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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2012

Public sitting

held on Friday 7 December 2012, at 10 a.m., at the Peace Palace,

President Tomka presiding,

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

VERBATIM RECORD

ANNÉE 2012

Audience publique

tenue le vendredi 7 décembre 2012, à 10 heures, au Palais de la Paix,

sous la présidence de M. Tomka, président,

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

COMPTE RENDU

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

Présents : M. Tomka, président
M. Sepúlveda-Amor, vice-président
MM. Owada
Abraham
Keith
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Mmes Xue
Donoghue
M. Gaja
Mme Sebutinde
M. Bhandari, juges
MM. Guillaume
Orrego Vicuña, juges *ad hoc*

M. Couvreur, greffier

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The PRESIDENT: Good morning, please be seated. The sitting is now open. This morning the Court will hear the continuation of the first round of oral argument of Chile.

I give the floor to Mr. David Colson. You have the floor, Sir.

Mr. COLSON:

PERU'S 1955 SUPREME RESOLUTION

1. Introduction

1.1. Thank you, Mr. President, Members of the Court. This morning Chile's presentation will address evidence of the practice implementing the all-purpose maritime boundary between Chile and Peru. My task is to begin that discussion with a short presentation about Peru's 1955 Supreme Resolution[1], and I will also comment briefly about the maps that have been presented as evidence in this case. I will be followed by Professor Paulsson who will address the 1968-1969 Agreement and Hito No. 1 issues, and after that Mr. Petrochilos will conclude the morning by addressing the evidence of the practice along the boundary parallel.

2. Peru's Supreme Resolution No. 23 of 1955

2.1. Sir Michael Wood took the Court through Peru's 1955 Supreme Resolution on Tuesday morning rather quickly, emphasizing that in Peru's legal structure this Resolution is low on the hierarchy of legal norms and it deals with a technical subject[2]. Nonetheless, the Supreme Resolution is the highest form of executive power, and the fact that it deals with a technical subject does not mean that this Resolution is not important to this case. It is a contemporaneous directive as to how Peru's zone is to be depicted, and it does not just deal with the outer limit of that zone, as was implied. The text is short and it is clear. And, in Chile's view, it clearly demonstrates Peru's long-standing acknowledgment of the Chile-Peru maritime boundary, a boundary that is all-purpose in nature and that follows a parallel of latitude. Peru, as you have heard, today nonetheless denies the applicability of the 1955 Supreme Resolution to the Chile-Peru maritime

[1]CMC, Vol. V. Ann. 170, p. 1025.

[2]CR 2012/28, pp. 35-37, paras. 36-43 (Wood).

boundary[3]. If the Court will bear with me I would like to go back over the same text that Sir Michael examined.

2.2. The full text is now coming up on the screen in Spanish, and in English and French versions. I also refer you to tab 47 in your folders. The Court may wish to note several points.

2.3. First, the title. The reference is to Peru's 200–mile zone. There is no hint, there is no caveat, there is no footnote, there is no asterisk that indicates that Peru's Supreme Resolution is about some but not all of Peru's zone, or that it concerns some but not all of its limits.

2.4. Second, the date. As the Court knows, the 1954 Agreement Relating to the Special Maritime Frontier Zone, which refers to the "parallel which constitutes the maritime boundary", was signed on 4 December 1954[4]. The Supreme Resolution was promulgated on 12 January 1955, just over one month later.

2.5. Third, the purpose. As expressed in the chapeau, the purpose is to specify how Peru's zone is to be depicted. A direct lineage is mentioned between this Resolution, the 1947 Supreme Decree and the Santiago Declaration. There is no hint here either that the Supreme Resolution is not intended to apply to all of Peru's zone.

2.6. Fourth, paragraph one. This paragraph concerns the outer limit of Peru's zone. Peru says this paragraph refers to the arcs-of-circles method and it therefore directs that the outer limit of Peru's zone be depicted accordingly; Chile contests that interpretation. I will have more to say about this in my presentation this afternoon, but the key point — the key point — is that the Court does not need to resolve this difference. The question of when Peru began to use the arcs-of-circles method to determine the outer limit of its zone is largely irrelevant for the purposes of this case: the reason that we are here is the lateral limit of the zone between Chile and Peru and that question is addressed in paragraph 2.

2.7. Paragraph 2 provides that the said line, namely, the line of the outer limit, may not extend beyond the parallel where the frontier of Peru reaches the sea and it refers to Article IV of the Santiago Declaration in that connection. This seems clear enough. No matter what technique is

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[3]CR 2012/28, p. 37, para. 43 (Wood).

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

used to determine the outer limit, or how far out from the coast the outer limit may extend, the outer limit cannot reach beyond the boundary parallel.

2.8. Now, Sir Michael Wood said that there is no provision in this Resolution, no provision in this particular paragraph of the Resolution that requires, as he said "that lines had to be shown along the parallels[5]. Literally it is true that these words do not appear in paragraph 2, but the Resolution requires any depiction of the outer limit to stop at the parallel at the point at which the frontier of Peru reaches the sea. And the clear purpose of such reference is to identify the northern and southern sides of Peru's zone. Can it really be that this Resolution, which was for the purpose of defining Peru's zone, does no more than to require that the outer limit of Peru's zone is meant to hang in the air or sea, as you wish — with no lines connecting it back to Peru's coast?

2.9. The argument that this Resolution only concerns the outer limit is new and it is unconvincing. It is inconceivable that a State would describe its 200-mile zone in this way. Peru's other argument about paragraph 2 of this Resolution, which at least is consistent with the theory of Peru's case as we understand it, is that Article IV does not apply to Chile, so, in Peru's case, this paragraph from the 1955 Supreme Resolution, describing the limits of Peru's 200-nautical-mile zone, does not address the southern limit of that zone — namely, the boundary with Chile.

2.10. Whatever the argument, Peru therefore today is asking the Court to believe that in 1955 Peru went to the trouble to promulgate a Supreme Resolution for the purpose of specifying how Peru's zone is to be depicted, but it chose to leave the entire southern side of that zone wide open — and Peru did not — the Supreme Resolution did not — even make mention of the fact that it was doing so.

2.11. Sixth, Foreign Minister David Aguilar Cornejo signed the 1955 Supreme Resolution together with the President. He, of course, had signed the 1954 Agreement Relating to the Special Maritime Frontier Zone[6] and the Complementary Convention[7] just five weeks earlier. And even Peru admits, although in a somewhat convoluted way, that the 1954 Agreement Relating to the Special Maritime Frontier Zone did and does in fact apply to Peru's southern limit — although

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[5]CR 2012/28, p. 36, para. 42 (Wood).

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

[7]CMC, Vol. II, Ann. 163.

Peru's case argues it is just a provisional fisheries enforcement line[8]. But Peru, today again, would have the Court believe that somehow, when the Foreign Minister of Peru, who signed the 1955 Supreme Resolution, which Peru now says did not apply to Chile, he forgot about the 1954 Agreement Relating to the Special Maritime Frontier Zone that he had signed just shortly before.

2.12. The argument that Peru makes is unbelievable. In early 1955, when Chile, Ecuador and Peru were under diplomatic and political pressure — "hostility" was the word that was used by Professor Lowe[9] — from the United States and major maritime States about their claim, Peru proudly passes a Supreme Resolution for the purpose of specifying how its zone is to be depicted. Peru does so in very clear language. There is nothing here to suggest that the limits of this zone are incomplete.

2.13. Furthermore, within a few months of the date of the 1955 Supreme Resolution, in May 1955, the Congress of Peru approved the Santiago Declaration, and the Complementary Convention and the 1954 Agreement Relating to the Special Maritime Frontier Zone[10]. Nowhere in the record of that process is there any reference to the effect that Peru was leaving the southern limit of its zone undefined.

2.14. We may also note that Peru's Foreign Ministry published this Supreme Resolution in a compendium of law of the sea materials in 1971 and also asked that it be published in the United Nations Legislative Series, which was done, and in neither case was there any mention that the limits of Peru's 200-nautical-mile zone described therein were incomplete[11]. The whole purpose of this Resolution would be defeated if indeed it was to be applied and understood as Peru's counsel claim today.

3. Dr. García Sayán as witness

3.1. But we do not need to rely upon Peru's counsel because we have a prominent and contemporary witness — Dr. Enrique García Sayán — you have heard his name several times already this week. We may recall that he was Peru's Foreign Minister in 1947. As Professor

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[8]See RP, para. 2.81.

[9]CR 2012/28, p. 18, para. 34 (Lowe).

[10]MP, Vol. II, Ann. 10.

[11]See CMC, Vol. IV, Ann. 164, pp. 990-991.

Crawford mentioned, he was the recipient of Chile's diplomatic Note formally notifying Peru of Chile's 1947 Proclamation[12]. He signed, along with President Bustamante y Rivero, Peru's 1947 Supreme Decree, declaring Peru's 200-mile zone[13]. Dr. García Sayán was Peru's leading law of the sea specialist of the day, and as Peru explained at the start of our proceedings this week, he was one of the "founding fathers" of the 200-mile zone[14]. He was a member of Peru's delegation to the First and Second United Nations Conferences on the Law of the Sea. He was later Secretary-General of the Permanent Commission of the South Pacific.

3.2. In March of 1955, shortly after the Supreme Resolution was promulgated, Dr. García Sayán published a small monograph. It is entitled, in English, "Notes on the Maritime Sovereignty of Peru: Defense of the 200 miles". It is about 50 pages in length. A portion of the original Spanish text is found at Annex 266 of Chile's Counter-Memorial with selected paragraphs translated into English. Dr. García Sayán published this monograph to defend and justify Peru's 200-mile zone to the international community. It is a forceful presentation of Peru's position. Within the framework of his much larger discussion, Dr. García Sayán refers to the 1955 Supreme Resolution, which had been promulgated just a few months before publication of his monograph. The full paragraph in which this reference is made is now on the screen and the key paragraph is highlighted in English translation. It is at tab 48 of your folders.

3.3. The Court will note that Dr. García Sayán accurately refers to the "parallels" — plural — that limit Peru's maritime zone to the north and south. This is not a typographical error. If Peru regarded the southern limit of its zone with Chile to be open or unresolved, Dr. García Sayán would have known of it and he would have said so. He understood Peru's zone and what it included and what it did not. He knew that it was limited north and south by parallels of latitude. And he said so. And we can say with confidence that if it was Peru's position in 1955 that Article IV did not apply to Chile, he would have said so and would have articulated Peru's position. But he did not. He referred to two parallels.

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[12]CMC, Vol. III, Ann. 52; and see CR 2012/30, p. 40, para. 2.6 (Crawford).

[13]MP, Vol. II, Ann. 6, p. 27.

[14]CR 2012/27, p. 18, para. 4 (Wagner).

3.4. But this is not all that may be found in this 1955 monograph. The monograph begins with a map that is now on the screen. A copy of this map is at Figure 4 of Chile's Counter-Memorial and is at tab 49 of your folders. There is no doubt that on this map, Peru's zone is limited to the north and south by parallels of latitude — and that the outer limit is determined by the trace parallel technique. This is what the Foreign Minister of Peru who signed the 1947 Decree, and who, as Professor Treves told you on Monday[15], defended Peru's zone in Geneva in 1958, thought about Peru's zone. This is what he put at the beginning of his monograph which he published for the purpose of defending Peru's zone to the international community.

4. Maps: Peru's Supreme Decree No. 570 of 1957

4.1. Two years later, in 1957, Peru published another decree, Supreme Decree 570[16]. Again, the full Spanish text is on the screen with the key paragraph highlighted in English. It is at tab 50 in your folders. This Decree required that maps published in Peru showing its boundaries be approved by the Ministry of Foreign Affairs to ensure the correct depiction of the country's boundaries. This is a rather unique law. Itself, it is evidence of the importance that Peru attached to ensuring clarity of its national limits. If Peru believed that there was no maritime boundary with Chile, it would have been the duty of the Foreign Ministry of Peru to ensure that no Chile-Peru boundary was shown on any map that it approved.

4.2. But Chile has produced, in the record, maps approved by the Foreign Ministry pursuant to this Decree which show both the Chile-Peru and Ecuador-Peru maritime boundaries; further, the boundaries that are shown are parallels of latitude. Now Peru tried to refute the effect of the Decree 570 evidence by referring to a subsequent Ministerial Resolution from 1961[17], and Mr. Bundy repeated that argument on Tuesday[18]. You can find this 1961 Resolution at tab 51 of your folders and it is now also shown on the screen. As is clear from the text of this Resolution, all that 1961 Resolution did was to affirm that the Ministry's authorization is limited only to ensuring "data that is directly related to the delimitation of Peru's bordering zones" is correct. The

[15]CR 2012/27, p. 50, para. 23 (Treves).

[16]MP, Vol. II, Ann. 11.

[17]RP, paras. 4.129-4.130, referring to RP, Vol. II, Ann. 9.

[18]CR 2012/28, p. 58, para. 17 (Bundy).

Resolution goes on with a disclaimer to the effect that Peru's Foreign Ministry was not responsible for the "concepts and commentaries relating to the historical and cartographic material" in the books containing the maps it approved[19]. This means nothing more than what it says: namely, the Ministry's stamp of approval concerned only the limits shown on the maps, not the concepts and commentaries that might also be mentioned in the books in which those maps appeared.

4.3. I will close by mentioning just one of those books which is now represented on the screen, and it is at tab 52 in your folders. This book was presented at figure 38 of Chile's Counter-Memorial; it was approved by Peru's Foreign Ministry in 1982 and published in the same year. It is an encyclopaedia for school children. The letter from the Foreign Ministry says "Peru's international boundaries have been drawn in an acceptable way…". And the map on page 20 of the encyclopaedia shows the lateral international maritime boundaries of Peru with Ecuador and Chile — and, in the case of the southern boundary with Chile, the map even refers to the parallel of Hito No. 1.

4.4. What is important is that there are maps published in Peru — yes by private parties — but the limits of Peru shown on those maps are required to be approved by the Ministry of Foreign Affairs of Peru and were so approved. These maps show that the southern maritime limit of Peru's zone is a parallel of latitude of the land boundary terminus with Chile, demonstrating both that there is a boundary and that the boundary is a parallel of latitude.

4.5. The parties to the Santiago Declaration did not annex a map to their treaty, giving physical expression to their will[20]. Contrary to Peru's assertion[21], this does not mean that the map evidence in this case has no probative value. The probative value of the maps presented by Chile must be assessed in the light of Peru's Supreme Decree of 1957, requiring Foreign Ministry approval of the boundaries depicted on them. Surely these maps are corroborative evidence endorsing a conclusion that the Court may reach by means unconnected with these maps[22]. Surely this map evidence bearing the approval of the Foreign Ministry shows the attitude of Peru with

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[19]RP, Vol. II, Ann. 9, p. 79.

[20]Cf. *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, para. 54.

[21]CR 2012/28, p. 58, paras. 16-18 (Bundy).

[22]*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, para. 56; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, para. 87; and *Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, para. 138.

respect to its international boundaries[23]. Surely these maps, published under the auspices of the State, and in the case of this particular map to educate its children, have high probative value[24]. These maps carry an official imprimatur. They confirm Chile's case and squarely contradict the argument that Peru makes before the Court.

Thank you, Mr. President, Members of the Court. That concludes my presentation. I ask you to call upon Professor Paulsson.

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

Mr. PAULSSON:

AGREEMENTS OF 1968-1969 TO SIGNAL THE MARITIME BOUNDARY

1. Mr. President, Members of the Court, it is an honour for me to share the responsibility of presenting Chile's case before your Court.

2. Yesterday you saw that the Agreements of 1952 and 1954 contain all the elements that are required for a proper resolution of this dispute. Now, Chile will show that this conclusion is confirmed by the conduct of the two States during the half decade that followed the Santiago Declaration.

3. This topic of subsequent conduct will be addressed by two speakers.

4. First, it will be my task to describe dealings between the two States at moments when their respective officials *explicitly stated* that they were acting in accordance with the agreed maritime border.

5. Mr. Petrochilos will follow me, and speak of another type of conduct, namely conduct concerning matters so plainly settled that the existence of the border was taken for granted.

6. My observations regarding the explicit application of an established boundary fall under two headings: namely, the elaborate process which led to the agreement in 1968-1969 to provide

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[23]*Honduras Borders (Guatemala/Honduras)*, Award, 23 January 1933, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. II, p. 1360.

[24]*Dispute between Argentina and Chile concerning the Beagle Channel*, Award, 18 February 1977, *RIAA*, Vol. XXI, para. 128.

better signalling for the boundary; and second, the role of Hito No. 1 as the reference point for the maritime boundary. I expect, Mr. President, to finish in one hour.

I. Overview of the agreements of 1968-1969: confirmation of the existing maritime boundary

7. Before I review some of the detail of what happened in 1968-1969, here is the big picture:

8. Chile and Peru had for a number of years been concerned about illegal transgressions of the border by fishing vessels. Mr. Petrochilos will be telling you more about this. I simply observe that both Chile and Peru saw the need for measures to stop such transgressions[25]. In early 1968, an agreement was reached to send official delegations from both States to the frontier area to find joint solutions. They were successful. The end product was a formal document dated 22 August 1969, which you can find at tab 22 of the day 1 folder. It was entitled "Act of the Chile-Peru Mixed Commission in Charge of Verifying the Location of Hito No. 1 and Signalling the Maritime Boundary"[26]. The maritime boundary, or in the original, *el limite maritimo.* What more needs to be said? This Commission had signalled *the* maritime boundary, not a possible boundary, or a proposed boundary, or a provisional boundary, or a boundary for special purposes. There was no reservation, there was no qualification, simply the task of ensuring the practical effects of a border — an *existing* border.

9. It is remarkable that Peru's written pleadings say *nothing* about this Act. Even this week, Peru spent only a few minutes on the 1968-1969 Agreement, and all it could find to argue was that terms such as "maritime frontier" and "maritime boundary" were "used indifferently" — whatever that means — and did not really mean very much, and are somehow to be understood as meaning something less than "a definitive, all-purpose maritime boundary"[27]. The 1968-1969 episode seems to be a significant source of trouble for Peru. Peru acts like a student who does not like the difficult exam questions he is given, and instead starts to recite memorized answers to different questions, more to his taste.

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[25]MP, Vol. III, Ann. 68, p. 407, para. 3; CMC, Vol. III, Ann.73, p. 552, penultimate para.

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

[27]CR 2012/28, p. 41, para. 55 (Wood).

10. For example, Peru proposes, at paragraph 4.128 of its Memorial, that the Mixed Commission was "not engaged in the drawing of a definitive and permanent international boundary"[28]. Well, no — but who ever said that in the first place?

11. The delegates had been given, by their Governments, an explicit task, I quote, "*materialicen el paralelo de la frontera marítima que se origina en el Hito número uno*"[29] which means "to materialize" — we might say in English "*to give physical effect to* the parallel of the maritime frontier which originates at Hito No. 1". There is no difficulty here; the border was already established.

12. Mr. President, Members of the Court, this important episode of an *agreed confirmation* of an existing boundary obviously has legal significance.

13. Chile and Peru are not the only States which have confirmed an existing maritime boundary in this manner. Ecuador and Colombia confirmed the co-ordinates of the reference point for *their* maritime boundary 37 years after concluding a delimitation agreement. Colombia and Ecuador also use, you recall, a parallel of latitude to divide their maritime zones. Their agreement of 1975 provides that the boundary followed — I quote, and I would invite you to listen carefully — "the line of the geographical parallel traversing the point at which the international land frontier between Ecuador and Colombia reaches the sea"[30] — a formulation which should remind you in general of the four parallel lines on the chart shown to you yesterday by the Agent of Chile and should remind you in particular of the Santiago Declaration. Although the Colombia-Ecuador agreement did not specify precise co-ordinates of the latitude of the boundary, the parties respected the agreed parallel. In June this year, 2012, only then did the two States agree on those precise co-ordinates. You will find the joint declaration of the two States, if you wish, at tab 54. In the meanwhile, neither of these two States ever expressed doubt that their maritime zones had already been fully delimited.

14. Allow me to recall your Judgment in *Libya/Chad*. Libya argued that a 1955 treaty should not be accepted as having established a border. Yet a treaty of friendship entered into

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[28]MP, para. 4.128.

[29]*Ibid.*, Vol. II, Ann. 59, p. 334, first para.

[30]CMC, Vol. II, Ann. 9, p. 65, Art. 1.

11 years later, in 1966, referred repeatedly to "the frontier," as though one existed. "Pay no attention to this", Libya told the Court. And now I will quote from Libya's Memorial at paragraph 5.540. This 1966 document

> "contained no provision purporting to delimit the bounday . . .; it was preceded by no boundary negotiation . . .; it was followed by no boundary negotiations to delimit or demarcate a boundary"[31].

This Libyan argument sounds familiar, does it not? It sounds very much like what Peru is saying today, as Peru tells you that the Mixed Commission's Act of 1969 is of no weight as a confirmation of the 1952 Santiago Declaration. Well, what did your Court answer Libya? Allow me to read from paragraph 66 of your Judgment:

> "The Treaty between Libya and Chad of 2 March 1966, like the Treaty of 1955, refers to friendship and neighbourly relations between the Parties, and deals with frontier questions. Articles 1 and 2 mention 'the frontier' between the two countries, with no suggestion of there being any uncertainty about it. Article 1 deals with order and security 'along the frontier' and Article 2 deals with the movement of people living 'on each side of the frontier'. Article 4 deals with frontier permits and Article 7 with frontier authorities. If a serious dispute had indeed existed regarding frontiers, eleven years after the conclusion of the 1955 Treaty, one would expect it to have been reflected in the 1966 Treaty." (*Territorial Dispute (Libyan Arab Jamahiriya/Chad) ICJ Reports 1994*, p 35, para. 66.)

15. So, I fear Peru has a serious problem. The confirmation we are looking at is much more powerful than the confirmation in *Libya/Chad*. In *our* story the agreement of the Parties in 1968-1969 was on the materialization of the existing boundary itself, and not, as in *Libya/Chad*, the implementation of general policies of co-operation in the frontier area. Moreover, the agreement in our case was confirmed through an elaborate series of meetings as well as official communications and conclusions. These official documents are addressed extensively in Chapter III, Section 2, of Chile's Counter-Memorial and Chapter II, Sections 4 and 5 of Chile's Rejoinder. Allow me to give you just some of the details.

II. Chile and Peru agreed to signal the existing maritime boundary

16. The Parties first met in January 1968. In the following weeks, they exchanged Notes expressing their agreement to build posts or signs "at the point at which the common border

[31] *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Memorial of Libya dated 26 Aug. 1991, para. 5.540.

reaches the sea, near [Hito No. 1]"[32]. Peru gets nowhere when it insists that this communication did not explicitly assert the Parties' intention to signal the existing maritime border of the parallel of Hito No. 1, because, as I will easily be able to show you, the lighthouses were built precisely to signal the maritime boundary following that very parallel of Hito No. 1. If, as Peru now claims, "[T]he concern of the States was to signal a point on land"[33], presumably to keep ships from being wrecked on land, you need only one lighthouse — not two.

17. Peru and Chile knew exactly what they were doing. When the Peruvian and Chilean delegations met in the frontier area in April 1968, the delegates signed a document[34]. You find it at tab 17 of the day 1 folder. This formal document describes their task, to give practical effect to the parallel corresponding to the "geographical location"[35] — the expression used — of Hito No. 1. There was no issue about the *unquestionable* location of that *Hito*. In another Exchange of Notes in August that year, 1968, the Governments fully approved the delegates' proposal to use leading marks that would trace a line to signal the parallel of the maritime frontier[36]. That remained the object of the exercise, and finally the Mixed Commission confirmed in its Act of 22 August 1969 that it had conducted field work to verify the location of Hito No. 1 and fix the location of the lighthouses along its parallel.

18. This Mixed Commission, I might add, was composed of the heads of the boundary departments of the foreign ministries as well as serving and retired navy officers of both States. Indeed, Peru's delegates were formally appointed by a supreme resolution[37].

III. Chile and Peru agreed to signal an all-purpose maritime boundary

19. The heads of the delegations were involved in the entire process, from the meeting in January 1968 onward. If the Parties had intended, as Peru now claims, to sign a "*provisional* line"[38], a line "for *policing* purposes"[39], or a line based on undefined *"ad hoc arrangements"*[40], the

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[32]MP, Vol. III, Ann. 71, p. 422, first para.; MP, Vol. III, Ann. 72, p. 426, first para.

[33]CR 2012/28, p. 41, para. 58 (Wood).

[34]MP Vol. II, Ann. 59.

[35]*Ibid.*, p. 337, penultimate para.

[36]MP Vol. III, Ann. 74, p. 435, first para and Ann. 75, p. 439, second para.

[37]CMC, Vo. IV, Ann. 165.

[38]MP, para. 4.4.

delegates and their Governments would have had ample opportunity to ask to amend the stated objective — which was to signal the "maritime frontier" and the "maritime boundary". What the Act of 1969 does record is that the Mixed Commission's tasks were the "[d]etermination and implementation of the parallel that passes through [Hito No. 1]" and "[p]hysically to give effect to the parallel by means of two points (one to the West and the other to the East of [Hito No. 1]) so that they . . . continue the alignment of the parallel"[41].

20. As this Court had occasion to remark in *Indonesia/Malaysia*, in such circumstances States are expected to clarify the position[42]. What Chile and Peru did was clear: to confirm their intention to signal the maritime boundary in an unqualified and unambiguous manner.

IV. *Diez Canseco* incident of 1966

21. The 1968-1969 process makes even more sense if we consider what had been happening in the immediately preceding years. In diplomatic correspondence prior to 1968, Peru had repeatedly protested against the incursion of Chilean fishing vessels into "Peruvian waters"[43], Peru's "territorial waters"[44] and Peru's "jurisdictional waters"[45] -- expressions used by Peru. These expressions would have been nonsensical if there had been no maritime boundary. There would have been no basis for the *agreement* of 1968-1969 to *signal* the maritime boundary, if both sides had not understood that an agreed boundary in fact existed.

22. This point is very well illustrated by the so-called *Diez Canseco* incident of 1966. The *Diez Canseco* was a corvette of the Peruvian navy which had pursued Chilean fishing vessels. Photos of the *Diez Canseco* — it is the same vessel — are on your screen — they are also at tab 55 of your folder. This was not a small ship of the category, as Peru puts it, of "near-shore fishermen encroaching on areas that were considered by fishing communities in the other State to belong to

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[39]MP, para. 4.4.

[40]RP, para. 4.49.

[41]CMC, Vol. II, Ann. 6, p. 37, para. 2.

[42]Case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 661, para. 72.

[43]CMC, Vol. III, Ann. 73, para. 552, first para.

[44]MP, Vol. III, Ann. 69, p. 411, first para.

[45]CMC, Vol. III, Ann. 77, p. 571.

them"[46]. The *Diez Canseco* was there for the defence of Peru's sovereign territory. It is not the kind of vessel that goes unnoticed into the waters of a neighbouring State. But Peru denied that there had been an illegal incursion and that may have been true. What is interesting is the way Peru affirmed its understanding of the boundary, as explained in a memorandum transmitted to Chile's Ministry of Foreign Affairs at the time. You will find this memorandum at tab 56 of your folders. This memorandum of explanation does two very significant things.

It affirms that a "frontier line"[47], *línea fronteriza* in Spanish, at sea dividing the Chilean and Peruvian maritime zones. And it shows its conception of this *línea fronteriza* as following the parallel of 18° 21' S, as can be objectively derived from the data provided in its memorandum. The slide which is on your screens now shows the three positions of *Diez Canseco* as it moved in the course of the day, as reported by Peru — now, just to be able to refer to them, they are here called Points A, B and C at the top. Peru stated to Chile that Points A, B and C were 7 miles, 3 miles and 2 miles respectively to the north of the frontier line, as indicated in this diagram. Of course, we want to know what are the points to be found 7, 3, and 2 miles due *south* of A, B and C. Let us call them A-prime, B-prime and C-prime, also shown on the screen. The *línea fronteriza* — and that is Peru's expression — is the line which passes through these three points. The next slide on the screen shows this line in red. As you will see, this is a parallel of 18° 21' latitude south. Peru criticizes Chile's submission that the line was only "implied"[48] in the document. "Implied?" Well, Peru was telling Chile that the *Diez Canseco* had [not] crossed the "frontier line" and gave absolutely precise indications of how far south the commander of the vessel would have to navigate to do so.

23. And yet Peru now suggests, as you heard on Tuesday, that this incident "took place very close inshore and not far from the Peru-Chile land boundary"[49], and the term "frontier line" — *línea fronteriza* — did not refer to "any international maritime boundary"[50]. Well, what then *did* it refer to? Land boundary? The words *línea fronteriza* could have meant only one thing: the *line* of

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[46]MP, para. 4.124.

[47]CMC, Vol. III, Ann. 75, pp. 559, 561 and 562.

[48]RP, para. 8 and footnote 11.

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

[50]*Ibid.*

the *frontier* at sea. Peru now tells the Court, as they said on Tuesday, that what it means is that Peru "was fully entitled to enforce its laws in maritime areas that were undisputedly within its jurisdiction, even in the absence of a maritime boundary agreement"[51]. But that does not get us anywhere. In 1966, when this incident occurred, Peru did not say that its Navy was acting in a zone that would come to Peru in a *future* delimitation. It did not even say, "We acted within our waters". Peru said that the *Diez Canseco* had stayed north of an existing *línea fronteriza*.

V. The lighthouses did not signal *the* land boundary

24. A few words. Mr. President, about the function of the lighthouses. Forgive me if I approach this subject in a slightly roundabout way. In 1968, the Secretary-General of the Peruvian Ministry of Foreign Affairs happened to be Mr. Javier Pérez de Cuéllar. He expressly stated in a Note of 5 August 1968 to Chile that Peru "approves in their entirety the terms of the documents signed on the Peruvian-Chilean border on 26 April 1968 by the representatives of both countries in relation to the installation of leading marks to materialise the parallel of the maritime frontier"[52]. In the present proceedings, Peru took the initiative to seek out Ambassador Pérez de Cuéllar and ask him to sign a declaration, which Peru has submitted as an appendix to its Reply[53]. Meaning no disrespect to Mr. Pérez de Cuéllar, I can only say that this idea bears all the signs of the kind of thing parties do when they lack a solid foundation for their position. Of course, we must recall what the Court said in *Nicaragua* v. *Honduras* — at paragraph 244 — about the limited weight of affidavits sworn by a State official for the purpose of litigation as to earlier facts[54]. In this instance, it was almost half a century after the agreement of 1968-1969 that Mr. Pérez de Cuéllar was asked to affirm Peru's new version of history. But that is not the main problem with the affidavit. The defect in the affidavit is both in what it says and what it does not say.

25. What it says is that the only purpose of the 1968-1969 exercise was "for fishermen of both countries to see from the sea the *land* boundary"[55]. What an extraordinary statement — you

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

[52]MP, Vol. II, Ann. 74, p. 435, first para.

[53]RP, Vol. II, App. B.

[54]Case concerning *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), I.C.J. Reports 2007 (II)*, p. 659, para. 244.

[55]RP, Vol. II, App. B, p. 24, third para.

heard me correctly — to see the land boundary! There was, of course, no need for such a thing. Not a single one of the many documents from the time — which I have gone through — expresses *this* as the objective. We are talking, after all, about the passage of ships, not automobiles.

26. Peru explained this week that what Mr. Pérez de Cuéllar meant to say was that the lighthouses "assist[ed] small fishing boats . . . to locate themselves at sea . . . by reference to a point on land"[56]. Well, first, his affidavit does not say so. Second, as I think I'll be able to prove beyond doubt, the lighthouses were intended to signal the Hito No. 1 parallel at *sea*, not an unspecified point on land, for which a single lighthouse would have been sufficient.

27. In 1968-1969, the Parties agreed to construct "two leading marks with daylight and night signalling"[57] in order to "signal the maritime boundary and physically give effect to the parallel that passes through" Hito No. 1[58]. As the delegates recorded in April 1968, one of those marks, the "front mark" or the mark at the shore, would be placed "in the surroundings of" Hito No. 1[59]. And the Parties did construct these leading marks in the form of two towers with lights, which came into operation in 1972. These towers appear on your screens now, as constructed by Chile and Peru, plus another lighthouse rebuilt by Peru, three years later in 1975. The Chilean lighthouse has been marked on large-scale charts of the frontier area as *Faro Limítrofe Enfilación Concordia* since 1973[60], thus indicating its role as a leading mark to be aligned with the other one to indicate the boundary.

28. In nautical terminology, "leading marks", or *marcas de enfilación* in Spanish, are aligned to show the straight line on which the line is located and which the marks then designate. This is important for understanding the function of the two lighthouses. These lighthouses are located on the parallel of Hito No. 1 and signal only that parallel. Another important feature was the extremely narrow beam of Peru's lighthouse. If, as Peru now claims, its light was "to show near-shore fishermen where the land boundary between Peru and Chile lay and whose coasts they

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[56]CR 2012/28, p. 41, para. 58 (Wood).

[57]MP, Vol. II, Ann. 59, p. 336, para. 1.

[58]CMC, Vol. II, Ann. 6, p. 35.

[59]MP, Vol. II, Ann. 59, p. 336, para. 1.

[60]*Ibid.*, Vol. IV, figs. 5.19 and 5.23.

were alongside"[61], this narrow range of visibility would have severely limited its usefulness. Peru's light is specifically designed to be *invisible* to mariners, except when they are very close to the maritime boundary parallel, so that they can easily identify that parallel. The obvious purpose of the Peruvian light is reinforced by the Chilean lighthouse, which is nowhere near the *land* boundary line, and which aids the near-coast fishermen to identify the course of the maritime boundary. So, the Chilean lighthouse functions together with the Peruvian lighthouse; when mariners can align the two, they know that they are on the parallel of the maritime boundary and nowhere else.

29. I need to demonstrate this on the screen. In the sketch-map you now see, you will see two things. A bird's eye view showing a hypothetical position at sea and, in the top left, an elevation view, showing what the mariner would see from that position. At position one on your screens, the vessel is now well south of the maritime boundary, the mariner would not be able to see the Peruvian light due to its very narrow visible arc. Next on your screens, as the mariner moves north, toward the maritime boundary, at position two, the light on the Peruvian tower begins to become visible, but the two lights are visible, not quite aligned, and the mariner would therefore know that he is still a little way away from the boundary parallel. Lastly, at position three on the red line, the mariner can observe, you see, that the lighthouses are aligned and he knows that he is on the parallel of the maritime boundary. These three slides may be found at tab 59 of your folders.

30. Trying to minimize the significance of the agreement of 1968-1969, Peru has suggested that it was somehow intended to help only, as I said, "small coastal fishing vessels"[62] and, consequently, that the line signalled by the lighthouses "represented a limited, and *ad hoc*, solution to a very specific problem within the 15-mile range of the lights"[63]. This is a misrepresentation of the function of the lighthouses, and with the explanations I have just given you, you can see why. The range of lights explains that they were intended to help fishermen in the area within 12 nautical miles of the coast, where there was no buffer zone. Although it would normally be easy for

[61]RP, para. 4.28.

[62]*Ibid.*, para. 4.27.

[63]MP, para. 4.128.

mariners to locate themselves near the coast by reference to landmarks, the flat and featureless terrain in this area made it difficult for coastal fishing vessels to identify the maritime boundary — hence the two lighthouses.

31. Incidentally, other similar systems have been used to signal international maritime boundaries, such as that between Turkey and the Soviet Union, who agreed in 1980 to define the sea boundary line with two leading marks and a buoy in the sea[64]. The lighthouses we are interested in in this case operated for nearly three decades until the Peruvian lighthouse was destroyed by an earthquake in 2001. Chile requested Peru to rebuild it[65], but Peru has not.

32. As for what the statement signed by Mr. Pérez de Cuéllar did *not* say, it avoided the numerous official references, which I have been quoting for half an hour now, acknowledging the maritime boundary parallel. In particular, the affidavit omits any mention of the Peruvian Note of 5 August 1968, which you can see on your screen and you will also find in your tab 60. The Note was signed by Mr. Pérez de Cuéllar on behalf of his Foreign Minister. It expressed formal approval of the building of the two towers for the purpose of signalling "the parallel of the maritime frontier"[66]. Needless to say, this document says precisely nothing about the need to indicate the land boundary.

I shall now, Mr. President, turn to my second topic which concerns the matter of Hito No. 1, which Peru has given unmerited prominence.

HITO NO. 1

I. Introduction

1. In 1930, Peru and Chile recorded that they were locating Hito No. 1 on the *orilla del mar*[67], which is "seashore" in English, "littoral" in French.

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[64]Protocol-Description of the Course of the Soviet-Turkish Sea Boundary Line between the Territorial Seas of the Union of Soviet Socialist Republics and the Republic of Turkey in the Black Sea, signed on 11 September 1980 in Tbilisi, English translation in J. I. Charney and L. M. Alexander, *International Maritime Boundaries*, 1991, Vol. II, p. 1687.

[65]CMC, Vol. III, Ann. 100, p. 673.

[66]MP, Vol. III, Ann. 74, p. 435, first paragraph.

[67]*Ibid.*, Vol. II, Ann. 54, p. 309.

2. A fundamental and decisive building block in resolving the present case, Mr. President, can be derived from one single observation about Hito No. 1. It is this: there is no controversy about the location and co-ordinates of Hito No. 1. That is really all you need to know.

3. And here is why. The Note signed by Mr. Pérez de Cuéllar on 5 August 1968 approved the proposal, we just saw it, to signal the existing maritime-frontier parallel and confirmed, for that purpose, the Mixed Commission would verify the position of Hito No. 1[68]. That is just what the Commission did, as it formally reported one year later[69]. And so the two alignment lighthouses were installed, and signalled the parallel of Hito No. 1 for 30 years. During all those years, Peru never raised any doubts as to the existence or course of the maritime boundary.

4. Today Peru argues that "the Parties could not have agreed a maritime boundary along the parallel of latitude passing through *Hito No. 1*"[70] simply because the parallel "does not reach the sea at Point Concordia, which is" — says Peru — "the land boundary terminus"[71]. On Peru's case, a new maritime boundary must start from Point 266, a point unilaterally declared by Peru three years before its application to this Court[72].

5. Peru seems to have developed an uncontrolled enthusiasm for creating complications where there had been none for half a century. Let us get rid of the obfuscations, and focus on seven plain propositions which I do not believe can be denied.

(i) In 1929, the two States agreed to a land boundary of 196 km[73] which has never been in question.

(ii) In 1930, a Mixed Commission "determined and marked"[74], as required under the 1929 Agreement, with 80 markers — 80 *hitos*[75].

(iii) The Parties agreed to place the most seaward of these markers, Hito No. 1, at a short distance from the water, to avoid its destruction by the sea[76]. The environment here is a

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[68]MP, Vol. II, Ann. 74**,** p. 435, first and second paras.

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

[70]RP, para. 2.88.

[71]*Ibid.*, para. 2.79.

[72]MP, Vol. II, Ann. 23, p. 115.

[73]CMC, Vol. IV, Ann. 169, p. 1014.

[74]MP, Vol. II, Ann. 45, p. 236, Art. 3.

[75]*Ibid.*, Ann. 55.

sandy shore, frequently submerged under waves and tides. And the coastline is unstable over time.

(iv) If one were to compare, on the one hand, the proposition that the land and sea boundaries should, if necessary, be connected by a straight westward line from Hito No. 1 and, on the other hand, Peru's position today, that the land boundary must be completed by a short line which dips south-west from Hito No. 1 until it reaches the water's edge, the difference between the two would be a contested area perhaps enough to contain a football field, but you would have to know that part of that field would regularly be submerged by the rising tide.

(v) This theoretical disagreement is acknowledged by Peru to be "a non-existing dispute"[77] — that is from Peru's second Memorial, paragraph 15. This issue is unlikely ever to arise as a substantive matter.

(vi) It follows that the supposed question of this little plot of sand has arisen in this case only as what in English is known as a red herring, or *une fausse piste* in French, to dress up a non-problem as though it creates serious difficulties of principle. There is no problem, legal or logical.

(vii) As the name of this case indicates, the Court is not seised with the task of deciding any matters regarding the two States' land boundary.

6. Given these seven simple propositions, Chile is left with no hesitation in confidently asserting that the maritime boundary is what the two States agreed to in 1952, as confirmed thereafter.

7. This leaves us with the task of disposing of the alleged problems Peru has laboured to derive from Hito No. 1.

II. Chile and Peru consensually determined Hito No. 1 as the reference point for their maritime boundary

8. Peru argues that the last steps of the land boundary were never established, and that this supposedly unresolved matter is fatal to Chile's position, because "the land dominates the sea"[78]

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[76]MP, Vol. III, Ann. 87, p. 505, last para.

[77]RP, para. 15.

and the Parties could not possibly have agreed to a maritime boundary without first having agreed to the point at which the land boundary ultimately reaches the water.

9. But Peru's problem is purely imaginary. Your recognition of the existing maritime boundary would leave no unresolved issues save if Peru were astonishingly to make an international claim of such a small matter, and assuming moreover that the matter could not be accommodated by neighbourly agreement. But even if we were to suppose that such a trivial point ultimately had to be settled by an international legal process in some competent forum, there are two possible outcomes: A, the land boundary line from Hito No. 1 goes straight westward into the sea or, B, it dips south-westward for a very short distance. Neither of these hypotheses creates any difficulty for the maritime boundary.

10. With respect to hypothesis A, straight westward, even Peru cannot say that there would be any legal or practical difficulty. It is only hypothesis B, namely, that the land boundary line should move seaward from Hito No. 1 in a south-westerly direction, which leads to Peru's supposed problem. Peru says that it is impossible for a maritime boundary to start at a point other than the precise intersection of the land boundary and the low-water line. It would be unacceptable for Peru to find itself with a segment, however tiny, of "dry coast" — meaning a coast having no seaward projection at all. When I say "tiny" — on the basis of the low-water line as ascertained from Peru's large-scale nautical chart in accordance with UNCLOS[79], this "dry coast" is approximately 46 m[80]. Peru told you that the maritime boundary — I quote from the transcript — "is seriously put into question by the fact that the line . . . asserted by Chile does not start from the point where the land boundary meets the sea"[81]. Yet since 1952, the two States, acting through many governments, presidents, ministers, legislators, concluding a multitude of formal confirmations, were, it seems, completely mistaken: their agreement is said to be an impossibility.

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[78]*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 3, para. 96, quoted at MP, para. 3.5.

[79]CMC, Vol. VI, fig. 24. UNCLOS Art. 5 reads: "Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State."

[80]RC, para. 2.179.

[81]CR 2012/29, p. 35, para. 2 (Bundy).

11. The *answer* to this supposed problem is simply that Peru is wrong. The practice of States and decisions of international tribunals confirm that land and sea boundaries are not required, legally or otherwise, to meet at a point of the physical low-water line.

Chile and Peru determined the reference point with full knowledge of the location of Hito No. 1

12. The examination of the practice of States needs to go no further than to consider the practice of Peru and Chile themselves. As we have seen, the Parties consensually determined Hito No. 1 as the reference point for the latitude of the maritime boundary, obviously in full knowledge of the position of Hito No. 1 in relation to the low-water line. In April 1968, the delegates submitted their proposal for signalling the maritime frontier parallel on the basis of their field work[82]. In August 1969, the Mixed Commission concluded further field work to verify the location of Hito No. 1 and fix the location of the two alignment lighthouses[83]. No concerns were raised in this entire process as to the fact that Hito No. 1 was to be found at a slight distance from the water. No suggestion was made that the Parties should use a different point as the reference point for the parallel of the maritime frontier.

13. The delegates were, of course, aware of the demarcation work back in 1930. Their document of 26 April 1968 referred to the Act signed in August 1930, where the location and characteristics of each *hito* were recorded[84]. Let us be precise. The Mixed Boundary Commission of 1929-1930 followed the identical sets of instructions issued by the Parties in April 1930[85] and agreed to place that boundary marker, Hito No. 1, at a point on the "seashore" — *orilla del mar* — with precise astronomical co-ordinates[86]. Given the impact of frequent heavy swells, earthquakes and tsunamis, as well as the loose-surface geomorphology of the area near the water line, Hito No. 1 had to be built at a stable location. The short distance between Hito No. 1 and the low-water line was of no significance to the Parties. They recorded the co-ordinates of Hito No. 1 and no further point closer to the sea. The same instructions of April 1930 also confirmed that the

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[82]MP, Vol. II, Ann. 59, p. 336, second para.

[83]CMC, Vol. II, Ann. 6, p. 35.

[84]MP, Vol. II, Ann. 59, p. 337, penultimate para.

[85]MP, Vol. III, Ann. 87.

[86]MP Vol. II, Ann. 54, p. 309, second para.

intersection of the boundary arc with the *seashore* was the starting-point of the land boundary line[87]. As Hito No. 1 is the most seaward determined point of the land boundary with agreed co-ordinates, located on the seashore, it was reasonable to adopt this boundary marker as the reference point within the meaning of Article IV of the Santiago Declaration, namely the point at which the land boundary reaches the sea[88]. The Parties never referred to a point on the low-water line for the purpose of marking the course of the maritime boundary parallel. Why would they? The stable point of Hito No. 1 was what they needed — and *all* they needed.

14. Until Peru began preparing for this case, it had never complained that the maritime boundary was not properly connected to the land boundary. Its State practice confirms this. An Atlas published by the Office of the President in 1970[89], a report issued by the National Institute of Statistics and Information in 2000[90], a yearbook on hydrocarbons issued by the Ministry of Energy and Mines in 2000[91] and a 2001 Law defining the administrative boundaries of the southernmost province of Tacna[92] all treated Hito No. 1 as the southernmost point of Peru's land territory or of Peru's coastline. This signified that Peru did not own any piece of land in the area south of the parallel of Hito No. 1. This understanding has been shared by Peruvian writers. It was in 1961 that Mr. Wagner de Reyna, one time "Director of Frontiers and Geographic Studies" of the Ministry of Foreign Affairs of Peru, published a monograph stating that the land boundary line between Chile and Peru ends "at a boundary marker (Concordia)[ ] which is located at 18° 21' 03" S, which is the southernmost point of Peru"[93].

IV. International law permits the use of Hito No. 1 as the reference point for the maritime boundary

15. The practice of Chile and Peru is not unique. In *Guyana* v. *Suriname*, the UNCLOS tribunal accepted that the parties had chosen a fixed point on dry land as the reference point for the

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[87]MP, Vol. III, Ann. 87, p. 505, third para.

[88]*Ibid.*, Vol. II, Ann. 47, p. 261, Art. IV.

[89]CMC, Vol. IV, Ann. 169, p. 1015.

[90]*Ibid.*, Ann. 186, p. 1136.

[91]*Ibid.*, Ann. 190, p. 1154.

[92]*Ibid.*, Ann. 191, p. 1157.

[93]RC, Vol. III, Ann. 186, p. 1251.

course of the maritime boundary. There was no agreed land boundary terminus between Guyana and Suriname, and the reference point was not even on the land boundary line. The Tribunal still acknowledged the starting-point of the maritime boundary as the intersection of the low-water line with the line running from the fixed point on land which the two States had agreed would form their maritime boundary[94].

16. Other States have also agreed to determine the course of their maritime boundaries by reference to a point on dry land, and I will refer to some examples without, I promise, going into details. The relevant agreements are publicly available, and extracts, together with sketch-maps depicting boundaries, are at tabs 62-68 of your folders. As you will see, in many of these examples, the land and maritime boundary lines do not meet at the low-water line or its equivalent at a river mouth. In Peru's theory, these examples, one supposes, are legal anomalies that would render existing maritime boundary agreements invalid, because for some reason States are not legally permitted to make such treaties. In reality, such supposed anomalies have not resulted in any disputes or revisions of boundary lines.

17. Such a reference point may be unrelated to the land boundary, as in *Guyana* v. *Suriname*. Another example is Brazil-Uruguay. As you can see on your screens — tab 62 — the maritime boundary between these two States follows a loxodrome drawn from a lighthouse. The boundary starts at a point where this line enters the Atlantic Ocean at the mouth of the River Chui[95]. Here, the agreed reference point for determining the course of the maritime boundary is a lighthouse, which is not connected to the land boundary[96]. The next example is Guinea-Bissau and Senegal. Their maritime boundary follows a straight line starting from — I quote from the agreement — the "intersection of the prolongation of the land frontier and the low-water mark, represented for that purpose by the Cape Roxo lighthouse"[97]. The slide on your screens, tab 63, shows that this

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[94]*Guyana* v. *Suriname*, Award, Permanent Court of Arbitration, 17 Sept. 2007, para. 308.

[95]See Exchange of Notes constituting an agreement on the definitive demarcation of the sea outlet of the River Chui and the lateral maritime border, signed at Montevideo on 21 July 1972, 1120 United Nations, *Treaty Series (UNTS)* 133; CMC, Vol. II, Ann. 7, p. 53, para. 2.

[96]See the protocol of 22 April 1853 between Brazil and Uruguay, quoted in part in the United States Department of State, *International Boundary Series No. 170: Brazil-Uruguay* (1976), available at http://www.law.fsu.edu/collection/limitsinseas/IBS170.pdf, p. 3

[97]Exchange of letters between France and Portugal, 26 April 1960, English translation of the quoted part in *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), I.C.J. Reports 1991*, p. 57, para. 12.

maritime boundary, as well as the land boundary ending at the southernmost dune of Cape Roxo[98]. The low-water line fluctuates, Members of the Court, but a lighthouse stays where it is. The location of the lighthouse is, again, unrelated to the land boundary. And so, the intersection of the prolongation of the land frontier and the low-water mark does not coincide with the intersection of the line drawn from the lighthouse and the low-water mark, and so a short "dry coast" is created, as shown on the slide, which does not have maritime projections.

18. Many States have also used the most seaward demarcated point of their land boundary as the starting-point of the maritime boundary line without worrying about the fact that it is not on the water's edge. For example, the maritime boundary between Colombia and Panama in the Caribbean starts from "the point at which the international land frontier meets the sea"[99] namely, Boundary Marker No. 1, on the top of Cape Tiburon at an altitude of 81 m above the sea[100], as shown on the screen. [This slide is also found at tab 64.] On the Pacific side, the next slide, the maritime boundary starts from Boundary Marker No. 14 on the coast, placed at an altitude of 26 m[101]. The next example is Poland-Germany: their maritime boundary is now shown on screen in red — you will also find this at tab 65. The maritime boundary starts at Point A on dry land, where that boundary meets the land boundary line[102]. You will also see two alignment beacons which indicate the direction of the maritime boundary. Next is Italy-Slovenia: as shown on your screen, tab 66, the maritime boundary between the two States is defined as a line starting at

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[98]See Convention between France and Portugal for the Delimitation of the French and Portuguese Possessions in West Africa, signed on 12 May 1886, Art. 1, English translation in the United States Department of State, *International Boundaries Series No. 141 — Guinea Bissau* (Portuguese Guinea) — *Senegal Boundary* (1974), available at http://www.law.fsu.edu/library/ collection/limitsinseas/IBS141.pdf, pp. 3 and 10.

[99]Treaty on the delimitation of marine and submarine areas and related matters between the Republic of Panama and the Republic of Colombia, signed at Cartagena on 20 November 1976, 1074 *UNTS* 217, Art. I.A.1.

[100]See Exchange of Notes between the Governments of Colombia and Panama constituting an agreement for the delimitation of the boundary between the two countries in execution of the treaty of 20 August 1924, signed at Panama on 17 June 1938, 193 *LNTS* 231, p. 245, penultimate para.

[101]Treaty on the delimitation of marine and submarine areas and related matters between the Republic of Panama and the Republic of Colombia, signed at Cartagena on 20 November 1976, 1074 *UNTS* 217, Art. I.B.1; Exchange of Notes between the Governments of Colombia and Panama constituting an agreement for the delimitation of the boundary between the two countries in execution of the treaty of 20 August 1924, signed at Panama on 17 June 1938, 193 *LNTS* 231, p. 245, last para.

[102]See Treaty between the German Democratic Republic and the Polish People's Republic on the delimitation of the sea areas in the Oder Bay, signed at Berlin on 22 May 1989, 1547 *UNTS* 277, Art. 1; Agreement between the Polish Republic and the German Democratic Republic concerning the demarcation of the established and existing Polish-German State frontier, signed at Zgorzelec on 6 July 1950, 319 *UNTS* 93, Arts 1 and 2; Instrument confirming the demarcation of the State frontier between Poland and Germany, signed at Frankfurt on the Oder on 27 January 1951, 319 *UNTS* 93.

Primary Mark No. 1, a boundary marker where the land boundary terminates[103]. Yet again, the maritime boundary between Jordan and Israel begins at "Boundary Pillar 0 on the seashore"[104], as shown as BP0 on your screens, tab 67, — the co-ordinates of this Boundary Pillar 0 is identical to the Boundary Marker 000IJ recorded in their land boundary agreement[105].

19. To summarize, in these examples the land boundary line is set out up to the most seaward boundary marker, but short of the low-water line. This creates a small discontinuity between that land boundary marker and the low-water line. The situation is similar to a "dry coast" in the sense that there is no agreement that would allocate, as Peru suggests, every grain of sand down to the low-water line and the corresponding maritime zone generated by each grain. No dispute is known to have arisen from the situation which, according to Peru, would be unacceptable.

20. One final example is a much larger anomaly. The next slide on your screen, tab 68, shows the land and maritime boundaries between Angola and Namibia. It is the same one, three times. The land boundary is the line drawn equidistant from both banks of the Kunene River, starting at its mouth[106], while the maritime boundary follows the parallel of latitude 17° 15' S, starting from the intersection of that parallel and the baseline[107]. The land boundary terminus changes over the years and there is bound to be a disjuncture between this terminus and the fixed starting-point of the maritime boundary. What you see are three sketch-maps showing different configurations of the river mouth, as they were found to exist between 2004 and 2012. Each sketch-map also depicts the land and maritime boundary lines. The land boundary terminus has

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[103]See Treaty between the Italian Republic and the Socialist Federal Republic of Yugoslavia on the delimitation of the frontier for the part not indicated as such in the Peace Treaty of 10 February 1947 (with annexes, exchange of letters and final act), signed at Osimo, Ancona, on 10 November 1975, 1466 *UNTS* 25, Anns. I and III.

[104]Maritime Boundary Agreement between the Government of the State of Israel and the Government of the Hashemite Kingdom of Jordan, signed at Aqaba on 18 January 1996, 2043 *UNTS* 241, Art. 1(1); Document entitled "Jordan Israel Boundary Commission: Formal Approval and Adoption of the Coordinates of the International Maritime Boundary Line in the Gulf of Aqaba", signed on 29 December 1998, 2042 *UNTS* 439, p. 449, Sec. 3.7.

[105]See Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan (with annexes, agreed minutes and maps), signed at Arava/Araba Crossing Point on 26 October 1994, 2042 *UNTS* 351, Art. 3; Document entitled "Jordan Israel Boundary Commission Formal Approval of Coordinates of the International Boundary Line", signed on 29 December 1998, 2042 *UNTS* 407, p. 432, Sec. 4.2.1.

[106]See Agreement between the Government of the Union of South Africa and the Government of the Republic of Portugal in relation to the boundary between the Mandated Territory of South West Africa and Angola, signed at Cape Town on 22 June 1926, 70 *LNTS* 305, Art. (2).

[107]See Treaty between the Government of the Republic of Angola and the Government of the Republic of Namibia regarding the Delimitation and Demarcation of the Maritime Borders between the Republic of Angola and the Republic of Namibia, signed at Luanda on 4 June 2002, English translation in D. A. Colson and R. W. Smith (eds.), *International Maritime Boundaries*, Vol. V, p. 3719, Art. III (1).

moved in this short period and, in each case, there is a dry coast and the length of this dry coast changes over time. As far as Chile is aware, the agreements between the two States is not troubled by this alleged anomaly and does not even address it.

V. Peru's self-declared point 266

21. The final problem is Peru's assertion that its self-declared, so-called "Point 266", slightly south of the parallel defended by Chile, must be the starting-point of the maritime boundary because that is where the land boundary should have ended.

22. Point 266 was unilaterally declared by Peru in 2005[108]. As Peru says, "it is certainly true" that the co-ordinates of this point have never been agreed[109]. So Point 266 is not opposable to Chile. At the outset of these hearings last Monday, Peru more than once showed you a map on which Point 266 appears. I show it to you again now. It is also at tab 69. As you can see, the source — bottom left — is Google. I am not an expert on the history of satellite and internet coverage in Latin America, but I cannot imagine that the Chileans and Peruvians who established the land boundary in 1930 had access to Google. This is something done more recently, but seriously we have no way of knowing the time of day of this photo, or what time of month. Seashores are fluid environments, especially where the land consists of sandy flats. It is difficult to resist asking oneself whether Peru is really serious about this. After all, there are international rules pertaining to reliance on maps. Article 5 of the United Nations Convention on the Law of the Sea requires a State to use its officially recognized large-scale charts to determine the low-water line, and not Google satellite imagery. So we have tried to do what Peru should have done, and we find, on the basis of the limited information provided by Peru, that Point 266 is not, in fact, on the low-water line. The slide now shown on your screens shows Peru's recent large-scale chart of the frontier area. We have plotted Point 266 and here it is — some 180 m on the wrong side of the low-water line, well out to sea: tab 70.

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[108]MP, Vol. II, Ann. 23, p. 115.

[109]RP, para. 1.32.

VI. Absence of the Court's jurisdiction over the land boundary

23. My final remark on the starting-point of the maritime boundary — and in fact my final remarks — concerns jurisdiction. Peru invites you to determine the starting-point of the land boundary which it says should have been the starting-point of the maritime boundary[110]. First of all, the Parties have expressly agreed and signalled their maritime boundary. But there is the further difficulty for Peru that this Court has no jurisdiction to delimit or mark the Parties' land boundary.

24. The 1929 Treaty of Lima finally and definitively established the land boundary between Chile and Peru. That was Article 2 of the 1929 Treaty[111]. What is more, Article 3 of the 1929 Treaty established the precise means for determining and marking the agreed boundary — through the work of a Mixed Commission made up of appointees from both States[112]. That same Article 3 also contained its own dispute resolution mechanism, providing:

> "If any dispute arises in the Commission it shall [note the mandatory word] be settled by the casting vote of a third member appointed by the President of the United States of America, from whose decision no appeal shall lie."[113]

There is also a general dispute resolution mechanism established by Article 12 of the Treaty, again mandatory — shall — and again for disputes to be settled ultimately by an appointee of the President of the United States[114].

25. In the Agreement of 24 April 1930[115], and then in Instructions dated 22 May 1930[116], the Parties also established, at that time, the technical procedures to be employed for determining the precise course of the boundary arc on the coastal area and positioning boundary markers on the arc, which they then did.

26. And so the demarcation of the intersection of the boundary arc and the low-water line constitute under Article VI of the Pact of Bogotá[117], "matters already settled by arrangement

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[110]RP, para. 1.15.

[111]MP, Vol. II, Ann. 45, p. 236, Art. 2.

[112]*Ibid.*, Art. 3.

[113]*Ibid.*

[114]*Ibid.*, p. 238, Art. 12.

[115]MP, Vol. III, Ann. 87.

[116]RP, Vol. II, Ann. 50.

[117]MP, Vol. II, Ann. 46, p. 246, Art. VI.

between the parties . . . [and] governed by agreements or treaties in force". It is therefore expressly impossible to invoke jurisdiction under Article XXXI of the Pact with regard to any dispute in that regard[118], and Peru cannot seise the Court of any matter concerning the delimitation or demarcation of the Parties' land boundary.

27. Mr. President, Members of the Court, I thank you for your patience. This concludes my presentation, unless I can be of specific further assistance to you. The next remarks on Chile's behalf, when you find it convenient to call on him, will be made by Mr. Petrochilos.

The PRESIDENT: Thank you, Professor Paulsson. The sitting is now suspended for 20 minutes. Afterwards, I will give the floor to Mr. Petrochilos.

The Court adjourned from 11.25 to 11.45 a.m.

The PRESIDENT: Please be seated. The hearing is resumed and the floor is yours, Mr. Petrochilos. Please.

Mr. PETROCHILOS:

Additional relevant practice of the Parties[119]

1. Thank you, Mr. President and Members of the Court. It is an honour to appear before you on behalf of the Republic of Chile in this case. Professor Paulsson described the agreements that the Parties concluded in 1968 and 1969, "acting upon" — I am using the Court's terms from the *Libya/Chad* case[120] — their pre-existing boundary agreement. And it falls to me now to address the balance of the Parties' practice. Now the legal relevance of this practice stems of course from Article 31 (3) *(b)* of the Vienna Convention on the Law of Treaties.

2. And I hope these two citations that I have just given will have made clear what my purpose is today. Our friends on the other side were tireless in citing authorities for the proposition, or around the theme, that practice on its own, does not a boundary make. Well their

[118]MP, Vol. II, Ann. 46, p. 250, Art. XXXI.

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

[120]*Territorial Dispute (Libyan Arab Jamahiriya/Chad), I.C.J. Reports 1994*, p. 6, para. 66.

efforts, I'm afraid, are for naught. It is not Chile's case that the practice of the Parties evidences a tacit agreement. It is not Chile's case that the practice of the Parties is constitutive of title to maritime zones. And it is not Chile's case that the practice of the Parties is a relevant circumstance in drawing the maritime boundary *de novo* or *ab initio*.

3. Chile's case is quite simply that the Parties' practice shows that both Peru and Chile considered that a permanent and all-purpose maritime boundary had been established along the line of the geographic parallel. That is to say, the practice confirms the existence and the meaning of the Parties' 1952 agreement on their maritime boundary.

A. Summary of the Parties' practice

4. The practice of the Parties to which I wish to take the Court this morning, and I estimate this will take us to around lunchtime, consists primarily of a range of official documents from laws and regulations, to formal communications between the Parties' foreign ministries, to a matrix of official acts, decisions, and publications, by various organs of the Parties.

[Slide]

5. And you have now on your screens — and also at tab 72 of your folders — a sample of such official documents. Our friends for Peru did not take you to them, so let us take the time to do so. The documents here were either communicated by Peru to Chile, or issued by Peru and Chile jointly. You will find their description, their date, and where they are to be found in the record. And key terms are highlighted for you. And these terms are plain. These documents speak of:

— vessels having trespassed the "Peru-Chile frontier" "into Peruvian waters";

— they speak of continuous violations of "the maritime frontier of Peru";

— and they speak of continuous transgressions of "[Peru's] maritime frontier";

— they speak of "the frontier line" *(línea fronteriza)*;

— "the Peruvian maritime frontier";

— the "jurisdictional boundary [of Chile]", the crossing of which, so said Peru, constituted a violation of "Peruvian jurisdictional waters" — a term which, as Peru says, means Peru's 200-mile maritime dominion[121];

[121] See RP, para. 24.

— and the documents speak of the "boundaries of the Peruvian jurisdictional waters".

But there is more. If you turn to the next page, which is now on your screen, you see:

— the "parallel of the maritime frontier originating at Boundary Marker number one";

— the "parallel of the maritime frontier";

— once more, the "jurisdictional boundary";

— or "the maritime boundary" *(límite maritimo)* — a term that we find, as you can see, in several documents;

and again over the page you will see:

— the "frontier line"

— the "dividing line of the maritime frontier", and

— again, the "maritime frontier".

6. According to your jurisprudence, these official acknowledgments of the maritime boundary are "evidence of the [Peruvian] official view"[122]. Peru cannot now resile from them. Nor can Peru credibly ask the Court to ignore their plain terms.

7. And one more inconvenient fact for Peru is that none of these official positions and acknowledgments refers to a provisional arrangement for near-shore fisheries. They refer to a maritime "frontier" or to a maritime "boundary", or to the "dividing line of the frontier". Terms which are plain and unqualified.

8. Now, I am conscious that Sir Michael Wood suggested otherwise on Tuesday. He said that "expressions like 'maritime frontier' or 'maritime boundary' . . . do not indicate 'a definitive, all-purpose maritime boundary', as Chile . . . asserts". Such terms, he said, are "imprecise and non-technical"[123]. But he did not suggest any better terms. And, in fact, Mr. Bundy a little later said that the Chile-Argentina Treaty of 1984 and the Peru-Ecuador Exchange of Notes of 2011 are comprehensive delimitations because they expressly delimit maritime boundaries[124]. Now Peru will inform us in due course of what their preferred terminology for a maritime boundary is. But

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[122] *Minquiers and Ecrehos (France/United Kingdom), I.C.J. Reports 1953*, p. 71, cited with approval in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, p. 659, para. 257.

[123] CR 2012/28, p. 40, para. 55 (Wood).

[124] *Ibid.*, p. 62, paras. 31 *et seq.* (Bundy).

the point — and this is an important point — is this: in the official documents in the historical record, Peru did not once query, let alone object to, terms such as "maritime frontier" or "maritime boundary".

9. And in addition to the plain and unqualified terms that the Parties have used, as we will see, the maritime boundary has been applied to a range of matters that have nothing to do with fisheries, including research for hydrocarbons and jurisdiction over airspace.

10. Indeed, Mr. President, Peru has never had in place a fisheries zone: rather, it had, and has, a single 200 mile maritime zone, or as it is called "maritime dominion", with territorial-sea characteristics. And so Peru's present theory about a fisheries boundary fails in its premise. For there never was a fisheries zone to delimit in the first place.

11. Now, I said minutes ago that the official documents and acts of the Parties affirm the existence of the boundary. But what we do not have is just as important. There has not been tension arising from competing claims or, indeed, from any uncertainty about the location of the boundary; there has not been confrontation or hot incidents between navies. Never has Peru exercised any jurisdiction to the south of the boundary parallel; and never has Chile exercised any jurisdiction north of it. There has been peaceful, open, uninterrupted exercise of jurisdiction on both sides of this boundary for many decades.

B. Both Parties acknowledged their maritime boundary in the context of negotiations concerning potential access to the sea for Bolivia

12. Let me turn, then, to particulars, and the first specific example in this series of instances I will be taking you to this morning is the negotiations in 1975-1976, for the grant of a corridor to the sea for Bolivia. In December 1975, Chile made to Bolivia a specific proposal for a land corridor. And this proposal also involved "a territorial sea, economic zone and continental shelf" for Bolivia[125]. Peru was consulted by Chile, because Peru's prior agreement was required by the Protocol to the 1929 Treaty of Lima[126] for territorial sessions. And so Peru received both Bolivia's and Chile's positions, and it acknowledged receipt of these documents[127].

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[125]See RC, Vol. II, Ann. 25, p. 135, para. 4.d).

[126]See MP, Ann. 45, p. 239, Art. 1; RC, Vol. II, Ann. 25, p. 137, para. 4.n).

[127]See RC, Vol. II, Ann. 26, second para.

13. In January 1976, Peru read Chile's proposal[128]; this would grant to Bolivia "the maritime territory between the parallels of the extreme points of the coast that will be ceded" to Bolivia[129]. [Slide]

14. And now I will illustrate this for you — it is on your screens and also at tab 73 of your folders. The Bolivian maritime zone would have been bounded, as you have heard, by two parallels of latitude — to the north, the existing Chile-Peru maritime boundary; and to the south, a new parallel of latitude, corresponding to the Chile-Bolivia land boundary that would come into being after the land session.

15. Now, this proposal was referred to an *ad hoc* Commission in Peru. It was headed by President Bustamante y Rivero who, as you have heard, had co-signed Peru's 1947 maritime zone proclamation and had just six years earlier retired as President of the Court. The basis for Chile's proposal was clear, and it is plain for you to see on the diagram: Chile could grant a land corridor and maritime zones to Bolivia because there was a maritime boundary in place between Chile and Peru, and that boundary divided all maritime zones — to repeat: "territorial sea, economic zone and continental shelf" — and the boundary followed the parallel of latitude, as is depicted.

16. Peru raised no objection to these points, which are of course of fundamental importance to the present case. In a meeting between Chile and Peru in July 1976, it was common ground that their maritime boundary had been established; and also that the 1954 Special Maritime Frontier Zone Agreement was applicable between them[130]. Sir Michael Wood said that "Chile has produced no records of the consultations to which it refers, and [Peru is] not aware of any."[131] The position, Mr. President, is that Chile has produced to the Court its record of discussions with Peru[132], and Peru has not. Following the Parties' meeting in July 1976, Peru made a counter-proposal. This focused on the land corridor[133]. As you heard from Sir Michael, Peru proposed that the coastal area

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[128]See RC, Vol. II, Ann. 26, p. 141, third para.

[129]*Ibid.*, Annex 25, p. 135, para. 4.d), third point.

[130]*Ibid.*, Ann. 55, p. 321.

[131]RC 2012/28, p. 44, para. 70 (Wood).

[132]RC, Vol. II, Anns. 26, 54 and 55.

[133]See *ibid.*, Vol. III, Ann. 87, p. 537.

of the land corridor would be under joint sovereignty of Chile, Peru and Bolivia; and also that the Chilean port of Arica be placed under tri-national administration[134].

17. Now, that was the extent to which Peru proposed something different from Chile. Peru did not say that there was no maritime boundary in place; nor did Peru say that the boundary was not at the parallel; nor did Peru say that it had entitlements to the south of the boundary parallel; though Peru should and of course would have said such fundamental concerns if any existed. In fact Peru accepted that Chile — Chile and not Peru — could grant Bolivia "[e]xclusive sovereignty . . . over the sea"[135]. If Peru believed, as it says now, 30 years after the event, that Chile had no such entitlement to grant, it would certainly have retorted: one cannot give what one does not have — *Nemo dat quod non habet*.

18. I am conscious that Peru on Tuesday was very careful not to address the substance of these negotiations. Rather, Peru reacted to two sketch-maps that were produced with Chile's Rejoinder. One sketch-map, which was included in Annex 87 to Chile's Rejoinder, was contained in the Chilean governmental publication, in 1978, of the negotiations on the Bolivian corridor. Chile did not suggest, in its pleadings, nor does the sketch-map say, that it was produced by Peru. It was Chile's illustration of Peru's counter-proposal, and it was published 35 years ago. We are aware of no protest by Peru to that government publication, which suggests that Peru has never thought there could be any confusion about this. Similarly, figure 72 of Chile's Rejoinder, which was shown to the Court on Tuesday, is very obviously an illustration produced for this case.

19. So, to return to the substance of the matter which, once more, Peru does not wish to address, it is this: it is clear that in the negotiations about the Bolivian corridor, Peru did not take exception to the proposition that it was for Chile — again, not for Peru, for Chile — to grant a maritime area to Bolivia, and that maritime area was to be bounded by two parallels of latitude. And, as we have shown in our Rejoinder, this is how the position was generally understood[136].

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[134]CR 2012/28, p. 45, para.72 (Wood).

[135]RC, Vol. III, Ann. 87, p. 537, para. 4.

[136]*Ibid.*, Vol. V, fig. 73.

C. Both Parties acknowledged their maritime boundary in negotiations concerning special fishing rights for their nationals

20. The second example of the practice that I want to take you to concerns negotiations between Chile and Peru to allow their fishermen to fish on the other side of the maritime boundary. This would be a separate arrangement from that under the Frontier Zone Agreement of 1954, in that the 1954 Agreement tolerates accidental presence within the buffer zone, which is on either side of the boundary parallel, but it does not allow any fishing to take place there. And in these negotiations, once more, both Parties acknowledged the existence of their boundary. Negotiations took place in 1954-55 and, again, in 1961. I will focus now on 1961.

21. Chile proposed to allow Peruvian fishermen to fish up to 50 miles south of "the Chile-Peru frontier"[137]; with an equivalent right for Chilean fishermen to the waters north of the frontier. So, this would be a sort of mutual recognition scheme, which is much more than a simple zone of tolerance, as Peru tried to suggest last Tuesday[138]. Chile stated its motivation as follows: "[D]ue to the movement of the schools of anchovies along the frontier zone . . . the companies of the ports of Arica [which is in Chile] and Ilo [which is in Peru] are forced to cease operations for long periods due to the lack of fish."[139] Peru's Government referred this matter to the Peruvian national section of the Permanent Commission of the South Pacific. Now, this is a standing unit of senior Peruvian Government officials; and they prepared a report, which said this:

> "[T]he movement of the fish schools along the frontier line and its effects on the industries established in the ports near the frontier, is a proven fact which affects the fishing industries of Ilo and Arica in different ways, depending on the distance to the frontier and the types of fish involved."[140]

22. And so, in 1961 neither of the Parties referred to a provisional fisheries line being in place; quite the opposite — both of them used the terms "frontier" and "frontier line", which indicate a definitive and all-purpose boundary.

23. Chile adduced the relevant records with a Counter-Memorial, in March 2010. And then nothing was heard from Peru on this matter for the best part of three years, until Sir Michael devoted three sentences to it on Tuesday. He had nothing to say about Peru's report and the

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[137]CMC, Vol. III, Ann. 72, p. 547, para. 1.

[138]CR 2012/28, p. 38, para. 47 (Wood).

[139]CMC, Vol. III, Ann. 72, p. 545, first para.

[140]*Ibid.*, Ann. 120, p. 777, second para.

references there to a "frontier" and a "frontier line". And, as for Chile's proposal, he said that although this referred to the "Chile-Peru frontier", "this made no reference to a maritime boundary previously established"[141].

24. Well, what did Chile refer to if not the maritime boundary? Is Peru suggesting that Chile proposed that fishermen be allowed to fish 50 miles on either side of the boundary on land? Was this a negotiation about fishermen of crabs? Or is Peru suggesting that the term "frontier" meant not an existing frontier, but a hypothetical frontier or a yet-to-be-agreed frontier?

25. Whatever Peru may suggest — and perhaps we will find out next week — the point, again, is simple: Why did it take Peru 52 years to query the term "frontier" when its neighbour asserted that there was one at the time?

D. The Parties' sovereign control of their maritime zones confirms the existence of their maritime boundary

26. I turn next to the practice regarding the limits of the maritime zones in which each of the Parties exercises sovereign control. The important point here is that both Chile and Peru have applied parallels of latitude as limits to divide their navies' areas of responsibility; and, in doing so, both Chile and Peru have respected the boundary parallel. Diagrams on your screens will illustrate the position, and I will start with Peru. The complete picture may be found at tab 74 in your folders.

[Slide]

27. Peru created a coastguard within its navy in 1969. Its mission is to control Peru's "jurisdictional waters"[142]. Peru's waters were then sub-divided into areas of responsibility for local units, as you see illustrated. Under a Supreme Decree of 1987[143], each such area is bounded by two parallels of latitude and is called a Maritime District. The navy is charged there with a wide range of responsibilities. These include, in particular:

(i) controlling traffic and safety of navigation;

(ii) monitoring safety of human life;

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[141]RC, 2012/28, p. 38, para. 49 (Wood).

[142]MP, Vol. II, Ann. 14, p. 61, Art. 1.

[143]RC, Vol. III, Ann. 90, pp. 557-558, Art. A-020301.

(iii) taking anti-pollution measures;

(iv) authorizing the installation of temporary or permanent works at sea; and

(v) authorizing and supervising scientific research activities[144].

28. These are typical activities of States in their exclusive economic zone and continental shelf[145]. They are not directed directly simply to fisheries.

[Slide]

29. Peru's southernmost Maritime District to which I would now direct your attention — which is Maritime District No, 31 — is now highlighted on your screen. This covers the area "from . . . Parallel 16 25' South . . . to the frontier boundary, *límite fronterizo*, between Peru and Chile"[146]. In the context of defining areas of maritime jurisdiction, Mr. President and Members of the Court, the term "frontier boundary" is hardly an ambiguous one.

30. Now it is true Mr. Bundy suggested otherwise. He said the term "frontier boundary" means the land boundary[147].

[Slide]

Well, if that is right, then, as you can see on your screens, the upper limit of Peru's Maritime District 31 is fully defined by parallel 16° 25' S, and it extends out 200 miles; but to the south this Maritime District is limited to a point on the coast. What kind of maritime district is that? Which waters does Peru's navy control? Does the navy not know? Does the navy not need to know?

31. Quite simply, the reading of its own law that Peru advances in this litigation is not credible.

[Slide]

32. And if further proof of that were needed, let us look at Peru's northernmost Maritime District, which is Maritime District No. 11, at the top of your screen, which is highlighted. It is defined in the 1987 law of Peru as extending "from the maritime frontier with Ecuador, to . . . Parallel 06 21' S"[148]. And yet Peru submits to the Court that there was no maritime boundary with

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[144]RC, Vol. III, Ann. 90, pp. 554 557, Arts A-010201 and A-020201.

[145]UNCLOS, Arts. 56 and 77.

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

[147]CR 2012/28, pp. 61-62, para. 29 (Bundy).

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

Ecuador until May 2011. What are we to make of this? That Peru's regulations refer to inexistent maritime frontiers? That they refer to hypothetical maritime frontiers, lying 24 years in the future?

33. The position, Mr. President, is that in 1987 Peru defined its Maritime Districts, quite properly, in compliance with its two maritime boundaries — to the north with Ecuador, and to the south with Chile.

[Slide]

34. And turning now to the practice of Chile. In the north of the country, Chile also uses parallels of latitude to divide its Maritime *Gobernaciones*[149]. And the responsibilities that the Chilean navy exercises broadly mirror those of its Peruvian counterpart on the other side of the boundary[150]. And again, they are much broader than fisheries.

[Slide]

35. Chile's Maritime *Gobernacion* of Arica is now highlighted on the screen. It is bounded to the north by the "Chile-Peru international political boundary", *límite político internacional*[151]. We will see shortly that this term has also been used in the bilateral practice between Chile and Peru as, indeed, it has also been used between Chile and Argentina as well[152] to refer to their maritime boundaries.

36. As I have said already, there has never been any incident between the navies of the Parties on account of any overlapping claims or uncertainty about the boundary. Let me show you why.

[Slide]

37. Chile has produced to the Court a sketch-map that was contained in its navy's Rules of Engagement, when such Rules were adopted in the 1990s. It now appears on your screens and you will also find it also at tab 75. I would draw your attention first to the upper part of the map. There you see that Peru's waters are marked "Peruvian Territorial Sea", *Mar Territorial Peruano*. Unlike Chile, Peru has an undifferentiated 200-mile maritime dominion. And as you can see, Peru's

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[149]RP, Vol. II, Ann. 24, p. 187, Art. 1.

[150]RC, Vol. II, Ann. 44, pp. 237-238, Art. 3.

[151]RP, Vol. II, Ann. 24, p. 187, Art. 1.

[152]RC, Vol. II, Ann. 9, p. 45; *ibid.*, Ann. 10, pp. 49 and 51; *ibid.*, Ann. 11, p. 59, para. 2.

waters are always limited to the south by the boundary parallel — even further to the west than the outer limit of Chile's EEZ, which is also indicated on the map. You also see a rectangular hatched area in the middle of the map. That is the buffer zone on either side of the maritime boundary parallel, and it is marked as Special Maritime Frontier Zone — this name is, of course, directly taken from the title of the 1954 Agreement.

[Slide]

And, if we now zoom in on the right-hand side of the map — which you now see as an additional inset — we see that the boundary is clearly indicated along the parallel of latitude of Hito No 1.

38. Now, as I say, Peru has not provided to the Court any equivalent document. But you have already heard Mr. Paulsson on how Peru's corvette *Diez Canseco* stopped pursuit of a Chilean fishing boat just short of the "frontier line"[153]. And the words "frontier line" are not my own: they were used by Peru's Foreign Ministry in its relevant communication to Chile in 1966. So we know how Peru's Navy and Foreign Ministry understood the position, and how they represented it to Chile. Their understanding was clear — and so was the term they used: "the frontier line".

E. Peru's system for monitoring entry into and exit from its maritime dominion acknowledges the maritime boundary with Chile and Ecuador

39. I turn now to Peru's monitoring system for maritime traffic.

40. In 1988, Peru issued a reporting regulation. Both Professor Pellet and Mr. Bundy referred to this, but ever so briefly. They said that Peru requires of ships to report for search and rescue purposes — SAR purposes; and, they added, SAR zones are without prejudice to maritime boundaries[154]. My friends opposite were less keen to take you to Peru's regulation itself or indeed to the record of its Application. Let us do so.

41. Peru's regulation requires "[a]ny national or foreign ship . . . that crosses into Peruvian waters"[155], also referred to there as "jurisdictional waters"[156], to report upon entry into or exit from

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[153]CMC, Vol. III, Ann. 75, pp. 561-563, para. 3.

[154]CR 2012/28, p. 60, para 25 (Bundy).

[155]CMC, Vol. IV, Ann. 175, p. 1065, Sec. 1.34.

[156]*Ibid.*, Sec. 1.35.

Peru's waters. The regulation expressly refers to the "southern parallel 18° 21' S"[157]. So, the simple and dispositive fact here is that Peru requires any ship of any type to report upon crossing in and out of "Peruvian waters". This is not Peru's SAR zone. Peru's SAR zone extends some 3,000 miles from the coast. What matters here is how Peru defined the limits of its 200-mile waters in asking all vessels to report upon entry into or exit from them. Whatever other requirements may apply in Peru's SAR zone, it is clear that so far as reporting of positions is concerned, that requirement applies to Peru's maritime dominion.

42. And, indeed, the full title of Peru's reporting system, which is known as SISPER, is translated in English as "system of information on position and security in the maritime dominion of Peru"[158] — the maritime dominion of Peru. Now when Peru provided the SISPER regulation with its Reply, the words "maritime dominion" were somehow, shall we say, lost in translation[159]. Peru does not want you to see that its regulation contains the limits of its maritime dominion. And so, remarkably, these two words were deleted.

43. Peru's regulations were reissued three times after 1988 — in 1991, 1994, and 2001[160]. And the essential requirements have remained the same throughout. The 1991 version of the regulations, in particular, sets out a model report for a "sailing plan" that needs to be submitted[161]. And this has a section entitled "Crossing of the jurisdictional parallels"[162] — notice the plural here, "parallels" — and it sets forth the co-ordinates of both of Peru's two jurisdictional parallels. And the southern "jurisdictional parallel" in this regulation is the line of the maritime boundary with Chile. And there is no indication that this "jurisdictional parallel" is somehow a provisional one, or that it applied only to fishing boats of Peru and Chile.

44. SISPER also contains model reports as guidance for compliance. And it sets forth a sample point of entry into Peru's maritime dominion.

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[157]CMC, Vol. IV, Ann. 175, p. 1065, Sec. 1.34.

[158]*Ibid*., Sec. 1.35.

[159]See RP, Vol. II, Ann. 13; RP, para. 4.31 and footnote 385.

[160]See CMC, Vol. IV, Anns. 178, 180 and 193.

[161]*Ibid.*, Ann. 178, p. 1093, Ann. (3).

[162]*Ibid*., Sec. 12.

The statutory point from the 1991 version of SISPER — the sample point — is plotted on the chart that now appears on your screen and you see there is a little triangle on the left-hand side.

45. Chile has also obtained 68 reports, submitted by commercial ships of various flags, to comply with SISPER, between 2005 and 2010[163].

[Slide]

And we have plotted the reports on the chart that is before you. So in this frame on your screen, you see reports of entries into Peru's maritime dominion from the south: these are the purple thrusts northwards.

[Slide]

And in this frame now you also see reports of exits from Peru's maritime dominion, coloured in green. And in this last frame, you see that Peru's model reporting position, the reported positions of entry, and the reported positions of exit are all aligned on the boundary parallel — and this diagram you will also find under tab 76 of your folders. And as you also see here, once more, the boundary extends further westwards than Chile's 200-mile outer limit: Peru's maritime dominion is bounded throughout its full extension by the boundary parallel. And my colleague David Colson will return to this issue in the afternoon.

[Slide]

46. Now, applying the same methodology, we plotted reported entries into, and exits from, Peru's maritime dominion in the north, and they are on your screens. And, as you see now, when the boundary parallel with Ecuador is plotted on the chart, there is, again, alignment. This diagram you will find at tab 77. So, in short, Peru's regulations apply consistently to both of Peru's two maritime boundaries or "jurisdictional parallels" — to the north with Ecuador and to the south with Chile.

[163] They have been compiled as RC, Vol. IV, Ann. 154.

F. The Parties' fishing regulations and their implementation acknowledges their maritime boundary

1. The Parties' regulations of fishing activities in their respective maritime zones

47. I come now, Mr. President, to Chile's and Peru's practice on regulating fishing[164]. The record goes back to the mid-1950s and it shows, time and again, that both States recognized and respected the maritime boundary.

48. It bears emphasis that fishing is the main economic activity in the waters around the maritime boundary. And so control of fishing is emblematic of the exercise of sovereign jurisdiction by both States in these waters.

49. Thus Peru, since the 1950s, prohibits foreign vessels — except if they carry a special permit — from fishing in "Peruvian jurisdictional waters"[165], a term that was later changed to "territorial waters"[166], and later to "maritime dominion"[167]. Now all of these terms signify plenary jurisdiction. They do not signify a mere fisheries zone — and, as I say, Peru never even had such a zone.

50. Chile's fishing-regulation practice strongly indicates the existence and the course of the maritime boundary[168]. Let me give you two examples, stressing upfront that to neither of them was there any hint of opposition by Peru:

(a) First, a Decree in December 1986 regulated fishing in an area to the south of "the parallel which constitutes the northern maritime boundary"[169] with Chile.

(b) Secondly, we have nine licences issued by Chile to industrial fishing companies for the areas around the boundary, between 1971 and 1993[170], and the majority of these are from 1980. They were all excerpted in the *Official Gazette* of Chile, and they were visible to Peru. A table summarizing what was published is in your folders and, as you will be able to see there, at

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[164]See CMC, Chap. III.4.B, pp. 219-228; RC, Chap. III.5.B, pp. 157-161.

[165]RC, Vol. III, Ann. 82, p. 507, Art. 1.

[166]Art. 133 of the Regulation of Captaincies and Merchant Navy, quoted at CMC, Vol. III, Ann. 74, p. 555.

[167]Art. C-070004 of the Regulation of Captaincies and Maritime, Fluvial and Lacustrine Activities, quoted at CMC, Vol. IV, Ann. 176, p. 1072 and CMC, Vol. IV, Ann. 177, p. 1080.

[168]See CMC, paras. 3.61, 3.64 and 3.66; RC, Chap. III.5.G.2, pp. 179-181.

[169]CMC, Vol. III, Ann. 134, p. 843, Art. 1.

[170]See RC, Vol. II, Anns. 53, 59-63 and 65-67.

tab 78, in each one of these licences, the authorized "area of operations" was bounded to the north by the parallel of Hito No 1, notated as 18° 20' or 21' S.

51. Because both Parties have regulated fishing as one aspect — a prominent aspect — of sovereign rights in their 200-mile zones, both of them have treated unauthorized fishing as a violation of sovereign rights. Indeed, on many occasions, in the early 1960s and 1970s, Chile's authorities instructed fishermen in Arica not to carry out fishing "North of the frontier line"[171] or "North of the boundary parallel"[172].

52. And in formal requests made to the other State to ensure that its nationals respect the boundary, both the Santiago Declaration and the 1954 Frontier Zone Agreement were expressly relied upon. And so:

(a) In 1962, Peru complained about frequent trespassing by Chilean fishermen into Peruvian waters, and it stated this: "[T]aking strongly into account the sense and provisions of the 'Agreement Relating to a Special Maritime Frontier Zone' . . . [Peru] wishes the Government of Chile . . . to adopt measures to put an end to these illegitimate incursions, and that the owners of fishing vessels be notified that they must refrain from continuing to fish north of the Peru-Chile frontier"[173].

(b) And for its part, in 1965, Chile complained that the presence of Peruvian vessels in waters "south of the Chilean-Peruvian border" was "not consistent with the provisions contained in the [Santiago Declaration]"[174].

I pause for a minute at this document because it contains one more significant point. Mr. Bundy argued that it was only in the 1990s that Chile started arresting Peruvian fishermen in waters beyond the territorial sea[175]. He had overlooked this document, which in fact Peru placed on record. Chile's complaint was about Peruvian vessels in waters 45 miles to the west of Arica. And this was in 1965, not 1995.

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[171]CMC, Vol. III, Ann. 119, p. 770, para. 3; see also *ibid.*, Ann. 118, p. 765, para. 1.

[172]*Ibid.*, Ann. 128, p. 817, para. d), first para.

[173]*Ibid.*, Ann. 73, p. 552, penultimate para.

[174]MP, Vol. III, Ann. 68, p. 407, paras. 1 and 2.

[175]CR 2012/28, p. 57, paras. 12 and 13 (Bundy).

53. Now, I showed to the Court at the outset that, on multiple occasions, the official documents of both Parties refer in plain terms to a maritime boundary — not a provisional arrangement, not a line for limited purposes, not an informal system to avoid frictions among fishermen — but a boundary.

[Slide]

And some examples have been excerpted at tab 79 in the Court's folders, which now also appear on your screen. The documents here are Peruvian official communications from the period between November 1965 and September 1967. Peru complains here about illegal fishing by Chilean boats. And Peru uses, once more, as you see highlighted on your screens, the term "maritime frontier". The "maritime frontier", Chile submits, Mr. President, is not a mysterious concept — and never was.

2. The Parties' enforcement of the boundary line

In addition, Peru was ready and willing to defend the boundary against Chilean private vessels, even by use of force.

54. Five incidents have been documented in official papers. They start with the *Diez Canseco* incident of 1966 — this is the 220-foot corvette that you saw on your screens, which fired 16 canon shots[176]. And the incidents end 25 years later, in 1990[177]. For example, in September 1967 the Peruvian corvette *Gálvez* pursued Chilean trawlers that had violated the boundary. A formal protest by Peru's Foreign Ministry ensued. The protest said that Peru's Navy had pursued the trawlers up to, "the boundaries of the Peruvian jurisdictional waters"[178]. What could be clearer?

55. And Chilean fishermen, if caught, could be prosecuted. We have four Peruvian decisions on record, two from 1989 and two from 2000. The two decisions from 1989 state that the Chilean fishermen were arrested north of the "frontier line of the Republic of Chile, in the jurisdictional

[176]See CMC, Vol. III, Ann. 75.

[177]See RC, Vol. III, Ann. 92. See also the incident at CMC, Vol. III, Ann. 76, p. 567, para. 9 (13 May 1966).

[178]CMC, Vol. III, Ann. 77, p. 571.

waters of Peru"[179]. The decisions also refer to the "dividing line of the maritime frontier"[180]. Again, what could be clearer?

56. Each one of the four decisions, in 1989 and 2000, has the same legal basis; this is a rule that prohibits foreigners from fishing "in waters under Peruvian maritime dominion"[181]. And indeed all four of these decisions refer in terms to Peru's "jurisdictional waters"[182] — so there is no hint at all here of a special zone, or of a special line for fisheries.

57. And now, which frontier line specifically was Peru enforcing in these decisions? The decisions record approximate co-ordinates of the arrests and also the distance from the frontier line. These data are plotted on the charts before you now, and also at tab 80 in your folders.

[Slide]

As you see from the arrows connecting the points of arrest with the line of the maritime boundary, the frontier line that Peru was enforcing was in every case the parallel of Hito No. 1. And one more point here is that the Peruvian arrest farthest to the west — which is the little red dot on the left — occurred 65 miles from the starting-point of the boundary. I recognize that our friends for Peru have never explained what they have in mind when they speak of a "near-shore" boundary, but I suspect they would agree that 65 miles from the coast is rather far, from the coast.

58. As for Chile's arrests, now, of Peruvian boats, south of the boundary parallel, we have a total of 17 years' worth of records: we have the records for the year 1984 and for the 16-year period between 1994 and 2009. Such records are in the normal course destroyed periodically, and so we are fortunate to have such a long period available for us[183].

59. In these 17 years, Chile arrested more than 300 Peruvian boats in waters south of the boundary parallel — including of course in waters to which Peru now lays claim.

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[179]CMC, Vol. IV, Ann. 176, p. 1072, first para.; *ibid.*, Ann. 177, p. 1080, first para.

[180]*Ibid.*, Ann. 176, p. 1072, fourth para.; *ibid.*, Ann. 177, p. 1080, fourth para.

[181]*Ibid.*, Ann. 176, p. 1072, penultimate para.; *ibid.*, Ann. 177, p. 1080, penultimate para.; *ibid.*, Ann. 187, p. 1138, sixth para.; *ibid.*, Ann. 188, p. 1142, sixth para. all reproducing Article C-070004 of the Regulation of Captaincies and Maritime, Fluvial and Lacustrine Activities; See also CMC, para. 3.92.

[182]*Ibid.*, Ann. 176, p. 1072, first, third and fourth paras; *ibid.*, Ann. 177, p. 1080, first, third and fourth paras; *ibid.*, Ann. 187, p. 1139, first and second paras; *ibid.*, Ann. 188, p. 1143, first and second paras.

[183]The data are to be found at CMC, Vol. VI, App.

The chart on your screens, which you will also find at tab 81, covers part of the area in which arrests were made, up to about 80 miles to the south of the boundary: and so you see there 207 arrests plotted on the chart, out of a total of 309 arrests for the period. These are the many dispersed dots that you see below the red line of the boundary parallel. And as you see, arrests were made as far from the coast as 180 miles. Indeed, the vast majority of the arrests are well outside Chile's 12-mile territorial sea, which is also indicated.

60. Mr. President, Members of the Court, Peru tells you that the boundary has been applied "only in the sea areas lying close to [the Parties'] coasts"[184]. But the evidence here leaps out of the screen — the boundary has been enforced in the full extent of Chile's 200-mile zone.

61. Now Peru's Navy in Ilo and Peru's Consulate-General in Arica were notified of the arrests, by Chile's navy. Each notification gives the location of the arrest, or the distance from the "international political boundary", or both. The earliest notification we have in full text is from February 1999. It is difficult to suppose that Peru could have misunderstood its meaning. It says this:

> "The [Peruvian] vessel was . . . 3 miles within the Chilean territorial sea and with the Peruvian . . . and Chilean . . . lighthouses within sight, which . . . when aligned, indicate the parallel of Hito No. 1, which constitutes the international political boundary."[185]

And no protest was lodged by Peru. Peru did not cry that no maritime boundary existed. Nor did Peru even so much as query the "international political boundary".

3. Co-ordination between the Parties' navies

62. There is a related body of practice here, which concerns co-operation between the two States' navies in boundary-enforcement actions.

63. As recently as 1995, the navies of Peru and Chile memorialized a procedure for escorting arrested boats back to their home State's waters, if found fishing within the 10-mile buffer zone on either side of the boundary. The boats were to be escorted to a line that is described in this agreement of 1995 as the "international political boundary"[186]: and subsequent official

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

[185]See CMC, Vol. III, Ann. 88, p. 621.

[186]See *ibid.*, Vol. II, Ann. 21, p. 198, Ann. "A", III.

notifications also record that Peruvian fishing boats arrested in Chilean waters were escorted to the "international political boundary". Peru acknowledged these notifications on at least two occasions that we have on record[187]; and, again, it entered no reservation or even so much as a query about the boundary. Logbooks of Chilean navy ships also record instances of handing over, at the boundary, Peruvian fishing boats to the Peruvian navy[188]. And again, Peru did not object when the Chilean navy came up to the parallel of Hito No. 1, in waters that Peru now says were Peruvian after all.

64. In the same way, Peru's navy would escort Chilean vessels found on the wrong side of the boundary to the "parallel 18° 21' 03" S"[189] or to the "frontier area"[190]. So in Peru's own documents we see the parallel of Hito No 1 is used as equivalent to the notion of the "frontier area".

65. Mr. Bundy for Peru, on Tuesday, did not mention the 1995 agreement — which clearly confirmed the existence of the Parties' boundary — nor did he mention the implementation of that agreement. But he was keen to tell the Court of another event, which took place several years later, in 2003. He quoted one sentence from one document of the Chilean navy[191]. And I propose to give you the fuller picture.

66. In 2002, the Chilean and Peruvian navies started discussions on a common strategy against illegal activities at sea[192]. The common strategy envisaged that the two States' would communicate "with the purpose of arresting boats in their respective waters of jurisdictional responsibility"[193]. In 2003, Peru proposed to include a disclaimer to this draft strategy document, to the effect that "it 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"[194].

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[187]See CMC, Vol. III, Anns. 96 and 99.

[188]See *ibid.*, Ann. 141, p. 876; *ibid.*, Ann. 152, p. 928.

[189]*Ibid.*, Ann. 93, p. 644, para. 2.

[190]*Ibid.*, Ann. 102, p. 681, para. 1.

[191]CR 2012/28, p. 61, para. 27 (Bundy).

[192]CMC, Vol. II, Ann. 28, pp. 253-255.

[193]*Ibid.*, p. 255, para. 3 *(c)*.

[194]RP Vol. II, Ann. 88, p. 540, para. (5).

— The first significant thing that Peru omitted to say was that this was the first occasion — in 2003 — when Peru purported to reserve its position on the boundary.

— The second thing that was left out of Peru's account on Tuesday is that Chile's navy requested that Peru's proposed disclaimer be withdrawn, saying that it was "beyond the authority" of the navy to address international boundary issues, which are for the Foreign Ministry[195].

— The third point Peru omitted to say was that, also in 2003, Peru's navy attempted to set aside some of — what Peru's navy said itself — were "agreements in force" including the 1995 agreement which regards the international political boundary[196]. That is the fuller picture.

67. I now want to deal very briefly with three further areas of practice: first, sea-bed activities; second, scientific research on the continental shelf and in the water-column; and lastly, airspace. And I promise I will be very brief.

G. Sea-bed: The Parties' authorizations acknowledge their maritime boundary

68. The Court will recall that the physical continental shelf in the vicinity of the maritime boundary is very narrow. But what practice there is confirms the existence of the maritime boundary.

69. About a decade ago, Telefónica, the telecommunications company, built a fibre-optic network called South America-1, or for short SAm-1.

[Slide]

As you can now see on your screens, and also under tab 82, this was an ambitious project. It encircles large parts of the Central and South American coasts, in the Pacific and in the Atlantic[197].

[Slide]

And in the detail highlighted on your screens now, you can see the points where the cable makes landfall on Peru's and Chile's coasts. And so, each of the two States knew that the submarine cable would cross their boundary.

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[195] See RP Vol. II, Ann. 89, p. 548, para. (1).

[196] See CMC, Vol. II, Ann. 29, p. 263, para. C.1.

[197] Source: www.fcc.gov/Bureaus/International/Orders/2000/da001826.doc.

70. Peru requires authorization for laying cables in its maritime dominion and so, in September 2000, Peru duly approved the laying of two segments of the SAm-1 cable[198]. The legal basis for this authorization was a Peruvian law regarding "control and supervision of maritime . . . activities"[199]. And Peru itself describes this law as dealing with a "broad range of activities" in the 200-mile zone in which "Peru claimed exclusive rights" [200]. And so it is clear that in authorizing this cable Peru was exercising sovereign rights in its maritime dominion. Peru was not exercising any fisheries-limited jurisdiction.

[Slide]

71. And turning now to tab 83, and also on your screens, you see that Peru authorized part of *Segment O* of the SAm-1 cable. You see its course there; it is a purple line, as in fact it was laid in the Peruvian maritime dominion[201]. And, crucially, for present purposes, you see the end-point of Peru's authorization. It stops at latitude 18° 21' 00.0" S — that is, the geographic parallel of the maritime boundary.

[Slide]

72. And you also see on the chart now, as a green line, the continuation of *Segment O* and the next segment of the cable, which is *Segment P*. These parts are on the Chilean continental shelf and the territorial sea.

73. The bathymetric research for that purpose was authorized by Chile in 1999[202], and was conducted in 1999 and 2000 by two research vessels.

[Slide]

And as you see in this frame now on your screen, the route of the sea-bed research that Chile authorized is indicated as an interrupted line. It starts from the boundary parallel and it continues south of the parallel.

[Slide]

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[198]See RC, Vol. III, Ann. 96, p. 597, para. 1.

[199]Law on the Control and Supervision of Maritime, Fluvial and Lacustrine Activities, MP, Vol. II, Ann. 20.

[200]MP, para. 3.15.

[201]Based on Peru's and Chile's navigation charts.

[202]See CMC, Vol. III, Ann. 144, p. 891; CMC, para. 3.115 *(c)*.

74. Chile's authorization for this research contained a sketch-map, which is now on your screens, and also at tab 84.

[Slide]

And in the magnification you have in the inset, you see that the boundary parallel is indicated as a dotted line. It is plain that Chile's jurisdiction extends all the way to the boundary parallel.

75. And so, Mr. President, Peru bravely told you on Tuesday "that those activities that Chile cites . . . had nothing to do with the continental shelf"[203], but that is plainly wrong.

H. The Parties' authorizations of scientific research in the continental shelf and in the water-column acknowledge their maritime boundary

76. I turn next to marine scientific research. Under UNCLOS, authorization of such research is an EEZ and continental-shelf competence of the coastal State[204], and both Chilean and Peruvian law require authorizations for such research[205].

77. The Court has the evidence of twelve research projects, which goes back to 1977, and a summary of these you can find under tab 85 in your folders. The projects cover a wide range of matters unrelated to fisheries, such as hydrocarbons, marine sediments, bathymetry, biology, and other matters. Chile's official authorizations for these projects refer expressly to the "International Political Boundary"[206] or the "boundary of the frontier with Peru"[207]. And some of these authorizations specify with co-ordinates the parallel of Hito No. 1[208] as the northern limit of the research area.

[Slide]

78. The composite diagram that you now have on your screens, and also at tab 86, illustrates the routes or the areas of four of the research projects that were authorized by Chile. And, as you see, these go right up to the boundary, or very close to it, covering the area that is now claimed by

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[203]CR 2012/29, p. 16, para. 63 (Bundy)

[204]See UNCLOS Art. 246.

[205]See CMC, Vol. III, Ann. 131, p. 831, para. 2 (Chilean law); *ibid.*, Ann. 82, p. 594, first para (Peruvian law).

[206]*Ibid.*, Ann. 147, p. 905, para. 2; *ibid.*, Ann. 148, p. 909 para. 2; *ibid.*, Ann. 156, p. 943 para. 2.a.

[207]*Ibid.*, Ann. 155, p. 939, para. 1.

[208]See *ibid.*, Ann. 155, p. 939, para. 1; *ibid.*, Ann. 156, p. 943, para. 2.a.

Peru[209]. And you also see how far from Chile's coast these projects extended — disproving, once more, Peru's theory about some near-shore boundary arrangement.

79. A recent example is the mission by the German research vessel *Sonne*, in 2002. This involved a single research voyage, first through Chilean and then through Peruvian waters. So two authorizations were needed — there would be a single voyage, and two authorizations, and both States knew that. Chile authorized the leg of the mission up to "the International Political Boundary"[210]. And Peru did not object to Chile's authorization, nor did it even reserve its position.

80. And Mr. President, Members of the Court, this illustrates the broader point here. The broader point is that, since 1952, Chile is not aware of even one instance where Peru has purported to authorize any scientific research activity south of the boundary parallel, either in the waters or on the sea-bed. Both Parties have respected the maritime boundary, in this activity as in all others.

I. Peru's Airspace is bounded by the maritime boundary with Chile

81. The last aspect of practice that I want to touch on is jurisdiction in respect of airspace. As our friends for Peru mentioned, control of airspace is a different subject from FIR, or Flight Information Region zones[211]. And although there is some FIR-related practice that is relevant to this boundary, I will be focusing only on airspace this morning.

82. Since 1979, under Peru's Constitution, the national territory of Peru, *territorio del Estado*, comprises both Peru's maritime dominion and the airspace over the maritime dominion[212]. And at all times relevant to this case, Peru claimed "exclusive and full sovereignty" in its airspace[213]. Peru has for many decades considered the boundary of its airspace to the south to be a settled matter. Thus, in 1966, Peru "denounced . . . illegal incursions"[214] — that is a quote from the Peruvian document — illegal incursions of its airspace by two Chilean airplanes above Peruvian waters. Naturally, if the boundary were merely a provisional line "to avoid conflicts between

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[209]See CMC, Vol. VI, Figures 31-33; RC, Vol. V, Figure 79.

[210]CMC, Vol. III, Ann. 150, p. 917, para. 2.

[211]CR 2012/28, p. 59, para. 21 (Bundy).

[212]See MP, Vol. II, Ann. 17, p. 72, Art 97; CMC, Vol. IV, Ann. 179, p. 1099, Art. 54.

[213]CMC, Vol. IV, Ann. 185, p. 1132, Art. 3.

[214]*Ibid.*, Vol. III, Ann. 76, p. 565, first para. See *ibid.*, paras. 2 and 4.

fishing vessels"[215], as Peru now says, Peru would not have felt entitled to make protests about aerial incursions of its maritime boundary.

83. Peru requires authorization for "entry into, transit within and exit from" its airspace[216]. And to enforce this requirement, as in fact it does, Peru must know the perimeter of its airspace. And Peru's authorizations are required to specify the point, or points, at which an aircraft is to cross the airspace boundary[217].

84. We have four such authorizations on record, from 2007 and 2008 — again, records of this kind are kept only for a time, so it is difficult to go back in time. All these authorizations were issued by Peru's Air Force for official flights of Chile's Government[218].

[Slide]

85. The diagram that is now on your screens and also under tab 87, illustrates one of the four authorized flight paths. As you can see, the flight was described as a series of waypoints, which are points on Peru's boundaries or airport codes. And you see that the flight ultimately crossed into Ecuador, and then, overflying Peruvian aerial territory once more, exits from the south, returning to Chile.

86. And there are three observations here.

— First, in these four authorizations on the record, Peru authorized "flight over Peruvian territory"[219] or "flight inbound/outbound over Peruvian territory"[220]: and "Peruvian territory" is most certainly not a zone of limited fisheries jurisdiction.

— Secondly, you see two entry/exit points on the Peruvian airspace. You see the first one in the north, at the land boundary with Ecuador, this is point "PAGUR" in bold capital letters. And in the south, you see the entry/exit point, over Peru's maritime dominion, on the parallel of Hito No 1. This is the more musically-sounding name, "IREMI". Now IREMI is also an FIR point but, crucially for present purposes, IREMI is also an entry point into Peru's airspace.

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[215]MP, para. 4.106.

[216]CMC, Vol. IV, Ann. 185, p. 1132, Art. 21.1.

[217]See *ibid.*

[218]See *ibid.*, Vol. III, Ann. 158 and *ibid.*, Vol. VI, Figure 30.

[219]*Ibid.*, Vol. III, Ann. 158, pp. 958-959.

[220]*Ibid.*, pp. 954-957.

Here, Peru authorized in express terms flight over "Peruvian territory". Peru did not authorize flight through FIR Lima. Simply, IREMI was convenient shorthand, familiar to pilots and air-traffic controllers, to notate a point, which is located on the boundary, without having to cite a detailed set of co-ordinates and other details.

— Thirdly, as you also see on the diagram, point IREMI is on the maritime boundary, some 90 miles to the west of the outer limit of Chile's EEZ and continental shelf. And you will hear more about this from Mr. Colson this afternoon.

87. Now, to conclude, Peru has a concept of aerial territory — to conclude this part of my presentation, I hasten to say. To the south it is bounded by the maritime boundary. And aircraft do not fish.

88. Mr. President and Members of the Court, it is Peru's stated case that an all-purpose maritime boundary is one that covers the sea, the sea-bed, the subsoil, and the airspace[221]. The practice I traversed — and it was not an exhaustive account — concerns all such entitlements:

— sovereign control by navies,

— maritime traffic,

— fisheries,

— submarine cables on the sea-bed,

— scientific research in the water-column and in the subsoil,

— and airspace.

The practice meets Peru's own test.

J. Peru's defences

89. So, in the face of such practice, what does Peru say? Basically two things.

90. The first Peruvian defence is the familiar device of "I say so", *ipse dixit*. Peru concedes, of course, that a line in the sea has long been observed, and is in fact observed to this day: because, on the facts, it would be perfectly pointless for Peru to deny this. So, perhaps as the lesser of two evils, Peru attempts to downgrade the status of this line. And so Peru has contrived a theory; the theory goes like this:

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[221] See RP, para. 4.25.

— that the line arose at some time before or around 1954, but Peru will not tell us when[222]; and it arose from — I quote Peru now — "an informal practice . . . not set out in any international instrument"[223];

— that this line was adopted not by the two States but — it seems — simply by fishermen[224];

— and, Peru continues, it "assumed"[225] — this is Peru's word — that it ought to observe the line, in a spirit of self-restraint; and the theory continues

— that the line concerned policing, "particularly" of fisheries[226], but also other matters that Peru refuses to specify;

— and, finally, the line applied in the territorial sea and "an adjacent area (of the high seas)"[227]; but, again, how wide that adjacent zone is Peru, again, refuses to explain.

Mr. President, Peru spends its time describing that which is not and denying that which is. What does Peru have to back up its complicated theory, about an (1) informal, (2) provisional, (3) near-shore, (4) mostly fisheries-related arrangement (5) between fishermen, (6) complemented by a tacit practice of self-restraint? These descriptors appear nowhere in the objective contemporaneous documents. They appear for the first and only time in Peru's pleadings.

91. And so to Peru's second defence — which is the Bákula defence. You have already heard about this. It is based on the Bákula Note of 1986. This is a text that was penned no less than 34 years after the Santiago Declaration[228]. Peru says that the Note was "an explicit, unequivocal, written assertion . . . that no international maritime boundary between Peru and Chile had been agreed"[229]. Armed with this creative account of the Bákula Note, Peru goes on to suggest that the Parties' practice after 1986 does not count[230].

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[222]See MP, para. 4.105.

[223]*Ibid.*

[224]See *ibid.*, paras. 2.31 and 4.105.

[225]RP, para. 4.33.

[226]MP, para. 4.4.

[227]*Ibid.*

[228]*Ibid.*, Vol. III, Ann. 76.

[229]RP, para. 4.47.

[230]RP, para. 4.45.

92. It would not be fair to the diplomatic labours of Ambassador Bákula to say that his text was either unequivocal or explicit. The Court can read the document for itself, and we strongly invite you to do so. We wish to make two simple points.

93. First, the Note does say — it says expressly: it "constitutes the first presentation, via diplomatic channels, which the Government of Peru formulates before the Government of Chile . . ."[231]. The "first presentation". And so, to put it another way, if the Bákula Note marked a change in Peru's position — and that is a very big if — it was the first formulation of that change. It comes 34 years after the Santiago Declaration, during which 34 years both Parties had continuously observed their maritime boundary, and had represented to each other that they had a legal obligation to do so.

94. But, and this is now my second point, Peru is not right that there was a change in position in 1986. There was something different: there was an invitation to initiate new discussions about a settled boundary. The Bákula Note recorded that it was the "personal message"[232] of Peru's Foreign Minister. And one month after the Bákula Note, Foreign Minister Wagner (now the distinguished Agent) made statements to the Press. These were carried both in the Chilean and Peruvian newspapers of record. The Chilean Press reported the Minister's statement as follows,

> "[I]n the Declaration of Santiago . . . rules for the maritime delimitation were established.
>
> According to that treaty, the line of the parallels was established for that delimitation . . .
>
> The . . . use of the parallel, in the case of Peru and Chile, allows Chilean fishing vessels to fish 30 miles off Peruvian coasts and that is what is intended to be corrected, Wagner concluded . . ."[233]

95. The Press in Lima similarly reported that Minister Wagner said: "maritime delimitation is a topic which 'cannot be avoided' since the present measurement system, based on the line of the parallels, allows Chilean fishing vessels to fish 30 miles off the Peruvian coast"[234]. These reports, as far as we know, have never been disclaimed or modified by Peru's foreign ministry.

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[231]MP, Vol. III, Ann. 76, p. 448, third para.

[232]*Ibid.*, p. 446, penultimate para.

[233]RC, Vol. III, Ann. 141, p. 883, last three paras.

[234]*Ibid.*, Ann. 142, p. 887, fifth para.

96. So the position is clear. Peru appeared to wish to change the Santiago Declaration boundary; and it invited Chile to a discussion. Chile did not follow up on that invitation. And, for its part, Peru did not press the matter again. As a prominent Peruvian diplomat and former Foreign Minister wrote, the Bákula Note was an "isolated event"[235].

97. And indeed it was. Thirteen years later, in 1999, the Foreign Affairs Committee of the Peruvian Congress stated in its report that, after facilities for Peru had been completed in the Chilean port of Arica, this had "end[ed] any pending possible conflict with neighbouring countries"[236]. These words are just as emphatic as they are plain. And although Peru now alleges that "[f]rom 1986 onwards . . . [it] sought to initiate discussions" on delimitation with Chile[237], all that it can point to is the Bákula Note from 1986 — the isolated démarche which led nowhere.

98. And what did Peru in fact do after 1986? Well, it did much that confirmed the maritime boundary.

— As we have seen, in 1987 Peru defined the perimeters of its Maritime Districts observing the "frontier boundary between Peru and Chile"[238] — this, a year after the Bákula Note.

— Peru also prosecuted Chilean nationals for fishing in "Peruvian jurisdictional waters"[239], north of "the dividing line of the maritime frontier"[240]. That was in 1989 — three years after the Bákula Note.

— Peru issued regulations for reporting entry into and exit from its maritime dominion and these refer to "the jurisdictional parallel" of Hito No 1: that was in 1991, five years after the Bákula Note.

— And in 1995 — nine years after the Bákula Note now — the Chilean and Peruvian navies agreed on a procedure to escort arrested fishing boats to the "international political boundary"[241].

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[235]RC, Vol. IV, Ann. 183, p. 1237.

[236]CMC, Vol. IV, Ann. 183, p. 1123, sixth introductory para.

[237]MP, para. 8.7.

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

[239]CMC, Vol. IV, Ann. 176, p. 1072, third para.; *ibid.*, Ann. 177, p. 1080, third para.

[240]*Ibid.*, fourth para.; *ibid.*, Ann. 177, p. 1080, fourth para.

[241]*Ibid.*, Vol. II, Ann. 21, pp. 197-198, Ann. "A", III.

99. Equally significant is what Peru did not do in response to Chile's continuing practice of adhering to the boundary.

— In 1988, Chile updated its official *Sailing Directions* and, as in the earlier edition of 1980, the first edition after the boundary lighthouses, about which you have heard from Mr. Paulsson, the *Sailing Directions* reiterated "[t]he maritime boundary is the parallel of Boundary Marker No. 1."[242] The maritime boundary is the parallel of Boundary Marker No. 1. Plain. This was two years after the Bákula Note, and Peru issues no reaction.

— In 1992 Chile published a nautical chart which depicted the maritime boundary with Peru on the Hito No 1 parallel[243]. Peru issues no reaction. Another Chilean chart indicating the boundary followed in 1994. Again, no reaction by Peru. A third map, in 1998, still no reaction by Peru. Peru reacts for the first time in 2000[244]. Peru admitted that it was aware of these charts, and the distinguished Agent of Peru confirmed this on Monday[245]. And it reacted after three charts and eight years.

Significantly, in 2000, Peru was not prepared to state a claim to the waters south of the boundary parallel. Peru was not prepared to take the position that there was no delimitation between the Parties. Such a claim was not stated until August 2007, and it was stated in the form of a sketch-map[246]. That map paints an area of Chilean waters as an "*área en controversia*", or a "disputed area"[247]. And, of course, this unusual and purely unilateral addition by Peru only serves to highlight the reality of the matter — that until that time these waters were not disputed. So there and then, in 2007, was there a change in Peru's position.

100. And so, Mr. President, Members of the Court, where does the objective evidence about the Parties' understanding and implementation of the Santiago Declaration and the 1954 Frontier Zone Agreement lead? We submit it leads to only one conclusion: that the Parties did indeed agree to an all-purpose maritime boundary in 1952 and acted upon it in the decades thereafter.

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[242]CMC, Vol. III, Ann. 133, p. 839, third para; *ibid.*, Ann. 135, p. 847, third para.

[243]MP, Vol. IV, figs. 5.24, 5.25 and 7.3.

[244]CMC, paras. 1.44-1.45.

[245]MP, paras. 5.25-5.27. See RC 2012/27, p. 20, para. 17 (Wagner).

[246]MP, Vol. II, Ann. 24, p. 120, Art. 1; *ibid.*, Vol. IV, fig. 2.4.

[247]*Ibid.*, Vol. IV, fig. 2.4.

And, for good measure, both Ecuador and the international community at large had precisely the same understanding of the position, as you will hear from Professor Dupuy this afternoon. This concludes my presentation, and I am grateful you for your patient attention.

The PRESIDENT: Thank you, Mr. Petrochilos. The Court will meet again this afternoon between 3 p.m. and 6 p.m., when Chile will conclude its first round of oral argument. Thank you. This sitting is adjourned.

The Court rose at 12.55 p.m.

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