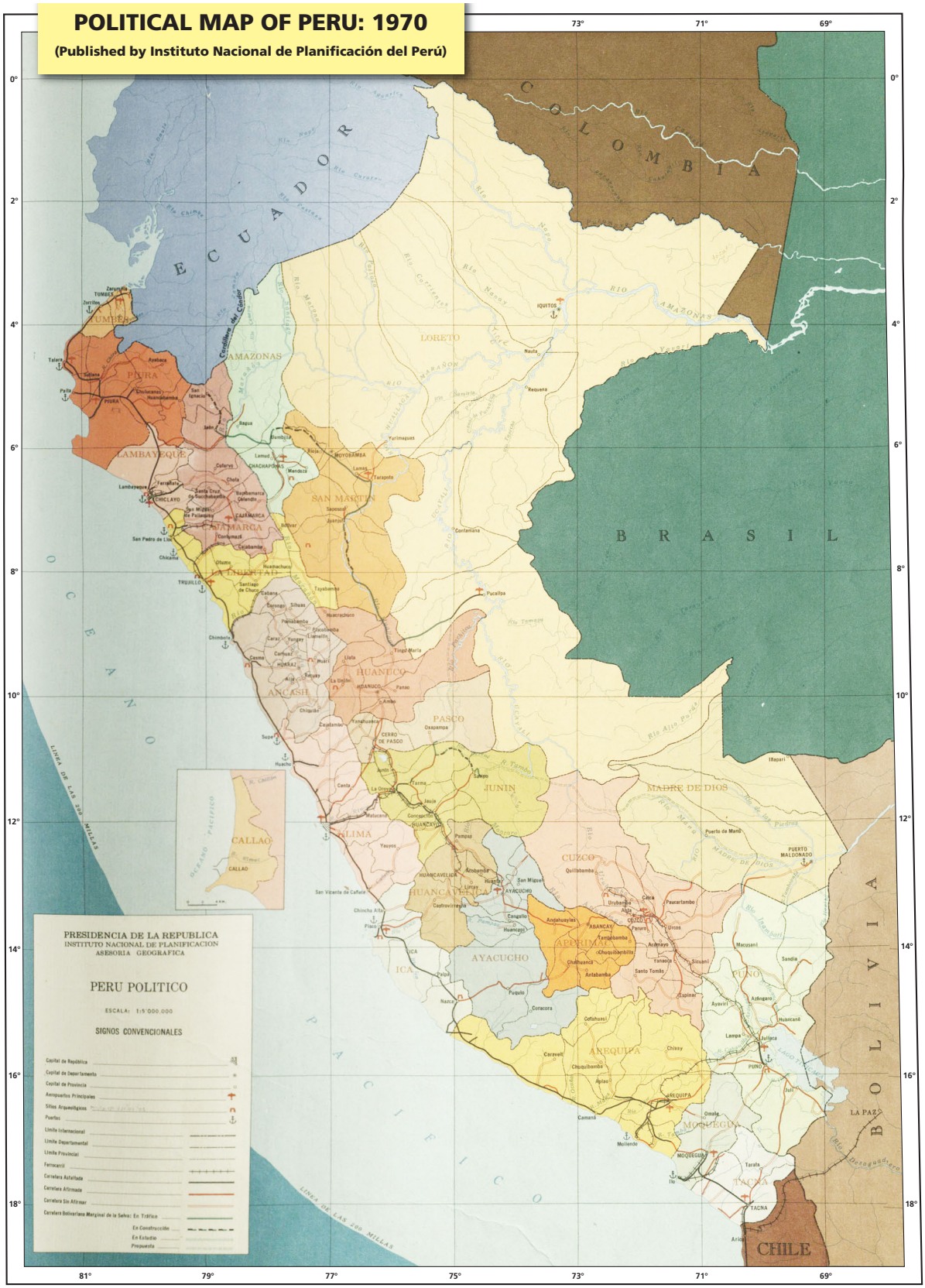
POLITICAL MAP OF PERU: 1970
(Published by Instituto Nacional de Planificación del Perú)
ECUADOR
COLOMBIA
BRASIL
BOLIVIA
CHILE
OCEANO PACIFICO
PRESIDENCIA DE LA REPUBLICA
INSTITUTO NACIONAL DE PLANIFICACION
ASESORIA GEOGRAFICA
PERU POLITICO
ESCALA: 1:5'000.000
SIGNOS CONVENCIONALES
TUMBES
PIURA
LAMBAYEQUE
AMAZONAS
LORETO
SAN MARTIN
CAJAMARCA
LA LIBERTAD
ANCASH
HUANUCO
PASCO
JUNIN
CALLAO
LIMA
HUANCAVELICA
ICA
AYACUCHO
CUZCO
MADRE DE DIOS
APURIMAC
AREQUIPA
MOQUEGUA
PUNO
TACNA
LA PAZ
IQUITOS
PUCALLPA
PUERTO MALDONADO
LINEA DE LAS 200 MILLAS

Figure R-4.9

MAP PUBLISHED BY PERU'S MINISTRY OF FISHERIES: 1973

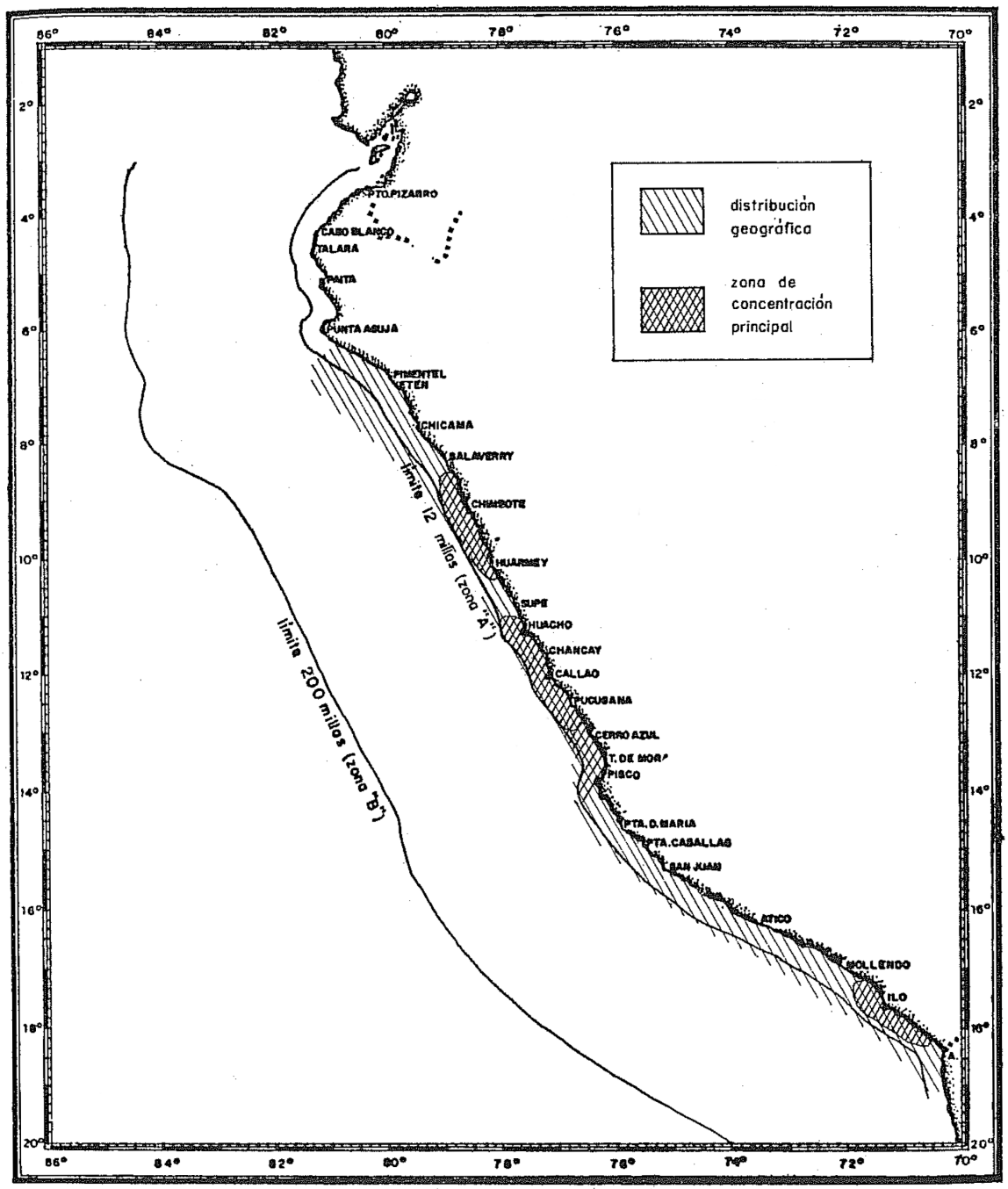

Figure R-4.14

4.138 **Figure R-4.15** is another "Political Map of Peru" prepared by the National Geographic Institute in 1989. Once again, the depiction of Peru's maritime zone is shown in a similar way to the maps discussed above – i.e., there is no maritime boundary, and Peru's maritime spaces extend considerably to the south of the land boundary terminus along the coast[509].

4.139 Maps prepared by private Peruvian authors for scholarly works also depict Peru's maritime entitlements extending south of the parallel relied on by Chile. For example, a map included in a book published in 1977 by Guillermo Faura Gaig[510] and reproduced in a 1979 book authored by Professor Eduardo Ferrero Costa[511], shows both a perpendicular line extending from the land boundary, as well as the equidistance, or median, line between Peru and Chile (**Figure R-4.17**).

4.140 In short, it is Chile, not Peru, that has tried to change the cartographic depiction of the relevant area lying off the coasts of the Parties, by belatedly amending its official charts in the 1990s to depict a maritime boundary where none existed before and to alter the course of the land boundary where it meets the sea. Such a self-serving practice cannot possibly support Chile's thesis that a maritime boundary between the Parties has been in existence since 1952.

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509 See also the "Hydrographic Map" published in the 1989 *Peruvian National Atlas*, **Figure R-4.16** in Vol. III.

510 Faura Gaig, Guillermo S.: *El Mar Peruano y sus límites*, Lima, Amauta, 1977.

511 Ferrero Costa, Eduardo, *op. cit.* See also **Figure R-4.18** in Vol. III.

VII. Conclusions

4.141 Chile has devoted a good deal of space to the presentation of material that shows that the 1954 fisheries policing line was implemented by both States and was used on occasion for other purposes. It has produced no evidence whatsoever to show that the fisheries policing line was based upon an international maritime boundary agreed in 1952. It has offered no explanation for its response to Peru's 1986 invitation to negotiate an international maritime boundary, in which Chile said that "studies on this matter shall be carried out". Nor has it explained how it is that a supposedly "agreed" international boundary can be detected only through the carrying out of "studies". Chile has failed to show that the practice of the two States in the years after the Declaration of Santiago evidences an agreement in the Declaration of Santiago that the parallel of latitude should be used as an international maritime boundary between Peru and Chile.

4.142 This chapter has shown that Chile's argument that the subsequent practice of the Parties after 1952 establishes their agreement that the Declaration of Santiago had delimited the maritime boundary between the Parties is completely without merit –

(a) With respect to the 1954 Agreement on a Special Zone, it was only one of six fishery-related agreements concluded at that time that were focused on the defence of the 200-mile claims that had been the subject-matter of the Declaration of Santiago.

(b) The purpose of the 1954 Agreement on a Special Zone was practical in nature: it was designed to avoid fishing vessels poorly equipped with navigation instruments inadvertently fishing off the coasts of the other State, and to avoid incidents at sea, by creating zones of tolerance. It was not based on the implicit assumption that point IV of the Declaration of Santiago represented a delimitation of international maritime boundaries.


POLITICAL MAP OF PERU: 1989
(Published By Instituto Geográfico Nacional del Perú)
ECUADOR
COLOMBIA
BRASIL
BOLIVIA
CHILE
OCEANO PACIFICO
MAR DE GRAU
LINEA DE LAS 200 MILLAS
CALLAO
REPUBLICA DEL PERU
INSTITUTO GEOGRAFICO NACIONAL
PROYECTO ESPECIAL ATLAS DEL PERU
PERU POLITICO
ESCALA: 1:5'000,000
SIGNOS CONVENCIONALES
Capital de República
Capital de Departamento
Capital de Provincia
Límite Internacional
Límite Departamental
Límite Provincial

Figure R-4.15

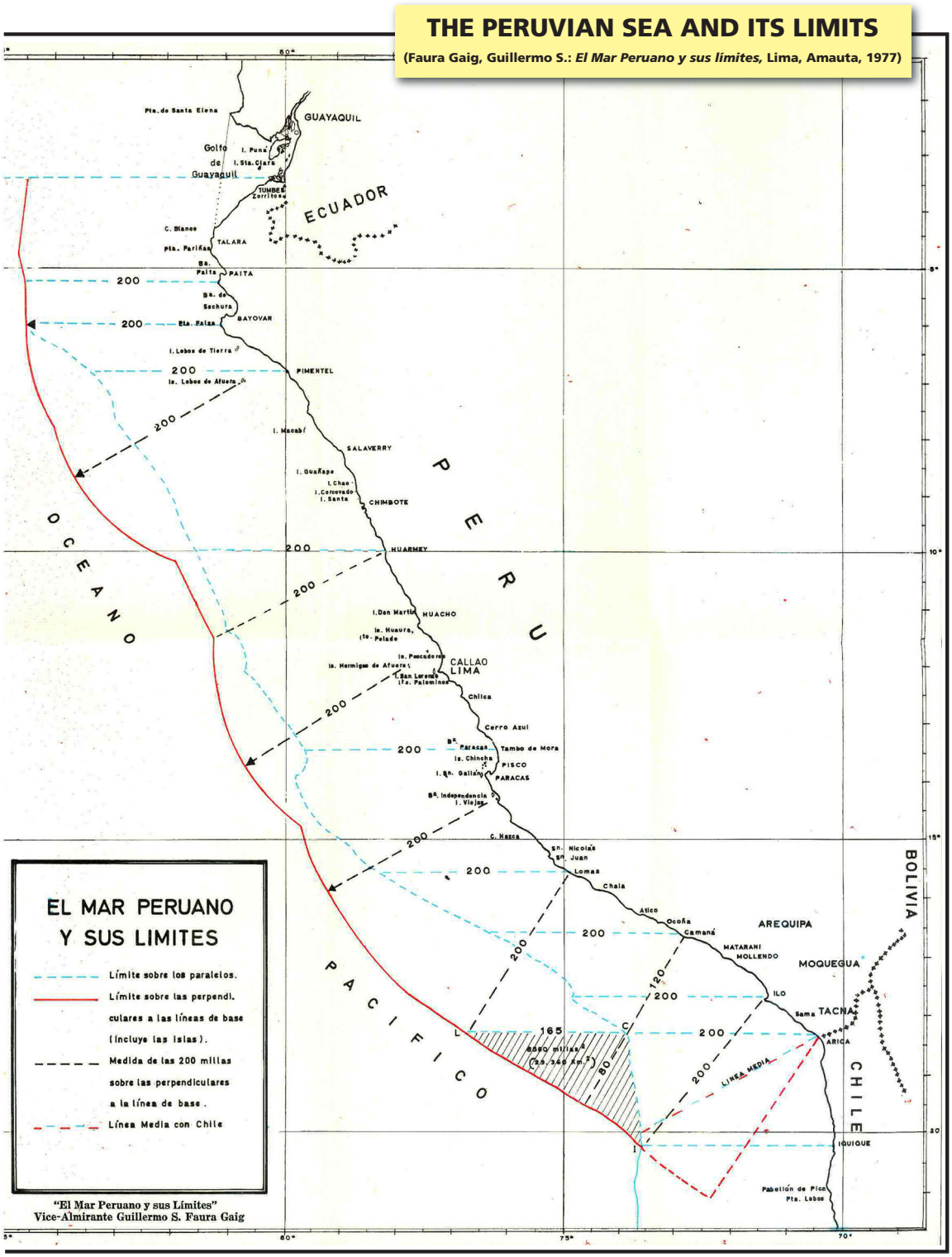
THE PERUVIAN SEA AND ITS LIMITS
(Faura Gaig, Guillermo S.: El Mar Peruano y sus limites, Lima, Amauta, 1977)
EL MAR PERUANO
Y SUS LIMITES
Límite sobre los paralelos.
Límite sobre las perpendi. culares a las líneas de base (incluye las islas).
Medida de las 200 millas sobre las perpendiculares a la línea de base.
Línea Media con Chile
"El Mar Peruano y sus Límites"
Vice-Almirante Guillermo S. Faura Gaig
ECUADOR
PERU
OCEANO PACIFICO
BOLIVIA
CHILE
GUAYAQUIL
Golfo de Guayaquil
TUMBES
TALARA
PAITA
BAYOVAR
PIMENTEL
SALAVERRY
CHIMBOTE
HUARMEY
HUACHO
CALLAO
LIMA
Chilca
Cerro Azul
Tambo de Mora
PISCO
PARACAS
Lomas
Chala
Atico
Ocoña
Camaná
AREQUIPA
MATARANI
MOLLENDO
MOQUEGUA
ILO
TACNA
ARICA
IQUIQUE
LINEA MEDIA
200
165
120
80

Figure R-4.17

(c) There is a complete absence of any official record emanating from Chile or Peru of the establishment of such maritime boundary at the time. While the post-1954 practice of the Parties, including their arrangements in 1968-1969 to erect light towers near the boundary, relied on the parallel for purposes of the policing of fishing to avoid friction between their respective fishing communities, this practice did not and could not convert what was a zone of tolerance into a permanent all-purpose maritime boundary.

(d) The 1986 Bákula Memorandum made it clear that Peru did not consider that there was a pre-existing maritime boundary between the Parties. That is why Peru invited Chile to discuss and agree such a boundary. Chile did not reject that proposal, but rather stated that studies on the matter would be carried out.

(e) Chile's own practice refutes the notion that Chile considered that there was an established maritime boundary between the Parties. Chile's internal legislation did not refer to the Declaration of Santiago as having delimited such a boundary. And it is clear in particular that no maritime boundary was agreed that had, as its starting-point on the coast, a point located exclusively in Peruvian territory.

(f) When Chile genuinely intended to enter into a maritime boundary agreement – as it did with Argentina in 1984 – it signed an agreement to that effect setting out the precise course of the boundary, annexed a map of the boundary line to the agreement, promptly registered the agreement with the United Nations, immediately published its own official maps depicting the boundary, and referred to the agreement in its internal laws. With respect to the situation between Chile and Peru, Chile took no such steps.

(g) Chile's own official mapping practice confirms the absence of any maritime boundary with Peru. No maritime boundary began to appear on Chilean charts until 1992, forty years after the Declaration of Santiago and six years after Peru had sent the 1986 Bákula representation.

(h) Contrary to Chile's cartography, Peru's official mapping practice has remained consistent in not depicting a maritime boundary between the two States.

(i) The third-party cartographic material cited by Chile was for the most part copied from an earlier publication by the Office of the Geographer of the United States State Department, which was itself inaccurate; and it has no probative value as to the intentions of the Parties to this case.

CHAPTER V

THE DELIMITATION LINE

I. Introduction

5.1 Peru's Memorial devoted a full chapter to a discussion of the principles and rules of international law governing maritime delimitation and their application to the facts of the case[512]. In that pleading, Peru demonstrated that an equidistance line drawn from the terminal point on the Parties' land boundary (Point Concordia) out to a distance of 200 nautical miles is solidly based on the law of maritime delimitation and produces an equitable result which reflects the relevant circumstances characterizing the area to be delimited between Peru and Chile.

5.2 Peru's position with respect to the principles upon which maritime delimitation should be based has not emerged for the first time in this case. Throughout the negotiation of the 1982 Convention on the Law of the Sea, Peru expressed the view that maritime delimitation should be based on three basic elements: *First*, the need to achieve a result in harmony with equity or equitable principles; *Second*, use of the median or equidistance line as a general method; *Third*, adjustment of the equidistance line if there are any relevant or special

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[512] PM, Chapter VI, pp. 195-241.

circumstances that need to be taken into account to ensure that the principle of equity is respected[513].

5.3 Historically, therefore, Peru did not align itself with either the group of countries that favoured reference being made to equidistance in the 1982 Convention on the Law of the Sea or the group that espoused "equitable principles". Rather, Peru advanced proposals which sought to find a middle ground by taking into account the basic principles referred to above.

5.4 Peru's position in the past, as well as its position in this case, has remained consistent. Peru fully respects customary international law on the issue of maritime delimitation, and its claim in this case is grounded in the application of that law to the facts.

5.5 Chile has chosen not to address in its Counter-Memorial the points set out in Peru's Memorial. Chile's position rests solely on the erroneous proposition that the Parties delimited their maritime boundary in the 1952 Declaration of Santiago.

5.6 In this chapter, Peru will refrain from repeating what it said in its Memorial, which stands largely unrebutted. Rather, Peru will first briefly recall the reasons why its delimitation position in this case respects the principles and rules of international law (Section II). Next, Peru will explain the fundamental inequitableness of Chile's delimitation claim (Section III). Peru will also address the few issues that Chile does raise in its Counter-Memorial concerning the applicable law, and how the delimitation exercise in this case can be approached (Section IV). The chapter concludes with the conclusions (Section V).

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513 See para. 19 and footnote 19 above.

II. Peru's Position Respects the Principles and Rules of International Law

5.7 Peru has previously noted that the overriding aim of maritime delimitation under customary international law is to achieve an equitable result. This principle was articulated by the Court as early as the 1969 *North Sea* cases, where the Court emphasized that "delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles."[514] It is also reflected in Articles 74 and 83 of the 1982 Convention on the Law of the Sea, which emphasize the need to reach an equitable solution.

5.8 The basic rule of maritime delimitation is clear. As the Court has held in numerous cases, it finds expression in the "equidistance/special circumstances" rule, which is broadly equivalent to the "equitable principles/relevant circumstances rule"[515]. The application of this rule involves a two-step process: *First*, the establishment of a provisional equidistance line; *Second*, the assessment of the relevant circumstances characterizing the area to be delimited in order to determine whether they justify any adjustment being made to the provisional line. In some cases where the relevant area can be readily identified, proportionality (or disproportionality) is applied as an *ex post facto* test of the equitableness of the result.

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514 *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 46, para. 85.

515 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 111, para. 231; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 441, para. 288; *Case Concerning Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment of 3 February 2009*, p. 37, para. 116.

5.9 In its most recent decision in a case concerning maritime delimitation – the *Romania-Ukraine* case – the Court reaffirmed these principles. It is also reiterated that it would proceed in defined stages, which it noted "have in recent decades been specified with precision."[516] The Court's Judgment thus stated the following:

> "First, the Court will establish a provisional delimitation line, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place."[517]

In a passage which is particularly opposite to the present case by virtue of the fact that the coasts of Peru and Chile are adjacent to each other, the Court added:

> "So far as delimitation between adjacent coasts is concerned, an equidistance line will be drawn unless there are compelling reasons that make this unfeasible in the particular case"[518].

5.10 Peru has applied these principles to the delimitation with Chile. In its Memorial, Peru identified the relevant coasts of the Parties, including the basepoints on the Parties' baselines which control the course of the equidistance line[519]. Peru next described the relevant area within which the delimitation is to be effected[520]. It then discussed the starting-point for the delimitation, which is Point Concordia – the terminal point on the land boundary where it meets the sea[521].

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516 *Case concerning Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment of 3 February 2009*, p. 37, paras. 115 and 116.

517 *Ibid.*, para. 116.

518 *Ibid.*

519 PM, paras. 6.20-6.28.

520 PM, paras. 6.29-6.31.

521 PM, paras. 6.32-6.46 and Chapter II of this Reply.

5.11 Following this, Peru addressed the first step in the delimitation process – the construction of the provisional equidistance line. As is clear from any map of the area, the distinguishing characteristic of the Parties' coasts bordering the relevant area is that they change direction at almost the same point where the terminal point of the land boundary is located. Although they face in different directions, the relevant coasts of the Parties to the north and south of the land boundary are smooth. There are no islands or promontories that distort the course of the equidistance line.

5.12 In these circumstances, the construction of the provisional equidistance line is a straightforward exercise. The line, together with its control points, is shown on **Figure R-5.1**, which was included as Figure 6.6 (p. 225) to Peru's Memorial.

5.13 As for the second stage of the process – consideration of the relevant circumstances – Peru has shown that the principal category of potentially relevant circumstances concerns the geographic configuration of the area being delimited. In this case, the coastal geography of the Parties is uncomplicated. It is also balanced in terms of the length of each Party's relevant coast to the north and south of the land boundary. There is no disparity in the lengths of those coasts bordering the relevant area or offshore islands that might justify a shifting of the equidistance line[522].

5.14 Given this situation, and bearing in mind that a coastal bisector method produces virtually the same result as the application of the equidistance method (as shown by Figure 6.7 to Peru's Memorial[523]), there is no need for any adjustment to be made to the provisional equidistance line. In short,

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[522] PM, paras. 6.53-6.59.

[523] PM, Figure 6.7 (p. 227) and paras. 6.17 and 6.51.

the geographic characteristics of this case present a text book example of a situation where the application of the equidistance method produces a fair and equitable result.

5.15 Peru also applied the proportionality test to the equidistance line[524]. As **Figure R-5.2** shows, the equidistance line produces a result that fully satisfies the test of proportionality in so far as it accords to each Party maritime areas that are similar in size and commensurate with the length of their respective coasts.

III. The Inequitableness of Chile's Position

5.16 Chile has refrained from addressing any of these issues in its Counter-Memorial. There is no discussion of the relevant principles of law relating to maritime delimitation, no application of these principles to the geographic facts of the case, and no demonstration that Chile's parallel of latitude claim produces a result that is even colourably equitable.

5.17 The inequitableness of Chile's delimitation line stands out if reference is made to **Figure R-5.3**. As can be seen, Chile's line accords to itself a full 200-mile maritime extension projecting from its coast, including those parts of the coast lying near the land boundary. Peru, in contrast, suffers a severe cut-off effect as a result of the concave nature of the Parties' coasts bordering the delimitation area, and the fact that the parallel of latitude passes right in front of Peru's coast and thus falls much closer to that coast than to the coast of Chile[525].

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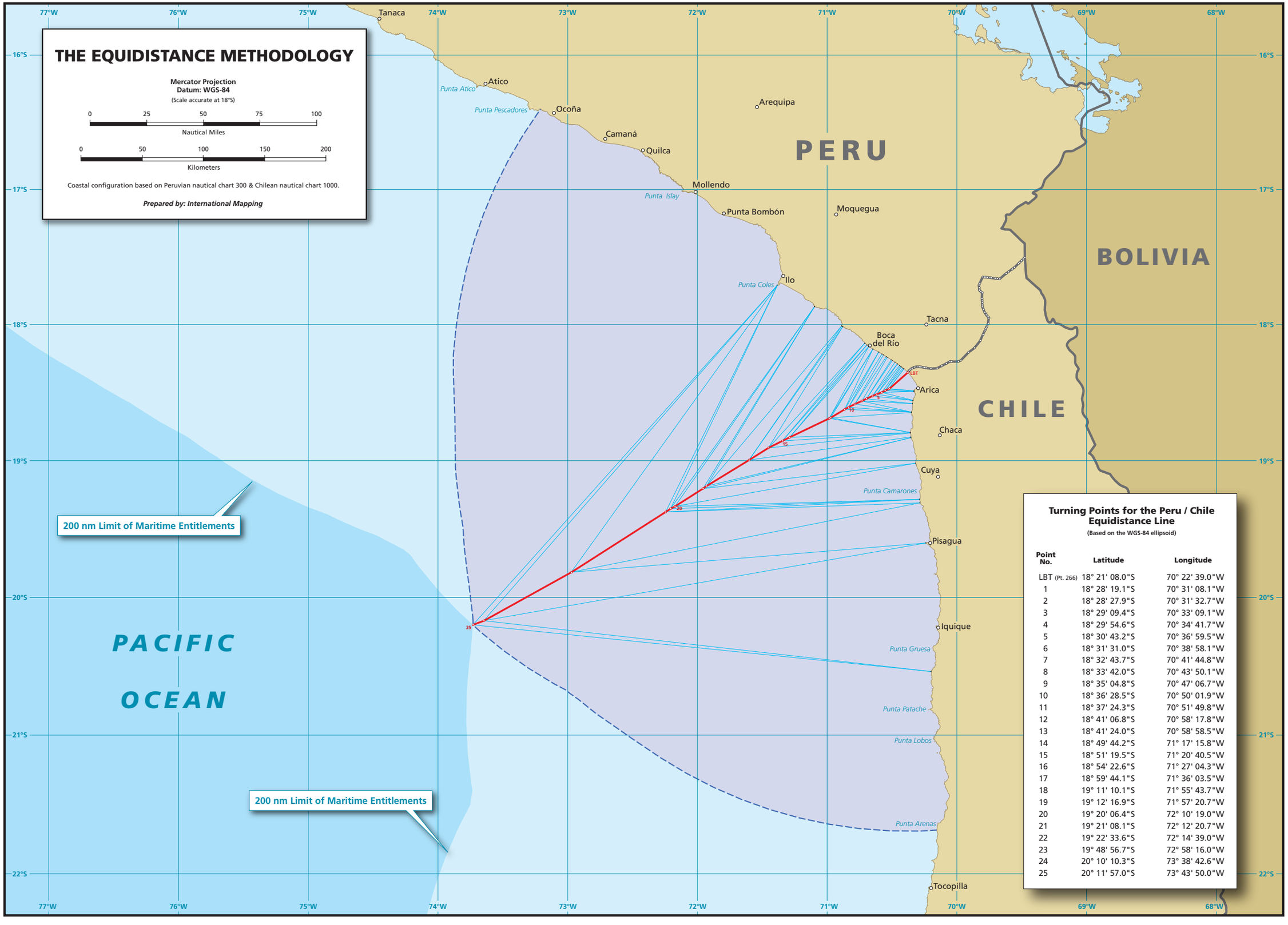
524 PM, paras. 6.69-6.75.

525 PM, paras. 6.61-6.67. In the Romania-Ukraine case, the Court observed that both Parties had argued that the other Party's claim cut off its own maritime entitlements. The Court noted, however, that: "[b]y contrast, the provisional equidistance line drawn by the Court avoids such a drawback as it allows the adjacent coasts of the Parties to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way. That being so, the Court sees no reason to adjust the provisional equidistance line on this ground." *Case Concerning Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment of 3 February 2009*, p. 61, para. 201.



Turning Points for the Peru / Chile Equidistance Line

(Based on the WGS-84 ellipsoid)

Point No.	Latitude	Longitude
LBT (Pt. 266)	18° 21' 08.0"S	70° 22' 39.0"W
1	18° 28' 19.1"S	70° 31' 08.1"W
2	18° 28' 27.9"S	70° 31' 32.7"W
3	18° 29' 09.4"S	70° 33' 09.1"W
4	18° 29' 54.6"S	70° 34' 41.7"W
5	18° 30' 43.2"S	70° 36' 59.5"W
6	18° 31' 31.0"S	70° 38' 58.1"W
7	18° 32' 43.7"S	70° 41' 44.8"W
8	18° 33' 42.0"S	70° 43' 50.1"W
9	18° 35' 04.8"S	70° 47' 06.7"W
10	18° 36' 28.5"S	70° 50' 01.9"W
11	18° 37' 24.3"S	70° 51' 49.8"W
12	18° 41' 06.8"S	70° 58' 17.8"W
13	18° 41' 24.0"S	70° 58' 58.5"W
14	18° 49' 44.2"S	71° 17' 15.8"W
15	18° 51' 19.5"S	71° 20' 40.5"W
16	18° 54' 22.6"S	71° 27' 04.3"W
17	18° 59' 44.1"S	71° 36' 03.5"W
18	19° 11' 10.1"S	71° 55' 43.7"W
19	19° 12' 16.9"S	71° 57' 20.7"W
20	19° 20' 06.4"S	72° 10' 19.0"W
21	19° 21' 08.1"S	72° 12' 20.7"W
22	19° 22' 33.6"S	72° 14' 39.0"W
23	19° 48' 56.7"S	72° 58' 16.0"W
24	20° 10' 10.3"S	73° 38' 42.6"W
25	20° 11' 57.0"S	73° 43' 50.0"W

Figure R-5.1

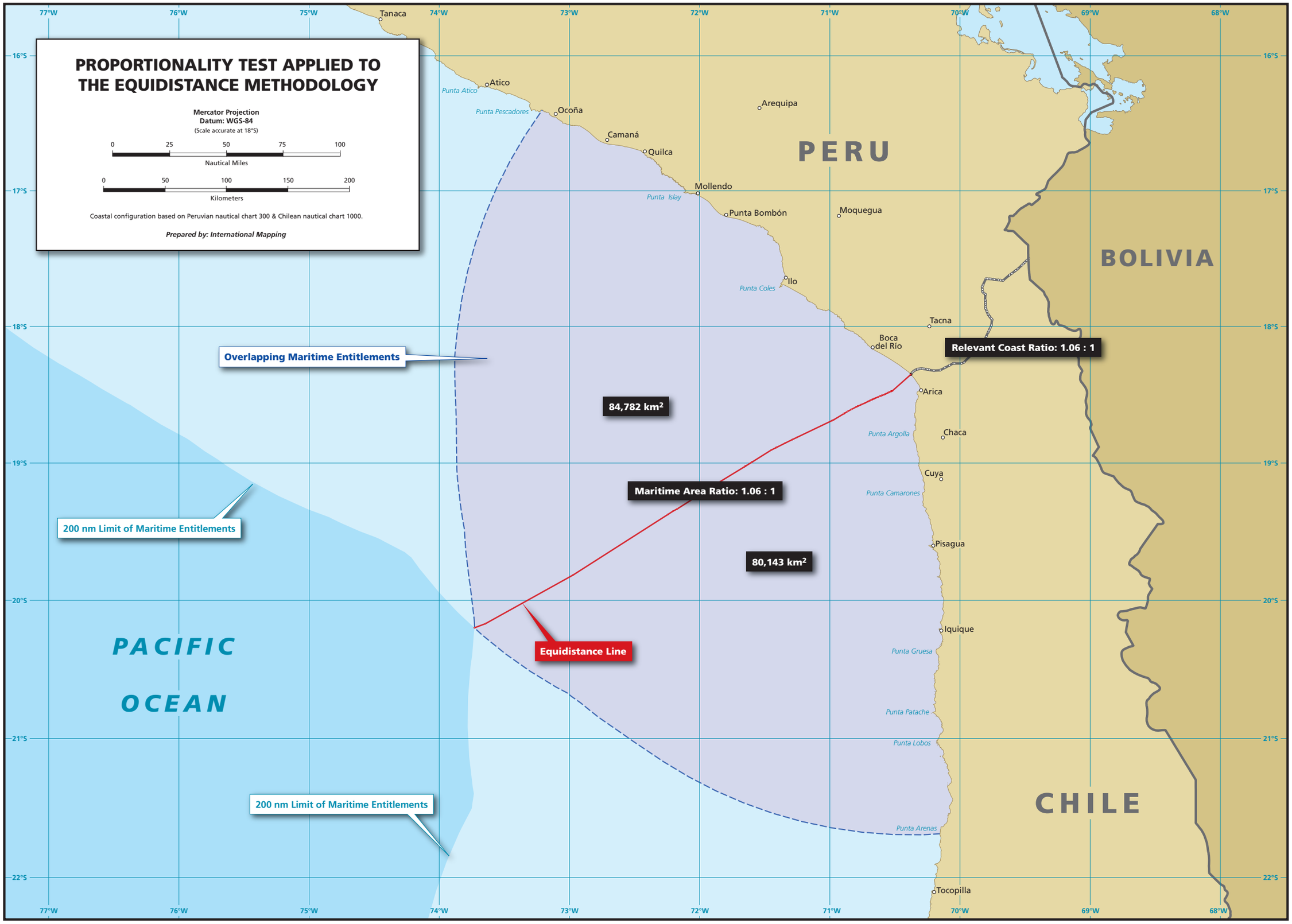

PROPORTIONALITY TEST APPLIED TO THE EQUIDISTANCE METHODOLOGY
Mercator Projection
Datum: WGS-84
(Scale accurate at 18°S)
0 25 50 75 100
Nautical Miles
0 50 100 150 200
Kilometers
Coastal configuration based on Peruvian nautical chart 300 & Chilean nautical chart 1000.
Prepared by: International Mapping
Overlapping Maritime Entitlements
84,782 km²
Relevant Coast Ratio: 1.06 : 1
Maritime Area Ratio: 1.06 : 1
80,143 km²
Equidistance Line
200 nm Limit of Maritime Entitlements
200 nm Limit of Maritime Entitlements
PERU
BOLIVIA
CHILE
PACIFIC OCEAN
Tanaca
Atico
Punta Atico
Ocoña
Punta Pescadores
Arequipa
Camaná
Quilca
Mollendo
Punta Islay
Punta Bombón
Moquegua
Ilo
Punta Coles
Tacna
Boca del Río
Arica
Punta Argolla
Chaca
Cuya
Punta Camarones
Pisagua
Iquique
Punta Gruesa
Punta Patache
Punta Lobos
Punta Arenas
Tocopilla
77°W
76°W
75°W
74°W
73°W
72°W
71°W
70°W
69°W
68°W
16°S
17°S
18°S
19°S
20°S
21°S
22°S

Figure R-5.2

INEQUITABLE CUT-OFF EFFECT CAUSED BY CHILE'S DELIMITATION CLAIM

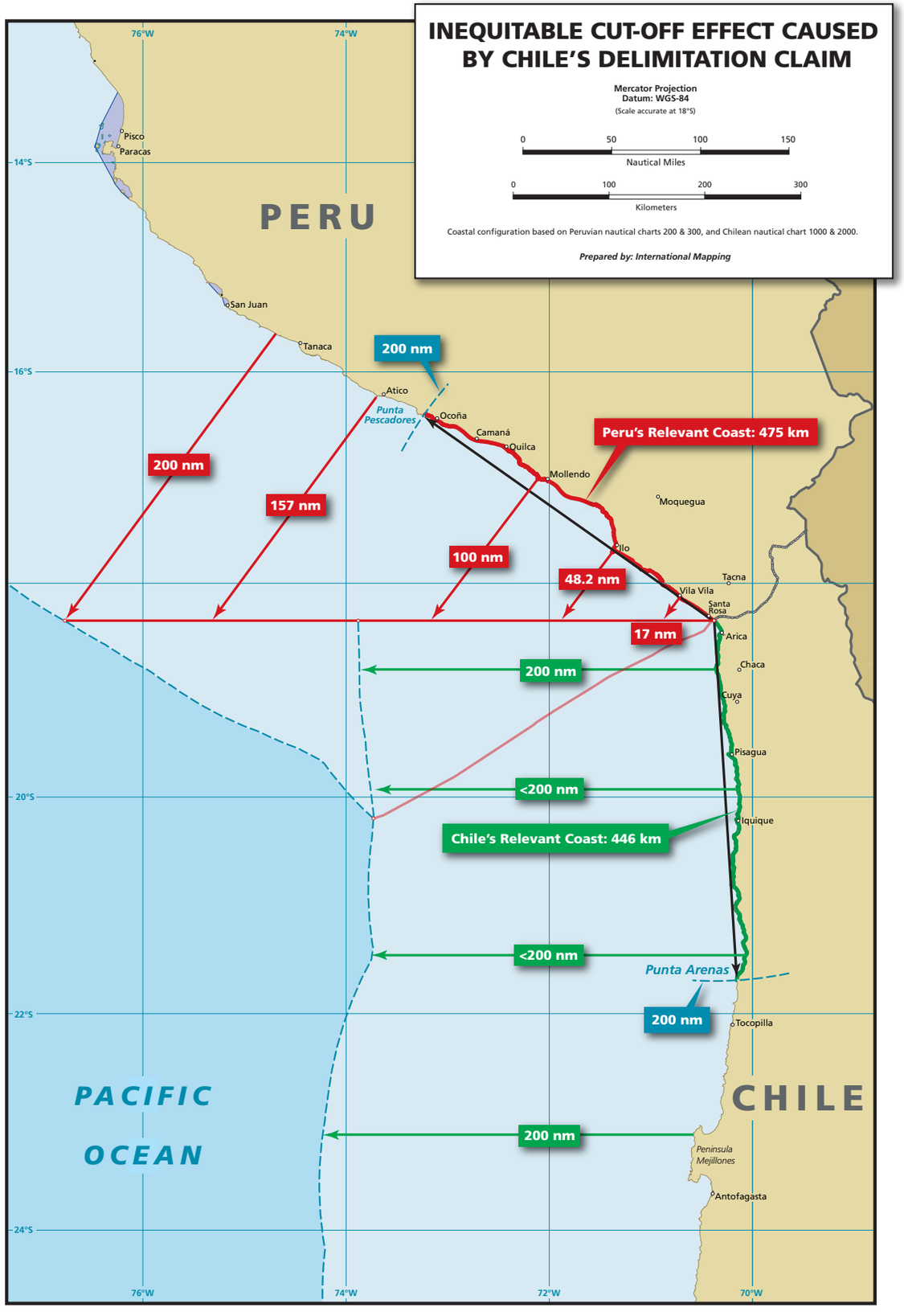
Mercator Projection
Datum: WGS-84
(Scale accurate at 18°S)

0 50 100 150
Nautical Miles

0 100 200 300
Kilometers

Coastal configuration based on Peruvian nautical charts 200 & 300, and Chilean nautical chart 1000 & 2000.

Prepared by: International Mapping



PROPORTIONALITY TEST APPLIED TO CHILE'S DELIMITATION CLAIM

Mercator Projection
Datum: WGS-84
(Scale accurate at 18°S)

0 50 100 150
Nautical Miles

0 100 200 300
Kilometers

Coastal configuration based on Peruvian nautical charts 200 & 300, and Chilean nautical chart 1000 & 2000.

Prepared by: International Mapping

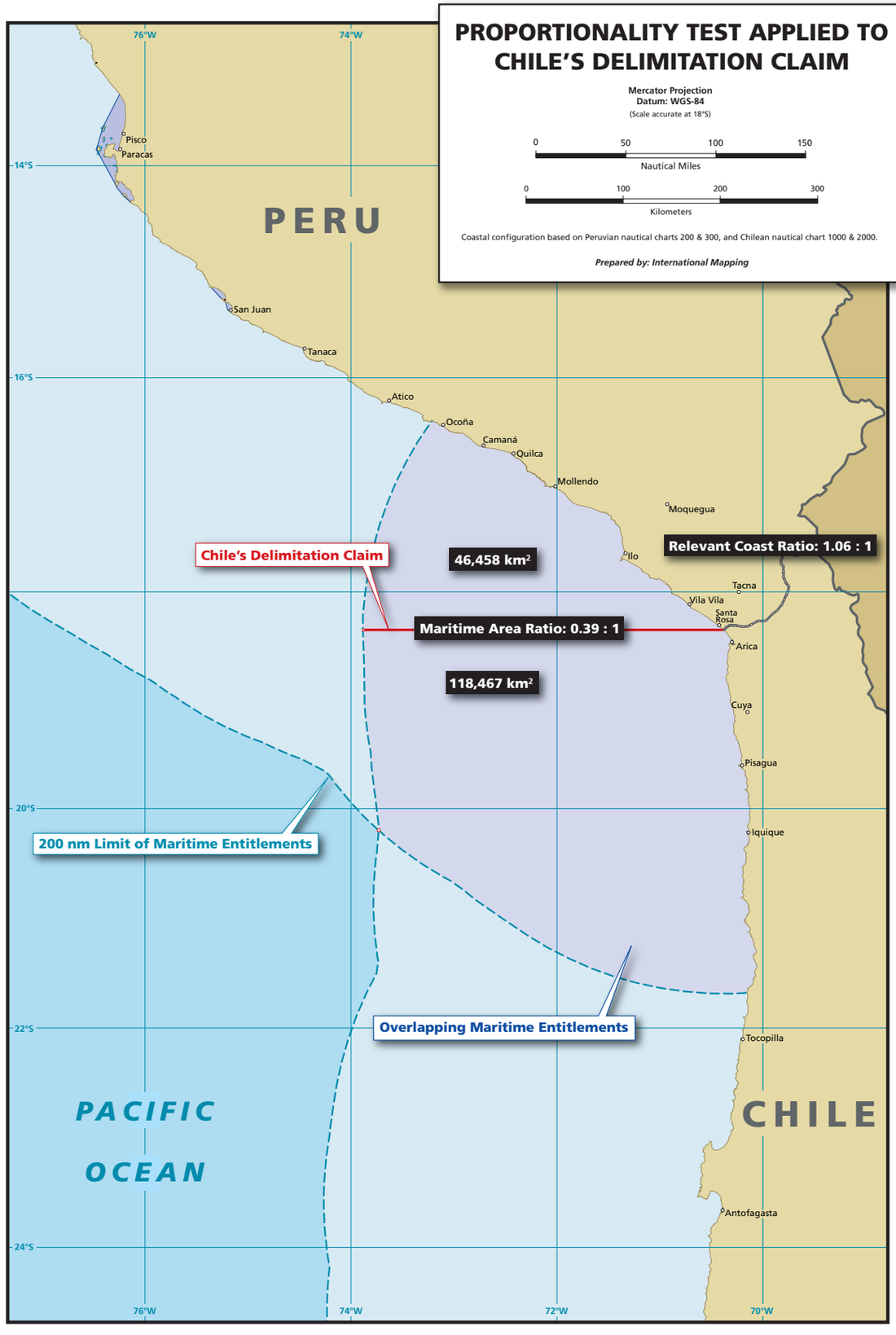


Figure R-5.3

5.18 Not surprisingly, a delimitation line following Chile's parallel of latitude also produces a result that is grossly disproportionate, as can be seen in **Figure R-5.3**. Despite the fact that the Parties' relevant coasts are the same length, Chile's line results in Chile obtaining maritime areas that are two and one-half times larger than those that would appertain to Peru (118,467 km² vs. 46,458 km²). Such a line cannot possibly be viewed as comporting with equitable principles or with the aim of achieving an equitable solution.

5.19 It is apparent that Chile has no interest in discussing the equitableness of its delimitation line. Indeed, Chile does not dispute the fact that its claim produces a massive amputation of Peru's maritime entitlements. Rather, Chile rests its case on the contention that there is a previously agreed maritime boundary extending along the parallel of latitude passing through Boundary Marker No. 1, whatever the effect that parallel has on the legal entitlements of the Parties to the maritime areas lying off their coasts, and without regard to how far out to sea that putative boundary extends.

5.20 Chile's Counter-Memorial also advances the extraordinary argument that Peru has somehow benefited from what Chile characterizes as a "stable frontier" along the parallel of latitude[526]. This proposition is as audacious as it is untrue.

5.21 As discussed earlier in this Reply[527], the Parties never contemplated, let alone agreed, a final and binding delimitation of their maritime zones that would produce such an open-ended, one-sided and inequitable result as is produced by a line following the parallel of latitude. How, it might be asked, can a line that cuts right across Peru's coast, and accords to Chile more than twice as much maritime area than to Peru, be claimed to be beneficial to Peru?

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526 CCM, para. 2.149.

527 See Chapter III, Section II and III.

By failing to address the delimitation methodology put forward by Peru, Chile must be deemed to have accepted the appropriateness of Peru's approach in the event that the Court finds, as Peru respectfully submits it should, that there is no pre-existing boundary between the Parties delimiting any of their maritime zones.

IV. Issues Concerning the Applicable Law and the Delimitation of the Parties' Maritime Zones

5.22 Chile does raise one argument in its Counter-Memorial with respect to Peru's delimitation line. While recognizing that Peru is not a party to the 1982 Convention on the Law of the Sea, Chile appears to take issue with Peru's statement that the principles of delimitation set forth in Articles 74 and 83 of the Convention reflect customary international law. According to Chile, because Peru claims a "maritime dominion" out to a distance of 200 nautical miles from its coast (not a continental shelf or exclusive economic zone), "Peru cannot rely on UNCLOS Articles 74 and 83 as the legal basis for a delimitation of its 'maritime dominion', because this is not a zone that can be delimited by application of those provisions."[528]

5.23 This line of argument is wrong and without object. While Peru has referred to its 200-mile legal entitlements as covering an area over which Peru has a "maritime domain", this in no way implies that the normal rules of maritime delimitation do not apply to such a zone, particularly in the light of the fact that the 1982 Convention (including Articles 74 and 83) does not form part of the applicable law in this case.

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[528] CCM, para. 1.73.

5.24 Peru's maritime entitlements were discussed in Peru's Memorial[529]. Peru takes pride in the fact that its 1947 Supreme Decree No. 781 establishing a zone of jurisdiction and sovereignty for the purposes of exploring, exploiting and conserving the natural resources within 200 nautical miles of its coast played a key role as a precursor to the subsequent recognition under the 1982 Convention on the Law of the Sea and customary international law that a coastal State possesses sovereign rights over the continental shelf and exclusive economic zone extending out to the same distance.

5.25 Article 98 of Peru's 1979 Constitution provided that Peru's maritime domain comprises the sea, seabed and subsoil up to a distance of 200 nautical miles measured from its baselines established by law[530]. Under that provision, Peru exercises sovereignty and jurisdiction in its maritime domain without prejudice to the freedom of international communications, and pursuant to laws and treaties ratified by Peru. The same principles are reflected in the 1993 version of Peru's Constitution which, in Article 54, also recognizes the freedom of international communications in the airspace above its maritime domain. Peru is also entitled to 200-nautical-mile continental shelf rights *ipso facto* and *ab initio*[531].

5.26 Peru has not enacted a territorial sea *per se* (unlike Chile which has a 12-mile territorial sea under its 1986 legislation)[532]. As Section II of the Introduction has explained, although Peru is not a party to the 1982 Convention on the Law of the Sea, Peru's maritime domain consecrated in its Constitution, and in other legislation relating to the exploitation and conservation of the resources within its 200-mile zone, is compatible with principles set out in the Convention. For

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529 PM, paras. 3.11-3.23.

530 Political Constitution of Peru of 1979. **PM, Annex 17**.

531 *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 22, para. 19 and p. 29, para. 39.

532 See paras. 20-26 and 3.24 above.

example, Peru's General Fishing Law has incorporated important elements of the 1982 Convention on the Law of the Sea in providing that Peru will determine the allowable catch of living resources within its maritime domain, permit foreign vessels to fish for the surplus not being exploited by Peru's existing fleet, and establish fish management systems, and fishing seasons and zones, in order to preserve the living resources of the area[533].

5.27 While elements of the international community may have found Peru's (and Chile's) original proclamation of 200-mile zones controversial over a half century ago, over the past three decades Peru has exercised its rights within its 200-mile zone in a manner that is consistent with international law. Peru has not received any complaints to the contrary. Moreover, Chile has never expressed any reservations about the nature of Peru's maritime domain, at least prior to the filling of its Counter-Memorial[534]. Indeed, Chile signed a Free Trade Agreement with Peru in 2006 which expressly recognized Peru's sovereignty and sovereign rights and jurisdiction corresponding to its maritime domain[535].

5.28 Given that the same rules apply to the delimitation of a single maritime boundary and to a boundary covering several zones of coincident jurisdictions, there is no reason why they do not equally apply to the delimitation of Peru's maritime domain with each of the various maritime zones adopted by Chile (Chile's 12-mile territorial sea and 200-mile continental shelf and exclusive economic zone). In view of the fact that the applicable law in this case is not the 1982 Convention on the Law of the Sea, but customary international law, Chile's argument that Peru cannot rely on Articles 74 and 83 of the Convention is irrelevant.

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533 See Article 47 of Law Decree No. 25977 General Fisheries Law. **PR, Annex 11**.

534 See para. 1.34 above.

535 See paras. 26 and 1.37 above.

5.29 Under general international law, the aim of maritime delimitation is to achieve an equitable result by means of the application of well-established principles and rules that have been consistently applied by the Court and arbitral tribunals. It follows that the Court can readily delimit the maritime areas between the Parties based on the principles of delimitation that have been clearly articulated in its jurisprudence.

5.30 In this connection, the Court has made it clear that the same principles apply to the delimitation of the continental shelf and the exclusive economic zone as to the delimitation of the territorial sea. As the Court stated in the *Qatar-Bahrain* case, the "equitable principles/relevant circumstances" rule applicable to the former situation is "closely interrelated" with the "equidistance/special circumstances" rule applied to the latter[536]. In the *Cameroon-Nigeria* case, the Court further emphasized that the two rules are "very similar"[537]. And in the *Romania-Ukraine* case, the Court once again reaffirmed the position[538].

5.31 Notwithstanding this basic rule of maritime delimitation, situations can exist where it is appropriate when applying the "equidistance/special circumstances" rule to proceed with delimitation in progressive stages and to delimit the territorial sea in a manner that is different from the delimitation of the continental shelf or column of water. This occurred, for example, in the *Guyana-Suriname* arbitration. There, the arbitral tribunal found that the parties had historically regarded a line drawn at variance with the equidistance line (a 10° line) as the proper delimitation line for what was originally their

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536 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 111, para. 231.

537 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 441, para. 288.

538 *Case concerning Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment of 3 February 2009*, pp. 37-38, paras. 115-120.

3-mile territorial seas. Accepting that this historical factor was a special circumstance justifying an adjustment to be made to the equidistance line, the tribunal delimited the first three miles of the maritime boundary by means of the 10° line[539].

5.32 With respect to the delimitation of the continental shelf and exclusive economic zone, the tribunal in *Guyana-Suriname* found that the provisional equidistance line required no adjustment due to the presence of any special or relevant circumstances. However, the tribunal still had to connect up the delimitation from the 3-mile limit of the parties' former territorial seas to the point on the 12-mile limit of their more recently enacted territorial seas where their continental shelf and exclusive economic zone entitlements commenced. As can be seen on **Figure R-5.4**, the tribunal did this by means of a straight line drawn diagonally along the shortest distance between the two points, thereby once again departing from strict equidistance[540]. This method was not materially different from the method that the Court adopted in the *Cameroon-Nigeria* case to connect up the endpoint of the territorial sea delimitation previously agreed by the parties under the Maroua Declaration and the start of the equidistance line which constituted the continental shelf and exclusive economic zone boundary, as shown on **Figure R-5.5**[541].

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539 *Guyana/Suriname*, Award of the Arbitral Tribunal, 17 September 2007, paras. 306-307.

540 *Ibid*., para. 323.

541 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 448, para. 307.


GUYANA–SURINAME
CONTINENTAL SHELF
BOUNDARY AWARD: 2007
Mercator Projection
WGS-84 Datum
0 25 50 75 100
Nautical Miles
0 50 100 150 200
Kilometers
Prepared by: International Mapping
56°W
55°W
10°N
9°N
8°N
7°N
6°N
58°W
57°W
ATLANTIC
OCEAN
Equidistance Line
Connector Segment
N10°E Segment
GUYANA
SURINAME
Georgetown
Paramaribo
Corentyne
River
1
2
3
4
5
6
7
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Figure R-5.4

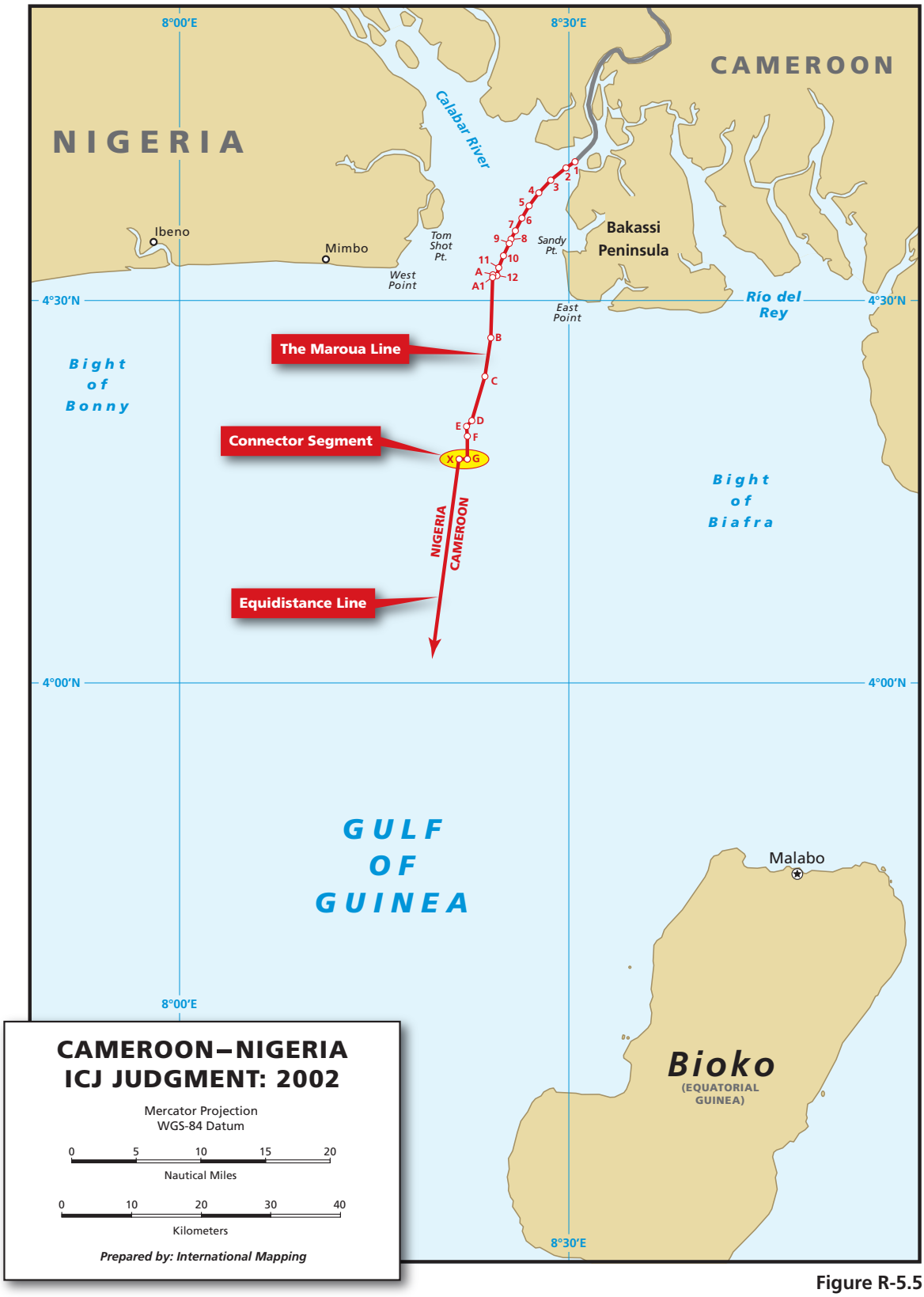
8°00′E
8°30′E
CAMEROON
NIGERIA
Calabar River
Ibeno
Mimbo
Tom Shot Pt.
West Point
Sandy Pt.
Bakassi Peninsula
East Point
4°30′N
Río del Rey
The Maroua Line
Bight of Bonny
Connector Segment
NIGERIA
CAMEROON
Bight of Biafra
Equidistance Line
4°00′N
GULF OF GUINEA
Malabo
Bioko
(EQUATORIAL GUINEA)
CAMEROON–NIGERIA
ICJ JUDGMENT: 2002
Mercator Projection
WGS-84 Datum
0 5 10 15 20
Nautical Miles
0 10 20 30 40
Kilometers
Prepared by: International Mapping

Figure R-5.5

5.33 It is also possible that the applicable law for the delimitation of the seabed and subsoil may not be the same as for the delimitation of the column of water. In the *Denmark-Norway* case, for example, the Court was faced with a situation where the delimitation of the continental shelf was governed by the 1958 Geneva Convention on the Continental Shelf while the delimitation of the fishery zone was governed by customary international law. As was noted in that case, the two lines could be coincident in location, but they would stem from different strands of the applicable law[542].

5.34 In the *Denmark-Norway* case, the Court found that the same methodology applied in both situations – namely, the establishment of the provisional equidistance line followed by the subsequent adjustment of that line to take into account the relevant circumstances characterizing the area to be delimited. As the Court stated:

> "It thus appears that, both for the continental shelf and for the fishery zones in this case, it is proper to begin the process of delimitation by a median line provisionally drawn."[543]

5.35 In the present case, Peru has shown that the delimitation of the Parties' respective maritime zones by means of an equidistance line produces a result that is in accordance with international law and entirely equitable. This can

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[542] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, pp. 56-57, paras. 41-42. There are also examples of State practice where EEZ boundaries differ from continental shelf boundaries. An example is provided by the 1971 and 1997 Agreements between Australia and Indonesia where, over part of the delimitation, separate boundary lines for the continental shelf and the EEZ were agreed. See Charney, J. I. and Smith, Robert W.: *International Maritime Boundaries*, Vol. IV, The Hague (etc.): Nijhoff, 2002, pp. 2697-2727.

[543] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 62, para. 53.

be tested by examining the course of the equidistance line over the first 12 miles of the boundary between Peru's maritime domain and Chile's territorial sea, as well as for the areas lying further seaward out to a distance of 200 nautical miles.

V. Conclusions

5.36 In the light of the foregoing, Peru's position on the maritime delimitation line between the Parties to be decided by the Court can be summarized as follows:

(a) In the light of the fact that Peru is not a party to the 1982 Convention on the Law of the Sea, the applicable law to the maritime delimitation is customary international law.

(b) The relevant principles and rules of maritime delimitation are expressed in the "equidistance/special circumstances" or "equitable principles/ relevant circumstances" rule.

(c) In applying these rules, Peru has first calculated the provisional equidistance line between the relevant coasts of the Parties. Thereafter, Peru has shown that there are no relevant circumstances that call for the adjustment of the equidistance line.

(d) Unlike Chile's parallel of latitude claim, an equidistance-based boundary avoids any undue cut-off of the maritime entitlements generated by the Parties' respective coasts, satisfies the test of proportionality and achieves an equitable result.

(e) The equidistance methodology applies equally to the delimitation between Peru's maritime domain and Chile's 12-mile territorial sea, and to the

delimitation of maritime areas lying further out to sea between Peru's maritime domain and Chile's continental shelf and exclusive economic zone.

(f) The repercussions of the Parties' delimitation positions with respect to the Peru's entitlement under international law to the "outer triangle" lying more than 200 nautical miles from Chile's coast, but within 200 miles of Peru's coast, is addressed in the next chapter.

CHAPTER VI

THE OUTER TRIANGLE

I. Introduction

6.1 As an answer to Chapter VII of Peru's Memorial on "Peru's Maritime Entitlements Off Its Southern Coast – The 'Outer Triangle'"[544], Chile devotes Section 5 of Chapter II of its Counter-Memorial to what it calls "The *Alta Mar* Area Now Claimed by Peru"[545]. In these limited developments it contents itself with raising three marginal arguments which never neatly face Peru's main line of reasoning.

6.2 For this reason, it is convenient to recall that the crucial point here is that, as all coastal States, Peru has legal entitlements to a maritime area up to a distance of 200 nautical miles "from the baselines from which the breadth of the territorial sea is measured" under well-established customary rules now codified in Articles 57 and 76, paragraph 1, of the 1982 Convention on the Law of the Sea. As shown in the Memorial[546], in this area, located within the 200 nautical-mile limit from the Peruvian coasts and beyond 200 nautical miles from Chile's coasts, Peru enjoys *exclusive sovereign rights* to

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544 PM, pp. 243-270.

545 CCM, paras. 2.108-2.134.

546 PM, paras. 7.25-7.38.

the extent and within the limits recognized by the modern law of the sea[547]. Peru's entitlements over that area and its resources exclude any claim from Chile going beyond the traditional freedoms recognized to all third States by general international law, as reflected in the 1982 Convention on the Law of the Sea. Peru's claim to the outer triangle is, therefore, by no means a claim to part of the high seas.

6.3 Carefully avoiding to address these obvious legal facts, Chile puts forward three disparate arguments:

- *First*, Peru's claims are inconsistent with each other;
- *Second*, the delimitation along the parallel of latitude claimed by Chile prevents any extension of Peru's maritime domain out to a full 200-nautical- mile limit, regardless of whether Chile has a maritime zone in the same area; and
- *Third*, Chile raises an argument based on the method used to calculate the 200 nautical miles distance.

II. Peru's Alleged Inconsistent Submissions

6.4 According to Chile:

> "Peru's formulation of its claim to the *alta mar* area '[b]eyond the point where the common maritime border [of Chile and Peru] ends' is inconsistent with its own primary position that there is no agreed boundary with Chile. If Peru's primary position were correct, the equidistance line which Peru submits should be drawn would delimit the full extent of Peru's total claim,

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[547] The position of Peru vis-à-vis the modern law of the sea is described in some details in the Introduction of the present Reply, Section II.

> including the *alta mar* area: there could be no 'outer triangle'. That can be seen very clearly in Figure 7.5 of Peru's Memorial (at page 265), which shows that Peru's proposed maritime boundary would give to Peru the *alta mar* area as well as the area claimed by Peru which lies within Chile's 200M limit. Yet Peru also asks the Court to declare that Peru has 'exclusive sovereign rights' in the *alta mar* area '[b]eyond the point where the common maritime border ends'."[548]

6.5 In the next paragraph of its Counter-Memorial, Chile asserts that Peru's claim to the outer triangle "could only be regarded as a claim in the alternative to its primary claim"[549] insofar as the equidistance line which, failing any agreement to the contrary constitutes the border line between the respective maritime domains of both countries, leaves to Peru the integrity of the outer triangle. These allegations call for two series of remarks:

- *First*, indeed, nothing prevents States Parties before the Court to plead "in the alternative"; but

- *Second*, this is not exactly so in the present case since there is no inconsistency between the two submissions made by Peru.

6.6 Therefore, the two Submissions made by Peru in its Memorial, and maintained in the present Reply, can better be characterized as being independent and complementary than alternative (A.). Moreover, Peru's second Submission can also be analysed as standing on its own (B.).

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[548] CCM, para. 1.15 (footnotes omitted); see also paras. 2.110-2.112.

[549] CCM, para. 1.16; see also para. 2.112.

A. Peru's Submissions are Independent and Complementary

6.7 It is quite usual for States to present alternative claims before the International Court of Justice[550]. The Court examines these subsidiary arguments without any hesitation or reluctance[551]. Thus, in the case concerning the *Arrest Warrant of 11 April 2000*, Belgium had made "a subsidiary argument"[552] (*À titre subsidiaire*) that the Court discussed and accepted[553]. It is therefore clear that, even if Peru's claims were alternative, they would nevertheless still be fully admissible.

6.8 In the present case, however, Peru's submissions are by no means inconsistent with each other. As Chile itself points out, "[i]f the boundary were an equidistance line …, there could not be any 'outer triangle'. The respective maritime zones of the Parties would be coterminous at the end of the equidistance line, and that line would give to Peru the *alta mar* area"[554]. This is correct; but, by the same token, it shows that both submissions are totally compatible and complementary to each other.

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[550] See e.g., *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, pp. 838-840, para. 12; Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment of 19 January 2009, I.C.J.*, pp. 5-7, para.10; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 418-420, paras. 21-22.

[551] See e.g., *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 857, para. 74; Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment of 19 January 2009, I.C.J.*, pp. 15-16, para. 49 and p. 17, para. 59; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 432, paras.65-67.

[552] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 18, para. 41.

[553] *Ibid.*, para. 43.

[554] CCM, para. 2.111 and footnote 280 with cross-reference to para. 2.108 thereto and PM, Figure 7.1 (p. 245). See also CCM, para. 1.15.

6.9 Therefore, if by an "alternative claim" Chile means a claim which could only succeed if the primary claim fails, Peru's second submission could not be characterized as being made in the alternative: it is but the logical and inescapable consequence of the former. In reality, the two submissions are not alternative. The first one requests the Court to delimit the maritime boundary by drawing an equidistance line in the area where the entitlements of the Parties overlap. The second requests the Court to acknowledge that Peru is entitled to exclusive sovereign rights, including within the outer triangle, in accordance with international law. Moreover (and only in this respect could the Submissions be described as being "alternative"), the second submission draws attention to the fact that, whatever the Court's decision concerning the direction of the delimitation line, it could not in any case fail to acknowledge Peru's exclusive sovereign rights over the outer triangle.

6.10 In any case, there is certainly not the slightest incompatibility between these essentially cumulative submissions. They are therefore not inconsistent; nor have they been treated inconsistently by Peru, which has linked them by the conjunction "and" which, given the circumstances, is more appropriate than the conjunction "or".

B. Peru's Second Submission Stands on Its Own

6.11 Since the first Peruvian submission necessarily calls for the second one, it might be wondered why Peru has expressly formulated this logically consequential submission. In the circumstances of the present case, the reason for that precaution is easy to be understood: Chile's claim to a "presencial sea" beyond its own maritime domain constitutes an obvious threat to Peru's exclusive sovereign rights in the outer triangle.

6.12 As was explained in the Memorial[555], Peru has no intention to express, within the framework of this case, general views as to the compatibility of this novel concept with the principles and rules of the modern law of the sea.

6.13 Chile asserts that "[t]he presencial sea is of no significance for the lateral boundary between the Parties" and that Peru's sovereign rights over its outer triangle are "not excluded by the presencial sea."[556] Peru would like to believe it. It notes however that, by virtue of its supposed rights in the "presencial sea", Chile expressly claims a right to have an access to the Peruvian outer triangle – which it alleges to be part of the high seas[557] – and, by virtue of its rights in its "presencial sea", a right to monitor the environment and to preserve marine resources[558], and various other rights such as the right to enact prohibition and restriction measures on fisheries or to adopt sanctions, which were enumerated in Peru's Memorial[559]. Significantly, the Chilean Counter-Memorial does not deny any of these elements of its presencial sea theory; to the contrary, Chile takes care not to mention them.

6.14 It is true that "UNCLOS expressly provides for coastal States to take measures in areas of the high seas adjacent to their EEZ concerning the conservation and management of straddling fish stocks, highly migratory species and marine mammals" and for the preservation of certain interests of coastal States in relation to fisheries in the high seas[560], and imposes special duties on those States beyond the 200 nautical miles limit[561]. But, as relevant as these

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555 PM, para. 7.20.

556 CCM, para. 2.126. See also para. 2.134.

557 CCM, paras. 1.12, 1.13, 1.14, 1.74, 2.108, 2.126, 2.128, 2.172 and 5.7.

558 CCM, para. 2.129.

559 PM, paras. 7.11-7.19.

560 CCM, para. 2.130 (footnotes omitted).

561 CCM, para. 2.133, citing Articles 98(2) and 100 of the 1982 Convention on the Law of the Sea. It must be noted that those provisions impose on States a duty to co-operate and do not allow them to adopt unilateral measures, as is the case of the Chile's concept of presencial sea.

provisions could have been if the outer triangle had genuinely been an area of high seas, that is not the case in the present dispute. As has been shown, the continental shelf in this area belongs *ipso facto* to Peru[562], and, clearly, Peru has also proclaimed its entitlement to a full 200-nautical-mile zone (including the water column) in its 1979[563] and 1993[564] Constitutions which Chile has never protested. Chile has therefore no such obligations or rights in the outer triangle area.

6.15 For the same reason, Chile's defence based on Peru's adoption of allegedly similar measures[565] is ill-founded. Peru's measures referred to by Chile apply *in the high seas*, not in the maritime domain lying within 200 nautical miles of another State. More particularly, the only specific provision mentioned by Chile[566] – Article 7 of Peru's General Law on Fisheries of 1992, which seeks to ensure the correlation between the conservation of the species measures that are applied in waters under national jurisdiction and the protection of living resources beyond jurisdictional waters – is only applicable to national flag vessels, and has no compulsory nature with respect to vessels flying another State's flag. Similarly, the measures provided for in the Agreement on the Protection of the Marine Environment and the Coastal Area of the South-East Pacific – concluded under the aegis of the CPPS and to which Chile and Peru are Parties – are applicable in the high seas "in order to prevent, reduce and control pollution of the marine environment and coastal area of the South-East Pacific and to ensure appropriate environmental management of natural resources."[567] These measures only apply with respect to the States Parties to that Agreement – which has never entered into force – and not to third States.

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562 PM, paras. 7.25-7.38.

563 See Article 98 of the Political Constitution of Peru of 1979. **PM, Annex 17**.

564 See Article 54 of the Political Constitution of Peru of 1993. **PM, Annex 19**.

565 CCM, para. 2.131.

566 *Ibid.*

567 See Article 3.1 of the Agreement on the Protection of the Marine Environment and the Coastal Area of the South-East Pacific, signed on 12 November 1981. **CCM, Annex 12**. See also CCM, para. 2.132.

6.16 Clearly Chile's claims, which might be sustainable as far as the high seas are concerned, are incompatible with the basic rights that the coastal State – Peru in the present case – enjoys in maritime areas that lie within 200 nautical miles from its coasts and where it possesses sovereign rights and jurisdiction. While the rights in question are limited to particular (but quite extensive) domains, they exclude interference by any other State. And yet, it is precisely in those domains that Chile claims to exercise rights by virtue of its "presencial sea" theory.

6.17 The exclusive rights of the coastal State have been quite clearly set forth in Article 56 (*Rights, jurisdiction and duties of the coastal State in the exclusive economic zone*) and Article 77 (*Rights of the coastal State over the continental shelf*) of the 1982 Convention on the Law of the Sea, which respectively read:

Article 56

"1. 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;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI."

Article 77

"1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 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.

4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil."

6.18 The Court has also had occasion to recall this legal situation with regard to the continental shelf in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*. As the Court stated:

> "Each coastal State is entitled to exercise sovereign rights over the continental shelf off its coasts for the purpose of exploring it and exploiting its natural resources (Art. 77 of the Convention) up to a distance of 200 miles from the baselines – subject of course to delimitation with neighbouring States – whatever the geophysical or geological features of the sea-bed within the area comprised between the coast and the 200-mile limit."[568]

6.19 It will be apparent that the rights claimed by Chile are incompatible with the *exclusive* rights recognized to the coastal State – that is Peru – within 200 nautical miles of its coast, whether Chile's "rights" concern:

- The "monitoring [of] the environment"[569] through an active presence, which is clearly incompatible with the exclusive right and duty of the coastal State to "ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation"[570];

- Prohibitions (*sub poena*) "such as closed seasons and capture quotas"[571], which cannot be reconciled with the rights of coastal States to "determine the allowable catch of the living resources in its exclusive economic zone"[572] and, more generally, with their exclusive right to utilize (or to regulate the utilization of) living resources in the area[573];

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568 *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 56, para. 77.

569 See CCM, para. 2.129. See also *Libro de la Defensa Nacional de Chile* [Defence White Book of Chile], 2002. **CCM, Annex 153**.

570 See Article 61(2), 1982 Convention on the Law of the Sea.

571 PM, para. 7.13.

572 See Article 61(1), 1982 Convention on the Law of the Sea. See also e.g., Article 62(4) and spec. (b) and (c).

573 See Article 62, 1982 Convention on the Law of the Sea.

- Sanctions or "[p]roceedings for violation of [laws]"[574] which is incompatible with the right of the coastal State, "in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, [to] take such measures, including … judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with [the] Convention"[575];

- "[P]rohibitions of specific types of rigs"[576] which is not compatible with the "exclusive right [of the coastal State] to construct and to authorize and regulate the construction, operation and use" of "installations and structures for the purposes provided for in article 56 and other economic purposes"[577]; or

- "[T]he right to collect registration fees"[578] which is clearly against the right of the coastal State to adopt laws and regulations as regards "licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration"[579].

6.20 It therefore appears that an express finding by the Court that "Peru is entitled to exercise exclusive sovereign rights over a maritime area lying out to a distance of 200 nautical miles from its baselines"[580] would be entirely justified.

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574 PM, para. 7.13. Chile's Decree No. 430/91 of 28 September 1991, establishing the Consolidated, Co-ordinated and Systematized Text of Law No. 18.892 of 1989 and its Amendments, General Law on Fisheries and Aquaculture, Art. 124. **PR, Annex 27**.

575 See Article 73(1), 1982 Convention on the Law of the Sea.

576 **PR, Annex 27**, Article 5.

577 See Article 60(1), 1982 Convention on the Law of the Sea.

578 **PR, Annex 27**, Article 43.

579 Article 62(4)(a), 1982 Convention on the Law of the Sea.

580 See Peru's Second Submission at p. 331.

III. Irrelevance of Chile's "Agreed Delimitation" Claim on Peru's Entitlement to Sovereign Rights in the Outer Triangle

6.21 According to Chile's second argument concerning the outer triangle:

> "Under the Santiago Declaration, the parallel of latitude operates as a limit for the entire seaward extent of the Parties' maritime zones, regardless of whether the other Party has an abutting zone."[581]

In an effort to establish this proposition, Chile makes two main arguments:

- *First* and generally, Chile's claimed agreed delimitation would apply regardless of the distance from the coast (A.); and,

- *Second*, Peru's outer triangle, if recognized to fall under Peru's sovereign rights and jurisdiction, would curtail Chile's practical access to the high seas (B.).

6.22 The first – and main – answer to such argumentation is that the Declaration of Santiago did not purport to establish a maritime delimitation between the two countries and has not done so[582]. It is therefore for the sole purpose of the discussion that Peru will answer hereafter in turn each of these two arguments.

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581 CCM, para. 1.16. See also paras. 2.113-2.116.

582 It goes without saying that Peru's discussion of this Chilean argument does not imply any kind of acceptation that the 1952 Santiago Declaration provides for a delimitation of the Parties' respective maritime areas and must be understood notwithstanding Peru's position in this respect, as exposed in Chapter III of this Reply.

A. The Chile's Claim for an Unlimited Seaward Extension of the Alleged Parallel of Latitude

6.23 Chile's general argument in order to deny Peru's entitlement to exclusive sovereign rights in the outer triangle is developed as follows in paragraph 2.114 of its Counter-Memorial:

> "Using parallels of latitude as maritime boundaries meant that if a State party unilaterally extended its zone seaward, the parallel of latitude would continue to operate as a lateral limit, regardless of whether the adjacent State claimed any abutting maritime zone of 'sovereignty' or any type of 'jurisdiction' on the other side of the parallel of latitude. In this way, if one State extended its claim further than 200 nautical miles, no issue of overlap could arise with the adjacent State. The adjacent State could at any time also extend its own zone, in which case the extended zone would continue to be laterally limited by the same parallel of latitude."[583]

6.24 This is a perplexing argument since it finds absolutely no support whatsoever in the text or the general spirit of the 1952 Declaration of Santiago and is clearly incompatible with the subsequent development of law, through the 1982 Convention on the Law of the Sea and as a matter of customary international law (1)[584]. The plain fact is that Peru's exclusive sovereign rights within the outer triangle exclude any third Party's claim (2).

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583 CCM, para. 2.114.

584 Cf. (by way of analogy) *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31; or *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 32.

1. The Inapplicability of Point II of the Declaration of Santiago

6.25 The text of point II of the Declaration of Santiago reads as follows:

> "… 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."

Spanish text:

> "... 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."

As noted in Peru's Memorial[585], this provision does not address lateral boundaries at all. A reference to the parallels only appears in point IV, which, absent any island, is not relevant in the relations between the Parties[586].

6.26 Moreover, point II of the Declaration of Santiago must be interpreted today in light of the subsequent development of the law of the sea, through the 1982 Convention on the Law of the Sea and by way of customary law. As the Court has observed: "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the

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585 See PM, para. 4.74.

586 See above, paras. 3.65-3.82.

interpretation."[587] This is all the more indispensable given that the norm in question is a "norm of [the three countries'] international maritime *policy*"; such a policy must be read in accordance with positive international law.

6.27 It is unsustainable to allege nowadays that the 1952 Declaration of Santiago allows a participating State to extend its maritime zones as far as it deems suitable. The modern law of the sea – to which Chile is bound as a Party to the 1982 Convention on the Law of the Sea and Peru through its abidance with, and acceptance of, the prevailing general customary international law – strictly limits any State's entitlements to sovereign rights in the exclusive economic zone to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured[588]. With respect to the continental shelf, a coastal State possesses sovereign rights "that extend beyond its territorial sea throughout the natural prolongation of its land 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."[589]

6.28 It is thus irrelevant to assert nowadays that the Declaration of Santiago did not establish any limitation on a State party's maritime zones so as to leave open the possibility of maritime entitlements beyond 200 nautical miles from the coast.

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587 See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, para. 53. See also *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 32, para. 56.

588 See Article 57, 1982 Convention on the Law of the Sea.

589 See Article 76, 1982 Convention on the Law of the Sea. See also Article 57.

2. Peru's Exclusive Sovereign Rights within the Outer Triangle exclude any Third Party's Claim

6.29 It must also be noted that, apart from traditional rights such as freedoms of navigation and overflight recognized by the modern law of the sea, a coastal State has no entitlement to sovereign rights in maritime areas located beyond this 200 nautical miles limit. States are therefore not allowed to extend their maritime domain at will, as results from the rules embodied in the 1982 Convention on the Law of the Sea[590] and as expressly recognized by Chile itself with respect to its own maritime domain[591]. In the present dispute, Chile has no right, and cannot claim any right (besides those pertaining to all other States), in the Peruvian outer triangle. This is not at all a question of a territorial dispute or maritime delimitation. The issue here is whether a State

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590 See Articles 56 and 77 quoted above, at para. 6.17.

591 Law No. 18.565 of 13 October 1986, Amendment to the Civil Code Regarding Maritime Spaces:
"Article 596.- The adjacent sea which extends to a distance of two hundred nautical miles measured from the baselines from which the width of the territorial sea is measured, and beyond the territorial sea, shall be known as the exclusive economic zone. The State shall exercise therein sovereign rights to explore, exploit, conserve and administer the living and non-living natural resources of the waters over the seabed, of the seabed and of the subsoil of the sea, and to develop any other activities with a view to the economic exploration and exploitation of this zone.
The State shall exercise exclusive sovereign rights over the continental shelf for the purposes of conserving, exploring and exploiting its natural resources.
In addition, the State shall have any other jurisdiction and the rights provided for under International Law in relation to the exclusive economic zone and the continental shelf."
(Spanish text: "Artículo 596.- El mar adyacente que se extiende hasta las doscientas millas marinas contadas desde las líneas de base a partir de las cuales se mide la anchura del mar territorial, y más allá de este último, se denomina zona económica exclusiva. En ella el Estado ejerce derechos de soberanía para explorar, explotar, conservar y administrar los recursos naturales vivos y no vivos de las aguas suprayacentes al lecho, del lecho y el subsuelo del mar, y para desarrollar cualesquiera otras actividades con miras a la exploración y explotación económicas de esa zona.
El Estado ejerce derechos de soberanía exclusivos sobre la plataforma continental para los fines de la conservación, exploración y explotación de sus recursos naturales.
Además, al Estado le corresponde toda otra jurisdicción y derechos previstos en el Derecho Internacional respecto de la zona económica exclusiva y de la plataforma continental."). **PM, Annex 36**.

such as Peru can be deprived of a right to an exclusive economic zone and continental shelf within its 200-mile zone that the international law of the sea prohibits any other State from claiming.

6.30 Given that Chile has no claim to sovereign rights over the Peruvian outer triangle, there is nothing in that area to be delimited between the Parties. As has been aptly explained, "[e]ntitlement to maritime zones precedes their delimitation, as an area over which no competing titles exist can not be delimited."[592] Or, as the Court itself put it:

> "The need for delimitation of areas of continental shelf between the Parties can only arise within the submarine region in which claims by them to the exercise of sovereign rights are legally possible according to international law."[593]

In other words, beyond 200 nautical miles from Chile's coasts, there is simply nothing to be delimited.

3. Peru Has Not Renounced Its Sovereign Rights within the Outer Triangle

6.31 The only possible argument in support of Chile's claim would have been an express renunciation by Peru. Such a renunciation cannot be lightly presumed. As the Court observed, "the pertinent legal test is whether there [is] thus

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592 Oude Elferink, Alex G.: "Does Undisputed Title to a Maritime Zone Always Exclude its Delimitation: The Grey Area Issue". In: *The International Journal of Marine and Coastal Law*, Vol. 13, No. 2, p. 146.

593 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 42, para. 34. See also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 22, para. 20; *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, pp. 35-36, paras. 84-85; *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 339, para. 228; *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, pp. 66-67, para. 64.

evidenced acquiescence" (*acquiescement manifeste*)[594] by Peru in either relinquishing any of its maritime domain to which it is entitled or passing title from itself to Chile. As Peru has shown in its Memorial[595], it is clear that it did not renounce to its sovereign rights in this area; for its part, Chile has no sovereign rights at all in the outer triangle.

6.32 In an attempt to present the Declaration of Santiago as being one among other cases where "one State's entitlement or claim is cut short by a delimitation line even though another State does not have the same type of maritime zone, or any zone at all, on the other side of that line"[596], Chile asserts that "such a line was agreed between Argentina and Chile in 1984."[597]

6.33 As was expressly explained in the Preamble of that instrument, the Parties declared that they "[h]ave resolved to conclude the following Treaty, which constitutes a compromise ...". Nevertheless, the present situation is in sharp contrast with the example provided by Chile. As Chile rightly notes: "[i]n that delimitation, Chile *conceded* an area almost as large as the *alta mar* area now claimed by Peru, to which Chile would otherwise have been entitled by application of a 200M distance criterion"[598]. This *cession* was expressly consented to by Chile through a formal treaty which indisputably established maritime boundaries between that country and Argentina[599]. It can be noted that the last paragraph of Article 7 of the 1984 Treaty provides that "south

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[594] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 353, para. 67. See also *Case Concerning Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment of 3 February 2009*, p. 25, para. 71.

[595] PM, paras. 7.29-7.38.

[596] CCM, para. 2.124.

[597] CCM, para. 2.125.

[598] *Ibid.* (Emphasis added).

[599] Treaty of Peace and Friendship between Chile and Argentina, signed on 29 November 1984. **CCM, Annex 15**.

of the end of the boundary (point F)" – which is the final point within 200 miles of the baselines of both parties – Chile's exclusive economic zone may be extended to the limits permitted by international law to the west of the meridian that forms the final segment of the boundary "ending on the east at the high seas." The effect is that areas south of point F that are within 200 miles of Chile's coastal baselines but beyond 200 miles from those of Argentina may not be claimed as part of the Chilean exclusive economic zone to the east of the meridian that formed the final segment of the maritime boundary. But it has to be noted that the agreement does not identify this meridian south of point F as a maritime boundary; quite to the contrary, it expressly identifies point F as the final point of the boundary. **Figure R-6.1** illustrates that transaction that satisfies the Parties.

6.34 Absent such a transaction, it is undeniable that, even under the extraordinary Chilean claim that the 1952 Declaration of Santiago would have delimited the respective maritime domains of Peru and Chile along the alleged parallel "at the point at which the land frontier of the States concerned reaches the sea" (*quod non*), such a finding would have no influence on Peru's entitlement to exercise exclusive sovereign rights over the outer triangle.

B. The Chile's Claim based on an Alleged Limitation of its Access to the High Seas

6.35 In its artificial attempt to deny Peru's exclusive sovereign rights over the outer triangle and its natural resources, Chile also argues that:

> "Peru's claim to the *alta mar* area seeks to expand its 'maritime dominion' in such a way that it would wrap around Chile's continental shelf and EEZ for a length of approximately 110M (in a North-South direction) and to a maximum breadth of 165M (in an East-West direction) … Peru's proposed expansion would very considerably curtail practical access to the high seas from

> the significant Chilean port of Arica, which lies directly to the east of the *alta mar* area."[600]

6.36 The Chilean complaint is unfounded on its face: under the modern international law of the sea, "[i]n the exclusive economic zone, all States ... enjoy ... the freedoms ... of navigation and overflight"[601].

6.37 Indeed, in conformity with this general prescription, Peru's maritime domain provides for freedom of navigation to all other States' ships. As early as 1947, Supreme Decree No. 781 had specified that:

> "The present declaration does not affect the right to free navigation of ships of all nations according to international law."[602]

6.38 This principle has been constantly maintained since then and is embodied in Peru's Constitution itself. Article 54 of the 1993 Political Constitution provides for freedom of international communications. Paragraphs 3 and 4 of Article 54 read as follows:

> "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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600 CCM, para. 1.14

601 See Article 58, para.1, 1982 Convention on the Law of the Sea.

602 Peru's Supreme Decree No. 781 of 1 August 1947, para. 4. **PM, Annex 6**.

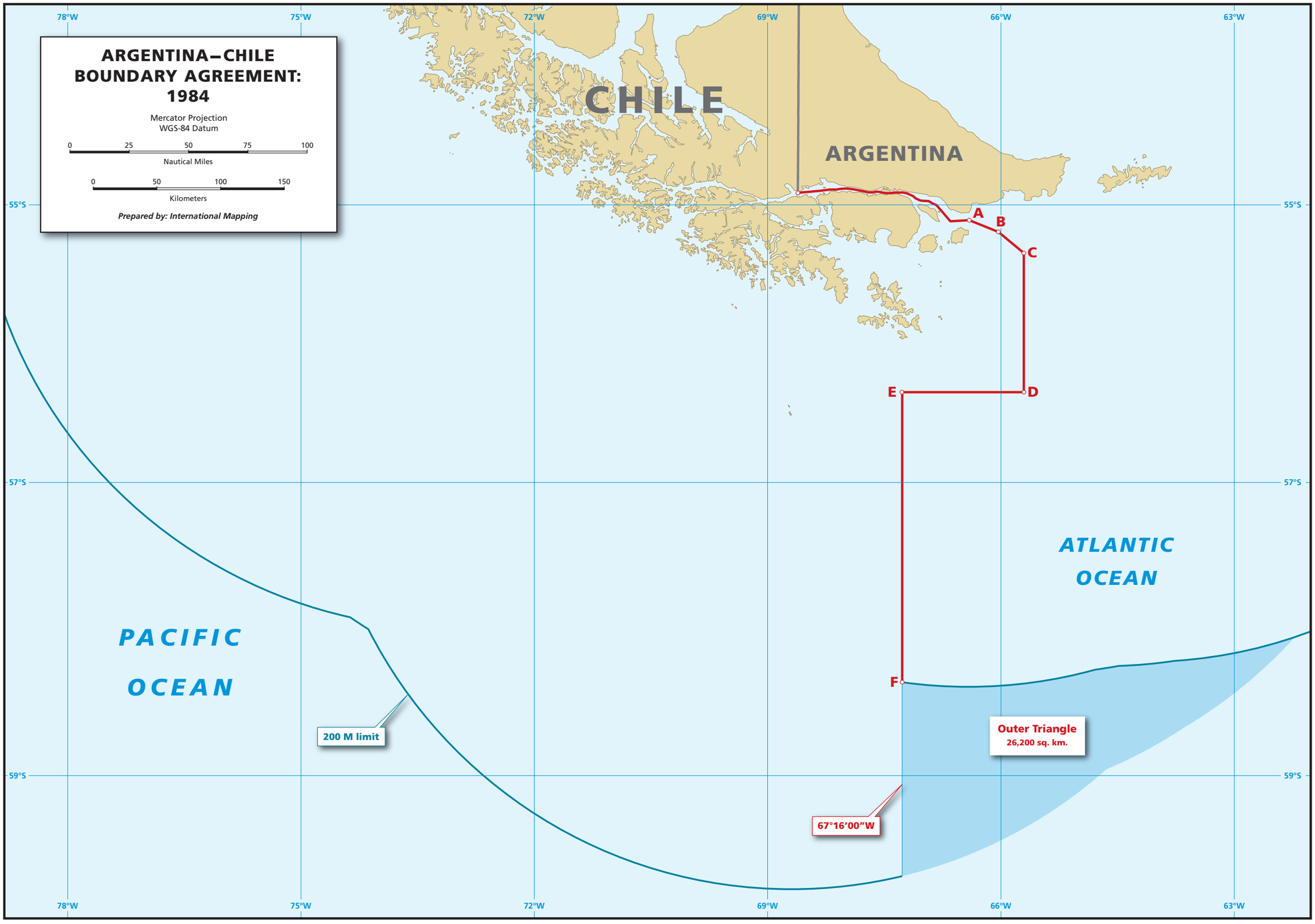
ARGENTINA–CHILE BOUNDARY AGREEMENT: 1984
Mercator Projection
WGS-84 Datum
0 25 50 75 100
Nautical Miles
0 50 100 150
Kilometers
Prepared by: International Mapping
78°W
75°W
72°W
69°W
66°W
63°W
55°S
57°S
59°S
CHILE
ARGENTINA
A
B
C
D
E
F
PACIFIC OCEAN
ATLANTIC OCEAN
200 M limit
Outer Triangle
26,200 sq. km.
67°16'00"W

Figure R-6.1

> *communications*, pursuant to the law and the treaties ratified by the State."[603]

Spanish text reads as follows:

> "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."

6.39 This is indeed a very paradoxical presentation of the situation. As shown on the two sketch-maps appearing here, **Figures R-6.2** and **R-6.3** which are faithful representations of the respective claims of the Parties with only a slight transposition of the axis of the maps which makes the maps more telling, it is very clear that it is Chile's claimed line following the alleged parallel which "considerably curtails practical access to the high seas" from the Peruvian coast. The following remarks are in order in this respect:

(a) The strict equidistance line constitutes the approximate bisector line of the angle formed by the coasts of the Parties in the region of Tacna (Peru) and Arica (Chile);

(b) As made crystal clear by the first sketch map (**Figure R-6.2**), the boundary being the equidistance line, all the harbours situated on both coasts (Arica, Pisagua, Iquique or Tocopilla in Chile; Vila Vila, Ilo, Mollendo,

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603 Political Constitution of Peru of 1993, paras. 3 and 4 (emphasis added). **PM, Annex 19**.

Quilca or Ocoña in Peru) have a direct access to the high seas: the shortest way to reach the high seas is for *all* these harbours entirely situated in the national maritime domain of the country where they are located;

(c) On the contrary, as shown by the second sketch map (**Figure R-6.3**), the line that follows the parallel of latitude claimed by Chile clearly blocks access from the Peruvian harbours of Vila Vila and Ilo to the Peruvian outer triangle that is part of the Peru's maritime domain.

IV. Chile's Argument Concerning the Method Used by Peru to Measure the Outer Limit of Its Maritime Domain

6.40 Probably because it has no doubt as to Peru's entitlement to exclusive sovereign rights over the outer triangle and its natural resources, in the Section of its Counter-Memorial devoted to that matter, Chile puts the emphasis on the discussion of an aspect which does not bear on the existence or the substance of Peru's rights in that area, but on the method used to measure the outer limit of Chile's and Peru's respective maritime domains. In this respect Chile contends – erroneously – that Peru has changed the method used to that effect[604], but, since Chile accepts "that the lateral boundary stands

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[604] Chile distorts Peruvian norms. A clear example of this is given by the way in which Chile makes reference to Supreme Resolution No. 23 of 12 January 1955 (CCM, paras. 3.50-3.56 and 4.30-4.32). On this respect, Peru has pointed out the true scope of such Resolution in paragraphs 4.112 and 4.113 of its Memorial, asserting that its purpose was to adjust the measurement method of the 200-mile projection. The 1955 Supreme Resolution refers to a constant distance from the coast, in a manner consistent with what had been previously established in the 1952 Petroleum Law and the Declaration of Santiago. The only reference to a parallel in the 1955 Resolution is circumscribed to what is provided for in point IV of the Declaration of Santiago, i.e., to the case where there is presence of islands.

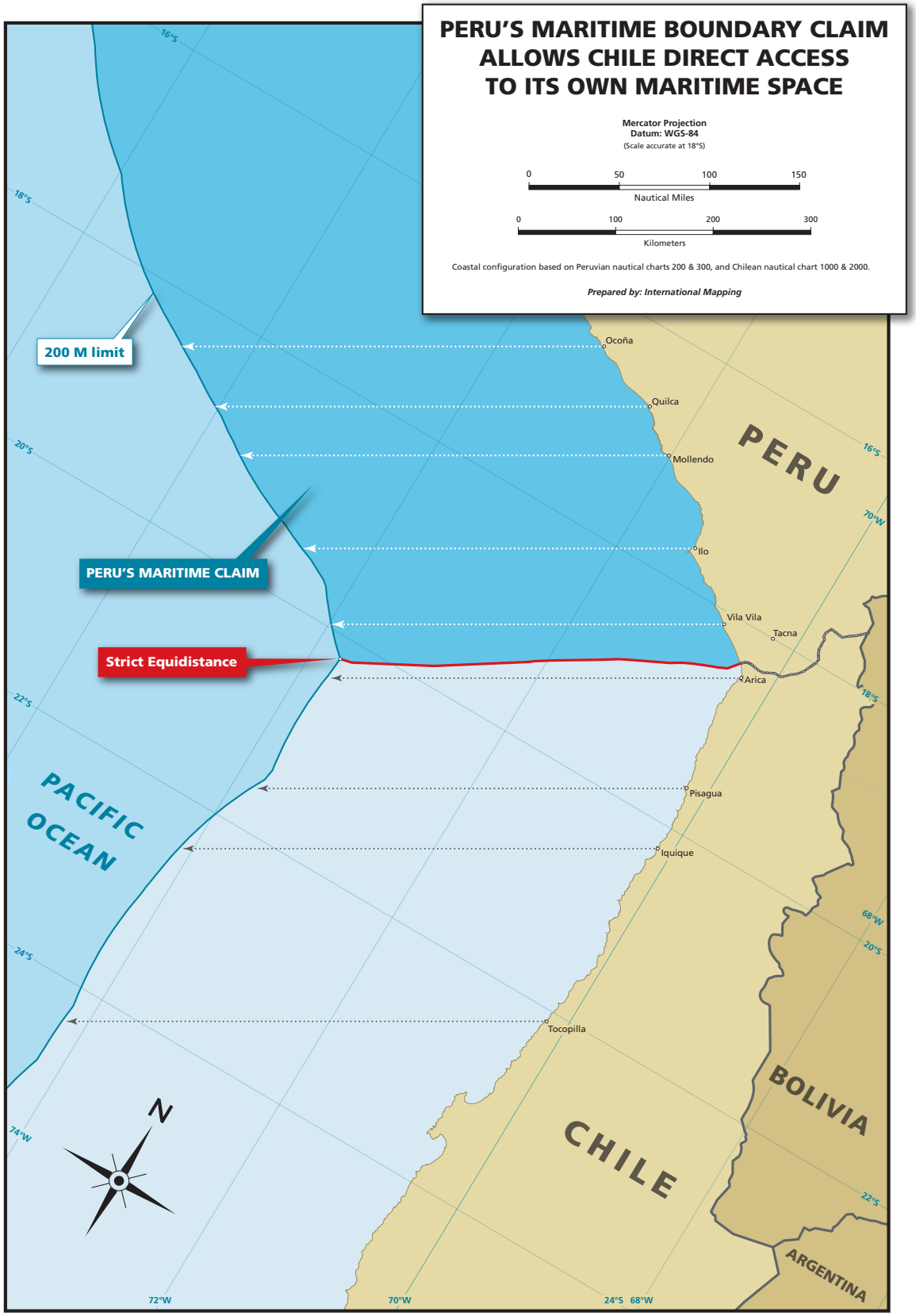
PERU'S MARITIME BOUNDARY CLAIM
ALLOWS CHILE DIRECT ACCESS
TO ITS OWN MARITIME SPACE
Mercator Projection
Datum: WGS-84
(Scale accurate at 18°S)
0 50 100 150
Nautical Miles
0 100 200 300
Kilometers
Coastal configuration based on Peruvian nautical charts 200 & 300, and Chilean nautical chart 1000 & 2000.
Prepared by: International Mapping
200 M limit
PERU'S MARITIME CLAIM
Strict Equidistance
Ocoña
Quilca
Mollendo
Ilo
Vila Vila
Tacna
Arica
Pisagua
Iquique
Tocopilla
PERU
CHILE
BOLIVIA
ARGENTINA
PACIFIC OCEAN
N
16°S
18°S
20°S
22°S
24°S
70°W
68°W
74°W
72°W

Figure R-6.2

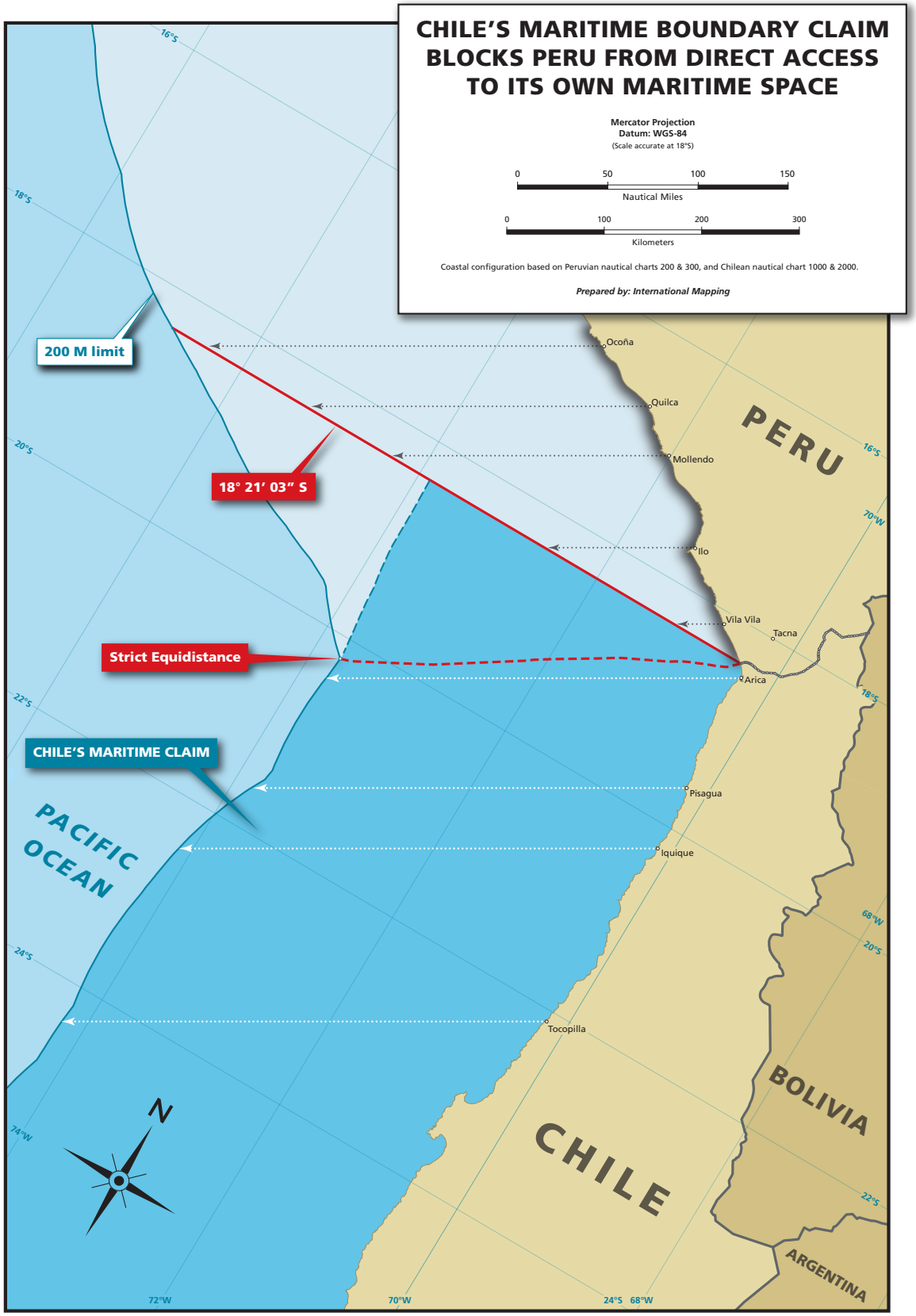
CHILE'S MARITIME BOUNDARY CLAIM
BLOCKS PERU FROM DIRECT ACCESS
TO ITS OWN MARITIME SPACE
Mercator Projection
Datum: WGS-84
(Scale accurate at 18°S)
0 50 100 150
Nautical Miles
0 100 200 300
Kilometers
Coastal configuration based on Peruvian nautical charts 200 & 300, and Chilean nautical chart 1000 & 2000.
Prepared by: International Mapping
200 M limit
18° 21' 03" S
Strict Equidistance
CHILE'S MARITIME CLAIM
PACIFIC OCEAN
PERU
CHILE
BOLIVIA
ARGENTINA
Ocoña
Quilca
Mollendo
Ilo
Vila Vila
Tacna
Arica
Pisagua
Iquique
Tocopilla
N
16°S
18°S
20°S
22°S
24°S
70°W
72°W
74°W
68°W

Figure R-6.3

regardless of the methodology that each State party adopts in measuring the outward reach of its maritime zone"[605], this alleged change would be of no consequence in respect to the issue discussed in the present Chapter: that is Peru's exclusive sovereign rights over the outer triangle.

6.41 While Chile accepts that "the Santiago Declaration was not prescriptive about the method to be used to measure the seaward limit of each State's maritime zone"[606], and states that it "does not object" to Peru's use of the envelope-of-arcs-of-circles method to measure the outward limit of its maritime domain[607], Chile tries to use this discussion to advance its case as to the establishment of a maritime boundary by the Declaration of Santiago. However, the link is obscure: precisely since whatever the methodology, it has no impact on the lateral boundary and there is no need to discuss the issue in this perspective; if the Declaration determined a maritime boundary, it will remain as fixed by it; if not, the maritime boundary would remain unfixed. Moreover, this would suppose that the signatories of the Declaration had (and still have) the right to extend their maritime domains beyond the 200 nautical mile limit, which is untenable as shown above[608].

6.42 As far as Peru can understand, the idea is that since the line was fixed at the alleged parallel, whatever the method used the boundary will remain fixed there. But this is a purely circular reasoning and does not help Chile. In substance, Chile contends that "since there *is* a boundary, the boundary remains where it is": this neither proves that there is a boundary, nor that it has to follow a specific direction, nor that Peru has no rights over the outer

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605 CCM, para. 2.119.

606 CCM, para. 2.123.

607 *Ibid.*

608 See above paras. 6.25-6.28 above.

triangle. It only shows that the artificial issue concerning the methodology is irrelevant for that purpose.

6.43 On this, Peru agrees. And it takes note that Chile "does not object" to Peru's use of the envelope-of-arcs-of-circles method.

6.44 By way of conclusion to this chapter, it is apparent that:

(a) Peru is entitled to a maritime domain extending up to 200 nautical miles from its coasts, in accordance with general international law as reflected by the 1952 Convention on the Law of the Sea, in particular Articles 57 and 76(2) of the Convention;

(b) The area situated north of the equidistance line, which is the maritime boundary line between the Parties, integrally constitutes Peru's maritime domain;

(c) Even if it were considered that the boundary does not follow the equidistance line (and whatever line would constitute the boundary), the "outer triangle", defined as the maritime area lying off Peru's southern coasts, within 200 nautical miles of Peru's baselines but more than 200 nautical miles from Chile's coasts, would be part of Peru's maritime domain where it enjoys sovereign rights and jurisdiction;

(d) In this zone, Peru's sovereign rights are exclusive in accordance with international law as reflected e.g., in Parts V and VI of the 1982 Convention on the Law of the Sea, and Chile can claim no rights apart from those recognized to third States by general international law, as presently embodied in the 1982 Convention;

(e) The recognition of the outer triangle as part of Peru's maritime domain by no means can be said to curtail practical access to the high seas from

Chile's harbours in the region; in contrast, the boundary line claimed by Chile would severely curtail access to the outer triangle from the Peru's harbours in the region; and

(f) Whatever the methodology used for measuring the outer limit of Peru's maritime domain, it has no impact on the lateral boundary.

CHAPTER VII

SUMMARY

7.1 The Court has jurisdiction to delimit the maritime boundary between Peru and Chile based on Article XXXI of the Pact of Bogotá. Chile's submissions in its Counter-Memorial have not raised any objections to the Court's jurisdiction or to the admissibility of Peru's claims. The Court is fully empowered to decide on the delimitation issues put to it in Peru's Application and Memorial, and responded to in Chile's Counter-Memorial.

7.2 Chile seeks to challenge the agreement of the Parties in 1929-1930 with respect to the endpoint of the land boundary where it meets the sea by arguing that *Hito No. 1* is the land boundary terminus.

7.3 The 1929 Treaty clearly stated that the land boundary "shall start from a point on the coast to be named 'Concordia', ten kilometres to the north of the bridge over the river Lluta". Moreover, the Joint Commission charged with demarcating the boundary in 1930 had precise instructions from the Governments of the two Parties that the starting point of the land boundary would be the point where an arc having a radius of ten kilometres from the river Lluta bridge intercepted the seashore. Contemporary sketch maps prepared at the time confirm the location of the land boundary, including its terminal point on the sea. This is Point Concordia, not *Hito No. 1*.

7.4 Any maritime boundary between the Parties must start at the terminal point of their land boundary where that boundary meets the sea. That point was settled in 1929-1930. Chile now tries to unsettle it by advancing a position that is directly at odds with what was agreed at the time. Moreover, Chile's position is also inconsistent with its own official mapping practice.

7.5 The main issue that divides the Parties concerns the object and purpose of the 1952 Declaration of Santiago and the interpretation of the express terms of point IV of that Declaration.

7.6 Contrary to Chile's assertions, the Declaration of Santiago was not, and was not intended to be, a legally-binding instrument establishing international maritime boundaries. A plain reading of its text, considered in the light of its object and purpose, shows that the Declaration of Santiago was a declaration of international maritime policy advanced in the face of threats from foreign whaling and fishing fleets. It was not a treaty, let alone a boundary agreement. The Declaration does not refer to a maritime boundary either in its title or in its text. No co-ordinates of a boundary are indicated and no map depicting a boundary is attached. It was not referred to as a boundary agreement at the time.

7.7 Point IV of the Declaration of Santiago is devoted solely to the question of islands. It sets forth the maritime zones of islands (200 nautical miles), and the limits to such zones in the event that an island or group of islands is situated less than 200 nautical miles from the general maritime zone of another signatory State (in which case, the maritime zone of the island or group of islands is limited by the parallel of latitude at the point where the land boundary of the States concerned reaches the sea). Point IV has nothing to do with the delimitation of the maritime boundary between two mainland coasts where islands are not a factor (as is the case between Peru and Chile).

It thus has no application to the delimitation of the waters adjacent to the land boundary between Peru and Chile.

7.8 The Parties' subsequent practice after the Declaration of Santiago was signed does not evidence any agreement between them that they considered the Declaration to have delimited their maritime boundary. No Chilean map published during the 40 years following the Declaration of Santiago depicted an agreed maritime boundary with Peru. Chile only unilaterally started to change its maps in a self-serving fashion in the 1990s. No Peruvian map published following the 1952 Declaration of Santiago depicted an agreed international maritime boundary with Chile. Neither Party's internal legislation refers to the fact that an international maritime boundary had been agreed under the Declaration of Santiago. To the contrary, in 1986, Peru proposed to Chile to negotiate a maritime delimitation agreement – a proposal which Chile said it would study.

7.9 The 1954 Agreement on a Special Zone, as well as the 1968-1969 light tower arrangements, and the general policing of fishing by the Parties, were designed to deal with the practical problem of reducing friction between fishermen operating small boats. None of this modified or derogated from the 1952 Declaration of Santiago, or evidenced the existence of an agreed, international maritime boundary for all purposes or of a permanent character.

7.10 Given the absence of any agreed boundary, the delimitation of the maritime boundary between the Parties falls to be decided by the Court. The applicable law in this case is customary international law, as reflected in the 1982 Convention on the Law of the Sea. Peru's maritime domain referred to in its Constitution and within which it exercises sovereignty, sovereign rights and jurisdiction, is fully compatible with international law and with the 1982

United Nations Convention on the Law of the Sea. For its part, Chile has never voiced any reservations about the nature of Peru's maritime domain in the past.

7.11 The basic principle of maritime delimitation is reflected in the "equidistance/ relevant circumstances" method articulated in the Court's jurisprudence. It is an unchallenged fact that an equidistance boundary between the Parties out to a distance of 200 nautical miles from their coasts achieves an equitable result in the light of the geographic facts of this case, and satisfies the test of proportionality. Furthermore, it is apparent that Chile's parallel of latitude claim cuts off Peru's legitimate maritime entitlements, fails to satisfy the proportionality test, and is grossly inequitable.

7.12 Chile's claimed delimitation line along the parallel of latitude also has the effect of depriving Peru of its sovereign rights over a maritime area which is located within 200 nautical miles of its own baselines, but beyond 200 nautical miles from Chile's baselines. This is the "outer triangle" discussed in Chapter VI. Chile's claim is incompatible with the exclusive sovereign rights that Peru possesses under international law in this area - an area where Chile has no continental shelf or exclusive economic zone entitlements at all. Recognition by the Court of Peru's rights in the "outer triangle" would in no way prejudice Chile or curtail its access to the high seas.

SUBMISSIONS

For the reasons set out in Peru's Memorial and this Reply, the Republic of Peru requests the Court to adjudge and declare that:

(1) The delimitation between the respective maritime zones between the Republic of Peru and the Republic of Chile, is a line starting at "Point Concordia" (defined as the intersection with the low-water mark of a 10-kilometre radius arc, having as its centre the first bridge over the River Lluta of the Arica-La Paz railway) and equidistant from the baselines of both Parties, up to a point situated at a distance of 200 nautical miles from those baselines, and

(2) Beyond the point where the common maritime border ends, Peru is entitled to exercise exclusive sovereign rights over a maritime area lying out to a distance of 200 nautical miles from its baselines.

The Republic of Peru reserves its right to amend these submissions as the case may be in the course of the present proceedings.

The Hague, 9 November 2010

ALLAN WAGNER

Agent of the Republic of Peru

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2. Official Letter (M): 5-4/166 of 11 July 1952 from the Minister of Foreign Affairs of Peru to the Ambassador of Peru to Chile
3. Official Letter No. 5-12-Y/269 of 13 October 1952, from the chargé d'affaires a.i. of Peru to Ecuador to the Minister of Foreign Affairs of Peru
4. Official Letter No. 5-12-A/152 of 17 October 1952, from the chargé d'affaires a.i. of Peru to Ecuador to the Minister of Foreign Affairs of Peru
5. Records of the Second 1954 Extraordinary Legislature of the Peruvian Congress. 2nd Session Held on Thursday 5 May 1955
6. Official Letter No. 5-4-Y/68 of 11 July 1955, from the chargé d'affaires a.i. of Peru to Chile to the Peruvian Minister of Foreign Affairs
7. Ministerial Resolution No. 458 of 28 April 1961, Issued by the Ministry of Foreign Affairs of Peru
8. Memorandum No. (J) - 11 of 24 January 1968, from the Head of Borders Department to the Secretary-General of the Ministry of Foreign Affairs of Peru
9. Records of the 1993 Constituent Congress Regarding the Manner in Which the Maritime Domain Was Addressed in the Text of the Constitution

10. Directoral Resolution N° 0313-94/DCG of 23 September 1994, Approving the Peruvian Positioning and Security Information System Issued by the Ministry of Defence
11. Supreme Resolution No. 231-2001-RE of 28 May 2001, Submitting to the Congress of the Republic the Documentation Concerning Peru's Accession to the 1982 United Nations Convention on the Law of the Sea
12. Official Letter RE (TRA) No. 3-0/74 of 30 May 2001, from the President of the Council of Ministers and Minister of Foreign Affairs of Peru to the President of the Congress
13. Law No. 29189, Law Specifying Article 3 of Law No. 27415, Law on Territorial Demarcation of the Province of Tacna, Department of Tacna

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14. Decree with Force of Law No. 2090 of 30 July 1930
15. Senate Records of Debates of the Congress of Chile. Session Number Twenty First Held on 10 August 1954
16. Decree No. 401 of 6 May 1985 Promulgating the Treaty of Peace and Friendship between the Government of the Republic of Chile and the Government of the Republic of Argentina
17. Decree No. 94 of 11 April 1985 on the Prohibition of the Use of Trawling and Fence Fishing Gears in the Indicated Areas and Abolishing the Decree that It Indicates
18. Decree with Force of Law No. 2-18.715 of 9 June 1989 Determines the Specific Limits of The Provinces of the Country
19. Decree No. 704 of 29 October 1990 Amending Decree (M) No. 1.190 of 1976 that Organises the Maritime Search and Rescue Service of Chile's Navy
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31. Note (GAB) No. 6/23 of 10 April 2001, from the President of the Council of Ministers and Minister of Foreign Affairs of Peru to the Minister of Foreign Affairs of Chile
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37. Letter of 9 June 2010 from His Excellency Alan García, President of the Republic of Peru to His Excellency Rafael Correa Delgado, President of the Republic of Ecuador

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38. Statements of President José María Velasco Ibarra, Reproduced in Ecuadorian Journal El Comercio of 16 October 1952

39. Statements of President José María Velasco Ibarra, Reproduced in Peruvian Journal El Comercio of 17 October 1952
40. Interview to Andrés Townsend Ezcurra in Peruvian Journal El Comercio of 28 January 1979
41. Article by Luis Alberto Sánchez Entitled “Sobre las 200 millas”, Published in Peruvian Journal Expreso of 23 October 1982
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43. Fax No. 5 of 27 January 2003 from the Directorate General of the Maritime Territory and Merchant Marine of the Chilean Navy (Directemar) to the General Director of Captaincies and Coastguards of the Peruvian Navy
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