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JUDGMENT

MARITIME DISPUTE
(PERU *v.* CHILE)

DIFFÉREND MARITIME
(PÉROU c. CHILI)

27 JANVIER 2014
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JUDGMENT

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.

In the case concerning the maritime dispute,

between

the Republic of Peru, represented by

H.E. Mr. Allan Wagner, Ambassador of Peru to the Kingdom of the Netherlands, former Minister for Foreign Affairs, former Minister of Defence, former Secretary-General of the Andean Community, as Agent;

H.E. Mr. Rafael Roncagliolo, Minister for Foreign Affairs, as Special Envoy;

H.E. Mr. José Antonio García Belaunde, Ambassador, former Minister for Foreign Affairs,

H.E. Mr. Jorge Chávez Soto, Ambassador, member of the Peruvian Delegation to the Third United Nations Conference on the Law of the Sea, former Adviser of the Minister for Foreign Affairs on Law of the Sea Matters,

as Co-Agents;

Mr. Rodman Bundy, avocat â la Cour d'appel de Paris, member of the New York Bar, Eversheds LLP, Paris,

Mr. Vaughan Lowe, Q.C., member of the English Bar, Emeritus Professor of International Law, Oxford University, associate member of the Institut de droit international,

Mr. Alain Pellet, Professor at the University Paris Ouest, Nanterre-La Défense, former Member and former Chairman of the International Law Commission, associate member of the Institut de droit international,

Mr. Tullio Treves, Professor at the Faculty of Law, State University of Milan, former judge of the International Tribunal for the Law of the Sea, Senior Consultant, Curtis, Mallet-Prevost, Colt and Mosle, Milan, member of the Institut de droit international,

Sir Michael Wood, K.C.M.G., member of the English Bar, Member of the International Law Commission,

as Counsel and Advocates;

Mr. Eduardo Ferrero, Member of the Permanent Court of Arbitration, former Minister for Foreign Affairs, member of the Peruvian Delegation to the Third United Nations Conference on the Law of the Sea,

Mr. Vicente Ugarte del Pino, former President of the Supreme Court of Justice, former President of the Court of Justice of the Andean Community, former Dean of the Lima Bar Association,

Mr. Roberto MacLean, former judge of the Supreme Court of Justice, former Member of the Permanent Court of Arbitration,

H.E. Mr. Manuel Rodríguez Cuadros, Ambassador of Peru to UNESCO, former Minister for Foreign Affairs,

as State Advocates;

Ms Marisol Agüero Colunga, Minister-Counsellor, LL.M., former Adviser of the Minister for Foreign Affairs on Law of the Sea Matters, Co-ordinator of the Peruvian Delegation,

H.E. Mr. Gustavo Meza-Cuadra, MIPP, Ambassador, Adviser of the Ministry of Foreign Affairs on Law of the Sea Matters,

Mr. Juan José Ruda, Member of the Permanent Court of Arbitration, Legal Adviser of the Ministry of Foreign Affairs, as Counsel;

Mr. Benjamin Samson, Researcher, Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

Mr. Eran Sthoeger, LL.M., New York University School of Law, as Assistant Counsel;

Mr. Carlos Enrique Gamarra, Vice Admiral (retired), Hydrographer, Adviser to the Office for Law of the Sea of the Ministry of Foreign Affairs, as Special Adviser;

Mr. Ramón Bahamonde, M.A., Advisory Office for the Law of the Sea of the Ministry of Foreign Affairs, Mr. Alejandro Deustua, M.A., Advisory Office for the Law of the Sea of the Ministry of Foreign Affairs,

Mr. Pablo Moscoso de la Cuba, LL.M., Advisory Office for the Law of the Sea of the Ministry of Foreign Affairs, as Legal Advisers;

Mr. Scott Edmonds, Cartographer, International Mapping,

Mr. Jaime Valdez, Lieutenant Commander (retired), National Cartographer of the Peruvian Delegation,

Mr. Aquiles Carcovich, Captain (retired), Cartographer,

Mr. Thomas Frogh, Cartographer, International Mapping,

as Technical Advisers;

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as Assistants,

and

the Republic of Chile,

represented by

H.E. Mr. Albert van Klaveren Stork, Ambassador, former Vice-Minister for Foreign Affairs, Professor at the University of Chile, as Agent;

H.E. Mr. Alfredo Moreno Charme, Minister for Foreign Affairs of Chile, as National Authority;

H.E. Mr. Juan Martabit Scaff, Ambassador of Chile to the Kingdom of the Netherlands,

H.E. Ms María Teresa Infante Caffi, National Director of Frontiers and Limits, Ministry of Foreign Affairs, Professor at the University of Chile, member of the Institut de droit international,

as Co-Agents;

Mr. Pierre-Marie Dupuy, Professor at the Graduate Institute of International Studies and Development, Geneva, and at the University of Paris II (Panthéon-Assas), associate member of the Institut de droit international,

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as Counsel and Advocates;

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Mr. Luis Winter, Ambassador, Ministry of Foreign Affairs,

Mr. Enrique Barros Bourie, Professor, University of Chile,

Mr. Julio Faúndez, Professor, University of Warwick,

Ms Ximena Fuentes Torrijo, Professor, University of Chile, Mr. Claudio Troncoso Repetto, Professor, University of Chile,

Mr. Andres Jana, Professor, University of Chile, Ms Mariana Durney, Legal Officer, Ministry of Foreign Affairs,

Mr. John Ranson, Legal Officer, Professor of International Law, Chilean Navy,

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Mr. Motohiro Maeda, Solicitor admitted in England and Wales, Freshfields Bruckhaus Deringer LLP,

Mr. Coalter G. Lathrop, Special Adviser, Sovereign Geographic, member of the North Carolina Bar,

H.E. Mr. Luis Goycoolea, Ministry of Foreign Affairs,

Mr. Antonio Correa Olbrich, Counsellor, Embassy of Chile in the Kingdom of the Netherlands,

Mr. Javier Gorostegui Obanoz, Second Secretary, Embassy of Chile in the Kingdom of the Netherlands,

Ms Kate Parlett, Solicitor admitted in England and Wales and in Queensland, Australia,

Ms Nienke Grossman, Assistant Professor, University of Baltimore, Maryland, member of the Bars of Virginia and the District of Columbia,

Ms Alexandra van der Meulen, Avocat à la Cour and member of the Bar of the State of New York,

Mr. Francisco Abriani, member of the Buenos Aires Bar,

Mr. Paolo Palchetti, Professor of International Law, University of Macerata, as Advisers;

Mr. Julio Poblete, National Division of Frontiers and Limits, Ministry of Foreign Affairs,

Ms Fiona Bloor, United Kingdom Hydrographic Office,

Mr. Dick Gent, Marine Delimitation Ltd.,

as Technical Advisers,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 16 January 2008, the Republic of Peru (hereinafter "Peru") filed in the Registry of the Court an Application instituting proceedings against the Republic of Chile (hereinafter "Chile") in respect of a dispute concerning, on the one hand, "the delimitation of the boundary between the maritime zones of the two States in the Pacific Ocean, beginning at a point on the coast called Concordia . . . the terminal point of the land boundary established pursuant to the Treaty . . . of 3 June 1929" and, on the other, the recognition in favour of Peru of a "maritime zone lying within 200 nautical miles of Peru's coast" and which should thus appertain to it, "but which Chile considers to be part of the high seas".

In its Application, Peru seeks to found the jurisdiction of the Court on Article XXXI of the American Treaty on Pacific Settlement signed on 30 April 1948, officially designated, according to Article LX thereof, as the "Pact of Bogotá" (hereinafter referred to as such).

2. In accordance with Article 40, paragraph 2, of the Statute of the Court, the Registrar immediately communicated the Application to the Government of Chile; and, under paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the Pact of Bogotá the notifications provided for in Article 63, paragraph 1, of the Statute of the Court. In accordance with the provisions

of Article 69, paragraph 3, of the Rules of Court, the Registrar moreover addressed to the Organization of American States (hereinafter the "OAS") the notification provided for in Article 34, paragraph 3, of the Statute of the Court. As provided for in Article 69, paragraph 3, of the Rules of Court, the Registry transmitted the written pleadings to the OAS and asked that organization whether or not it intended to furnish observations in writing within the meaning of that article; the OAS indicated that it did not intend to submit any such observations.

4. On the instructions of the Court, in accordance with the provisions of Article 69, paragraph 3, of the Rules of Court, the Registrar addressed to the Permanent Commission for the South Pacific (hereinafter the "CPPS", from the Spanish acronym for "Comisión Permanente del Pacífico Sur") the notification provided for in Article 34, paragraph 3, of the Statute of the Court with regard to the Declaration on the Maritime Zone, signed by Chile, Ecuador and Peru, in Santiago on 18 August 1952 (hereinafter the "1952 Santiago Declaration"), and to the Agreement relating to a Special Maritime Frontier Zone, signed by the same three States in Lima on 4 December 1954 (hereinafter the "1954 Special Maritime Frontier Zone Agreement"). In response, the CPPS indicated that it did not intend to submit any observations in writing within the meaning of Article 69, paragraph 3, of the Rules of Court.

5. On the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to Ecuador, as a State party to the 1952 Santiago Declaration and to the 1954 Special Maritime Frontier Zone Agreement, the notification provided for in Article 63, paragraph 1, of the Statute of the Court.

6. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred upon it by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Peru chose Mr. Gilbert Guillaume and Chile Mr. Francisco Orrego Vicuña.

7. By an Order dated 31 March 2008, the Court fixed 20 March 2009 as the time-limit for the filing of the Memorial of Peru and 9 March 2010 as the time-limit for the filing of the Counter-Memorial of Chile. Those pleadings were duly filed within the time-limits so prescribed.

8. By an Order of 27 April 2010, the Court authorized the submission of a Reply by Peru and a Rejoinder by Chile, and fixed 9 November 2010 and 11 July 2011 as the respective time-limits for the filing of those pleadings. The Reply and the Rejoinder were duly filed within the time-limits thus fixed.

9. Referring to Article 53, paragraph 1, of the Rules of Court, the Governments of Colombia, Ecuador and Bolivia asked to be furnished with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties pursuant to that same provision, the Court decided to grant each of these requests. The Registrar duly communicated these decisions to the said Governments and to the Parties.

10. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court, after having ascertained the views of the Parties, decided that copies of the pleadings and

documents annexed would be made accessible to the public on the opening of the oral proceedings.

11. Public hearings were held between 3 and 14 December 2012, at which the Court heard the oral arguments and replies of:

For Peru: H.E. Mr. Allan Wagner,
Mr. Alain Pellet,
Mr. Rodman Bundy,
Mr. Tullio Treves,
Sir Michael Wood,
Mr. Vaughan Lowe.

For Chile: H.E. Mr. Albert van Klaveren Stork,
Mr. Pierre-Marie Dupuy,
Mr. David Colson,
Mr. James Crawford,
Mr. Jan Paulsson,
Mr. Georgios Petrochilos,
Mr. Luigi Condorelli,
Mr. Samuel Wordsworth.

12. At the hearings, a Member of the Court put a question to the Parties, to which replies were given orally in accordance with Article 61, paragraph 4, of the Rules of Court.

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13. In its Application, the following requests were made by Peru:

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

The Government of Peru, further, reserves its right to supplement, amend or modify the present Application in the course of the proceedings."

14. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Peru,

in the Memorial and in the Reply:

"For the reasons set out [in Peru's Memorial and Reply], the Republic of Peru requests the Court to adjudge and declare that:

(1) The delimitation between the respective maritime zones between the Republic of Peru and the Republic of Chile, is a line starting at 'Point Concordia'

(defined as the intersection with the low-water mark of a 10-kilometre radius arc, having as its centre the first bridge over the River Lluta of the Arica-La Paz railway) and equidistant from the baselines of both Parties, up to a point situated at a distance of 200 nautical miles from those baselines, and

(2) Beyond the point where the common maritime border ends, Peru is entitled to exercise exclusive sovereign rights over a maritime area lying out to a distance of 200 nautical miles from its baselines.

The Republic of Peru reserves its right to amend these submissions as the case may be in the course of the present proceedings."

On behalf of the Government of Chile,

in the Counter-Memorial and in the Rejoinder:

"Chile respectfully requests the Court to:

(a) dismiss Peru's claims in their entirety;

(b) adjudge and declare that:

(i) the respective maritime zone entitlements of Chile and Peru have been fully delimited by agreement;

(ii) those maritime zone entitlements are delimited by a boundary following the parallel of latitude passing through the most seaward boundary marker of the land boundary between Chile and Peru, known as Hito No. 1, having a latitude of 18° 21' 00" S under WGS 84 Datum; and

(iii) Peru has no entitlement to any maritime zone extending to the south of that parallel."

15. At the oral proceedings, the Parties presented the same submissions as those contained in their written pleadings.

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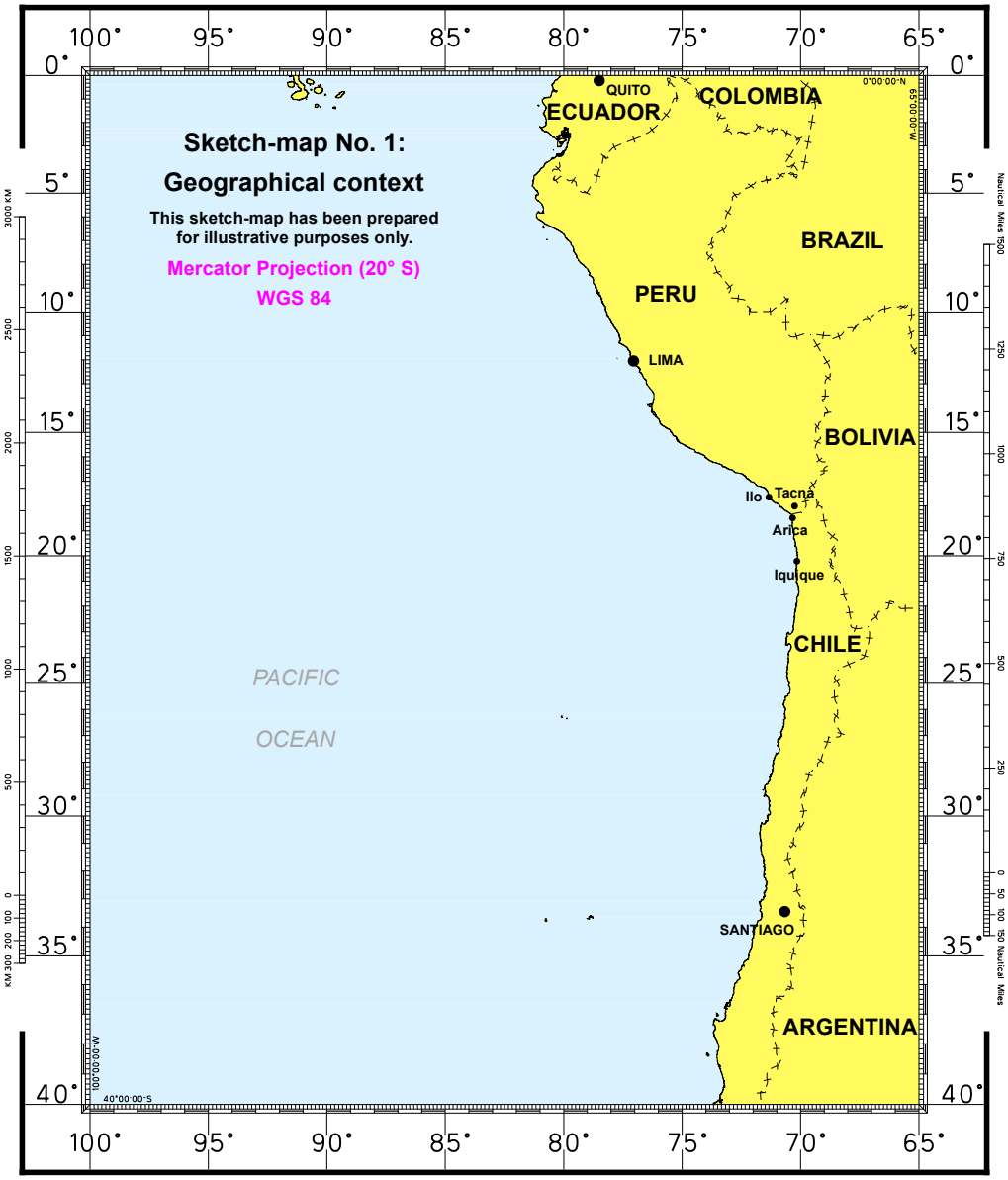
* *

I. Geography

16. Peru and Chile are situated in the western part of South America; their mainland coasts face the Pacific Ocean. Peru shares a land boundary with Ecuador to its north and with Chile to its south. In the area with which these proceedings are concerned, Peru's coast runs in a north-west direction from the starting-point of the land boundary between the Parties on the Pacific coast and Chile's generally follows a north-south orientation. The coasts of both Peru and Chile in that area are mostly uncomplicated and relatively smooth, with no distinct promontories or other distinguishing features. (See sketch-map No. 1: Geographical context.)


Sketch-map No. 1:
Geographical context
This sketch-map has been prepared for illustrative purposes only.
Mercator Projection (20° S)
WGS 84
QUITO
ECUADOR
COLOMBIA
BRAZIL
PERU
LIMA
BOLIVIA
Ilo
Tacna
Arica
Iquique
CHILE
PACIFIC
OCEAN
SANTIAGO
ARGENTINA
100°
95°
90°
85°
80°
75°
70°
65°
0°
5°
10°
15°
20°
25°
30°
35°
40°

II. Historical background

17. Chile gained its independence from Spain in 1818 and Peru did so in 1821. At the time of independence, Peru and Chile were not neighbouring States. Situated between the two countries was the Spanish colonial territory of Charcas which, as from 1825, became the Republic of Bolivia. In 1879 Chile declared war on Peru and Bolivia, in what is known historically as the War of the Pacific. In 1883 hostilities between Chile and Peru formally came to an end under the Treaty of Ancón. Under its terms, Peru ceded to Chile the coastal province of Tarapacá; in addition, Chile gained possession of the Peruvian provinces of Tacna and Arica for a period of ten years on the basis of an agreement that after that period of time there would be a plebiscite to determine sovereignty over these provinces. After the signing of the truce between Bolivia and Chile in 1884 and of the 1904 Treaty of Peace and Friendship between them, the entire Bolivian coast became Chilean.

18. Chile and Peru failed to agree on the terms of the above-mentioned plebiscite. Finally, on 3 June 1929, following mediation attempts by the President of the United States of America, the two countries signed the Treaty for the Settlement of the Dispute regarding Tacna and Arica (hereinafter the "1929 Treaty of Lima") and its Additional Protocol, whereby they agreed that Tacna would be returned to Peru while Chile would retain Arica. The 1929 Treaty of Lima also fixed the land boundary between the two countries. Under Article 3 of that Treaty, the Parties agreed that a Mixed Commission of Limits should be constituted in order to determine and mark the agreed boundary using a series of markers ("hitos" in Spanish). In its 1930 Final Act, the 1929-1930 Mixed Commission recorded the precise locations of the 80 markers that it had placed on the ground to demarcate the land boundary.

19. In 1947 both Parties unilaterally proclaimed certain maritime rights extending 200 nautical miles from their coasts (hereinafter collectively the "1947 Proclamations"). The President of Chile issued a Declaration concerning his country's claim on 23 June 1947 (hereinafter the "1947 Declaration" or "Chile's 1947 Declaration", reproduced at paragraph 37 below). The President of Peru issued Supreme Decree No. 781, claiming the rights of his country, on 1 August 1947 (hereinafter the "1947 Decree" or "Peru's 1947 Decree", reproduced at paragraph 38 below).

20. In 1952, 1954 and 1967, Chile, Ecuador and Peru negotiated twelve instruments to which the Parties in this case make reference. Four were adopted in Santiago in August 1952 during the Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific (the Regulations for Maritime Hunting Operations in the Waters of the South Pacific; the Joint Declaration concerning Fishing Problems in the South Pacific; the Santiago Declaration; and the Agreement Relating to the Organization of the Permanent Commission of the Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific). Six others were adopted in Lima in December 1954 (the Complementary Convention to the Declaration of Sovereignty on the Two-Hundred-Mile Maritime Zone; the Convention on the System of Sanctions; the Agreement relating to Measures of Supervision and Control in the Maritime Zones of the Signatory Countries; the Convention on the Granting of Permits for the Exploitation

of the Resources of the South Pacific; the Convention on the Ordinary Annual Meeting of the Permanent Commission for the South Pacific; and the Agreement Relating to a Special Maritime Frontier Zone). And, finally, two agreements relating to the functioning of the CPPS were signed in Quito in May 1967.

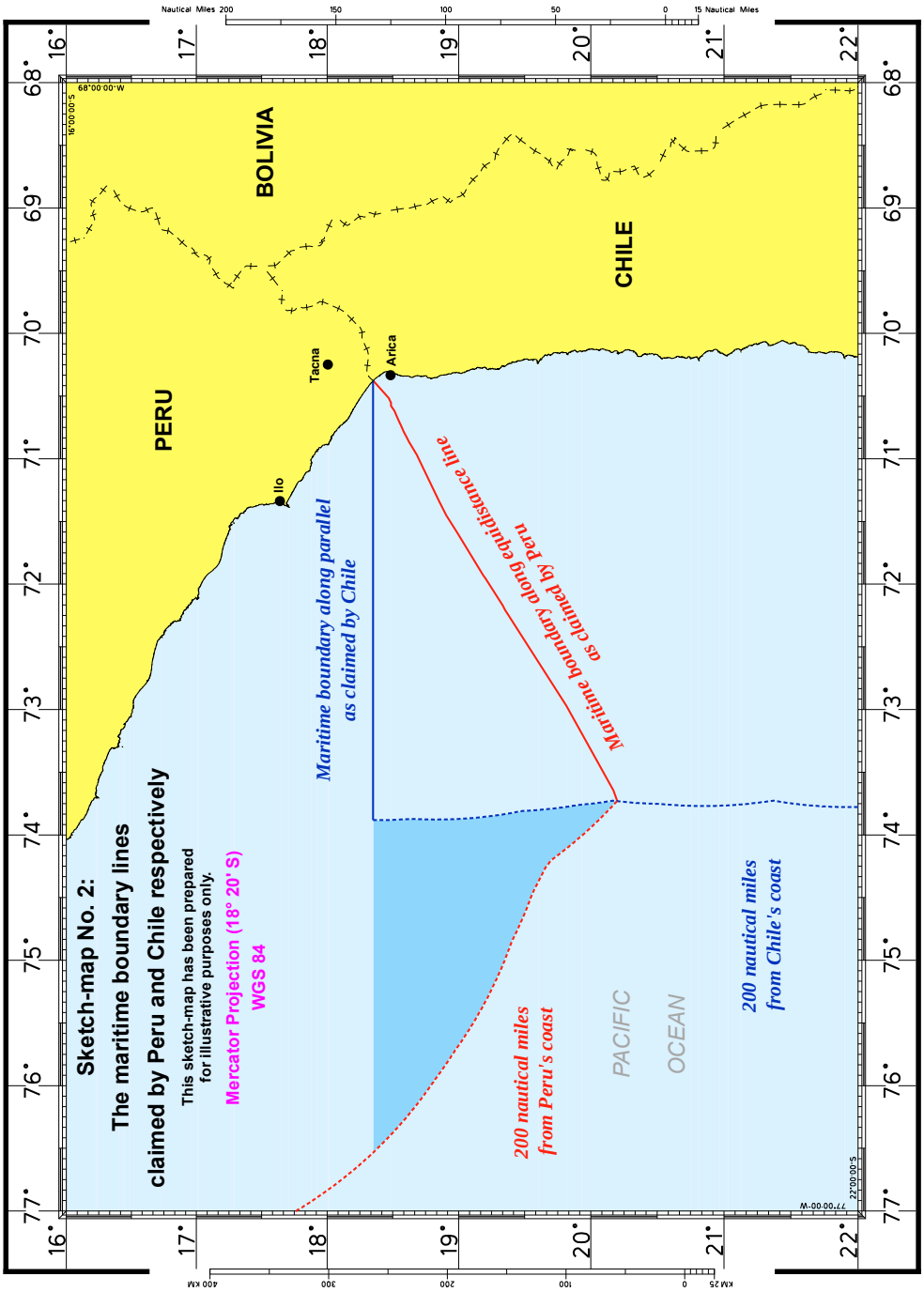
21. On 3 December 1973, the very day the Third United Nations Conference on the Law of the Sea began, the twelve instruments were submitted by the three signatory States to the United Nations Secretariat for registration under Article 102 of the Charter. The four 1952 instruments (including the Santiago Declaration) were registered on 12 May 1976 (United Nations, *Treaty Series (UNTS)*, Vol. 1006, pp. 301, 315, 323 and 331, Registration Nos. I-14756 to I-14759). The United Nations *Treaty Series* specifies that the four 1952 treaties came into force on 18 August 1952 upon signature. The 1954 Special Maritime Frontier Zone Agreement was registered with the United Nations Secretariat on 24 August 2004 (*UNTS*, Vol. 2274, p. 527, Registration No. I-40521). The United Nations *Treaty Series* indicates that the 1954 Special Maritime Frontier Zone Agreement entered into force on 21 September 1967 by the exchange of instruments of ratification. With regard to the two 1967 agreements, the Secretariat was informed in 1976 that the signatory States had agreed not to insist upon the registration of these instruments, as they related to matters of purely internal organization.

Representatives of the three States also signed in 1955 and later ratified the Agreement for the Regulation of Permits for the Exploitation of the Resources of the South Pacific. That treaty was not, however, submitted to the United Nations for registration along with the other twelve instruments in 1973 or at any other time.

III. Positions of the Parties

22. Peru and Chile have adopted fundamentally different positions in this case. Peru argues that no agreed maritime boundary exists between the two countries and asks the Court to plot a boundary line using the equidistance method in order to achieve an equitable result. Chile contends that the 1952 Santiago Declaration established an international maritime boundary along the parallel of latitude passing through the starting-point of the Peru-Chile land boundary and extending to a minimum of 200 nautical miles. It further relies on several agreements and subsequent practice as evidence of that boundary. Chile asks the Court to confirm the boundary line accordingly. (See sketch-map No. 2: The maritime boundary lines claimed by Peru and Chile respectively.) Peru also argues that, beyond the point where the common maritime boundary ends, it is entitled to exercise exclusive sovereign rights over a maritime area lying out to a distance of 200 nautical miles from its baselines. (This maritime area is depicted on sketch-map No. 2 in a darker shade of blue.) Chile responds that Peru has no entitlement to any maritime zone extending to the south of the parallel of latitude along which, as Chile maintains, the international maritime boundary runs.

23. Chile contends that the principle of *pacta sunt servanda* and the principle of stability of boundaries prevent any attempt to invite the Court to redraw a boundary that has already been agreed. Chile adds that there have been significant benefits to both Parties as a result of the stability of their long-standing maritime boundary. Peru argues


Sketch-map No. 2:
The maritime boundary lines
claimed by Peru and Chile respectively
This sketch-map has been prepared
for illustrative purposes only.
Mercator Projection (18° 20' S)
WGS 84
PERU
BOLIVIA
CHILE
Tacna
Arica
Ilo
Maritime boundary along parallel
as claimed by Chile
Maritime boundary along equidistance line
as claimed by Peru
200 nautical miles
from Peru's coast
200 nautical miles
from Chile's coast
PACIFIC
OCEAN
Nautical Miles 200 150 100 50 0 15 Nautical Miles
400 KM 300 200 100 0 KM 25
68°00'00"W
16°00'00"S
77°00'00"W
22°00'00"S

that the delimitation line advocated by Chile is totally inequitable as it accords Chile a full 200-nautical-mile maritime extension, whereas Peru, in contrast, suffers a severe cut-off effect. Peru states that it is extraordinary for Chile to seek to characterize a boundary line, which accords Chile more than twice as much maritime area as it would Peru, as a stable frontier which is beneficial to Peru.

IV. Whether there is an agreed maritime boundary

24. In order to settle the dispute before it, the Court must first ascertain whether an agreed maritime boundary exists, as Chile claims. In addressing this question, the Parties considered the significance of the 1947 Proclamations, the 1952 Santiago Declaration and various agreements concluded in 1952 and 1954. They also referred to the practice of the Parties subsequent to the 1952 Santiago Declaration. The Court will deal with each of these matters in turn.

1. The 1947 Proclamations of Chile and Peru

25. As noted above (see paragraph 19), in their 1947 Proclamations, Chile and Peru unilaterally proclaimed certain maritime rights extending 200 nautical miles from their respective coasts.

26. The Parties agree that the relevant historical background to these Proclamations involves a number of comparable proclamations by other States, namely the United States of America's two Proclamations of its policy with respect to both the natural resources of the subsoil and sea-bed of the continental shelf, and coastal fisheries in certain areas of the high seas, both dated 28 September 1945, the Mexican Declaration with Respect to Continental Shelf dated 29 October 1945 and the Argentinean Declaration Proclaiming Sovereignty over the Epicontinental Sea and the Continental Shelf dated 11 October 1946. Both Parties agree on the importance of fish and whale resources to their economies, submitting that the above-mentioned Proclamations by the United States of America placed increased pressure on the commercial exploitation of fisheries off the coast of the Pacific States of Latin America, thus motivating their 1947 Proclamations.

27. Beyond this background, the Parties present differing interpretations of both the content and legal significance of the 1947 Proclamations.

28. According to Peru, Chile's 1947 Declaration was an initial and innovative step, whereby it asserted an alterable claim to jurisdiction, dependent on the adoption of further measures; nothing in this Declaration indicated any intention, on the part of Chile, to address the question of lateral maritime boundaries with neighbouring States. Peru argues that its own 1947 Decree is similarly provisional, representing an initial step and not purporting to fix definitive limits of Peruvian jurisdiction.

Peru contends that although its 1947 Decree refers to the Peruvian zone of control and protection as "the area covered between the coast and an imaginary parallel line to it at a distance of two hundred (200) nautical miles measured following the line of the geographical parallels", such reference simply described the manner in which the seaward limits of the maritime zone would be drawn, with there being no intention to set

any lateral boundaries with neighbouring States. Peru further considers that, according to terminology at the relevant time, the language of "sovereignty" in its 1947 Decree referred simply to rights over resources.

29. By contrast, Chile understands the Parties' 1947 Proclamations as more relevant, considering them to be "concordant unilateral proclamations, each claiming sovereignty to a distance of 200 nautical miles", being "substantially similar in form, content and effect". Chile observes that each of the Parties proclaims national sovereignty over its adjacent continental shelf, as well as in respect of the water column, indicating also a right to extend the outer limit of its respective maritime zone.

30. Peru contests Chile's description of the 1947 Proclamations as "concordant", emphasizing that, although Chile's 1947 Declaration and Peru's 1947 Decree were closely related in time and object, they were not co-ordinated or agreed between the Parties.

31. Chile further argues that the 1947 Proclamations set clear boundaries of the maritime zones referred to therein. Chile contends that the method in Peru's 1947 Decree of using a geographical parallel to measure the outward limit of the maritime zone also necessarily determines the northern and southern lateral limits of such zone along such line of geographical parallel. According to Chile, its own references to a "perimeter" and to the "mathematical parallel" in its 1947 Declaration could be similarly understood as indicating that a *tracé parallèle* method was used to indicate the perimeter of the claimed Chilean zone.

32. Chile adds that parallels of latitude were also used in the practice of American States. Peru responds that the use of parallels of latitude by other American States described by Chile are not instances of the use of parallels of latitude as international maritime boundaries.

33. For Chile, the primary significance of the 1947 Proclamations is as antecedents to the 1952 Santiago Declaration. Chile also refers to the 1947 Proclamations as circumstances of the conclusion of the 1952 Santiago Declaration and the 1954 Special Maritime Frontier Zone Agreement, in accordance with Article 32 of the Vienna Convention on the Law of Treaties. Chile maintains that the 1947 Proclamations, in particular Peru's use of a "line of the geographic parallels" to measure its maritime projection, rendered the boundary delimitation uncontroversial in 1952, as there could be no less controversial boundary delimitation than when the claimed maritime zones of two adjacent States abut perfectly but do not overlap. However, Chile further clarifies that it does not consider that the 1947 Proclamations themselves established a maritime boundary between the Parties.

34. Peru questions the Chilean claim that the adjacent maritime zones abut perfectly by pointing out that the 1947 Proclamations do not stipulate co-ordinates or refer to international boundaries. Peru's view on the connection between the 1947 Proclamations and the 1952 Santiago Declaration is that the 1947 Proclamations cannot constitute circumstances of the 1952 Santiago

Declaration's conclusion in the sense of Article 32 of the Vienna Convention on the Law of Treaties as they pre-date the conclusion of the 1952 Santiago Declaration by

five years. Peru also questions Chile's assertion that the 1947 Proclamations constitute circumstances of the conclusion of the 1954 Special Maritime Frontier Zone Agreement.

35. The Parties further disagree on the legal nature of the 1947 Proclamations, particularly Chile's 1947 Declaration. Chile contends that the 1947 Proclamations each had immediate effect, without the need for further formality or enacting legislation. Peru denies this, contending rather that Chile's 1947 Declaration did not have the nature of a legal act. It points to the fact that the 1947 Declaration was published only in a daily newspaper and not in the Official Gazette of Chile.

36. Chile's response to these arguments is that the status of its 1947 Declaration under domestic law is not determinative of its status under international law, emphasizing that it was an international claim made by the President of Chile and addressed to the international community. Chile points out that the Parties exchanged formal notifications of their 1947 Proclamations, arguing that the lack of protest thereto demonstrates acceptance of the validity of the other's claim to sovereignty, including in relation to the perimeter. This was challenged by Peru.

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37. The relevant paragraphs of Chile's 1947 Declaration provide as follows:

"Considering:

1. That the Governments of the United States of America, of Mexico and of the Argentine Republic, by presidential declarations made on 28 September 1945, 29 October 1945, and 11 October 1946, respectively,

.....

2. That they have explicitly proclaimed the rights of their States to protect, preserve, control and inspect fishing enterprises, with the object of preventing illicit activities threatening to damage or destroy the considerable natural riches of this kind contained in the seas adjacent to their coasts, and which are indispensable to the welfare and progress of their respective peoples; and that the justice of such claims is indisputable;

3. That it is manifestly convenient, in the case of the Chilean Republic, to issue a similar proclamation of sovereignty, not only by the fact of possessing and having already under exploitation natural riches essential to the life of the nation and contained in the continental shelf, such as the coal-mines, which are exploited both on the mainland and under the sea, but further because, in view of its topography and the narrowness of its boundaries, the life of the country is linked to the sea and to all present and future natural riches contained within it, more so than in the case of any other country;

.....

(1) The Government of Chile confirms and proclaims its national sovereignty over all the continental shelf adjacent to the continental and island coasts of its national

territory, whatever may be their depth below the sea, and claims by consequence all the natural riches which exist on the said shelf, both in and under it, known or to be discovered.

(2) The Government of Chile confirms and proclaims its national sovereignty over the seas adjacent to its coasts whatever may be their depths, and within those limits necessary in order to reserve, protect, preserve and exploit the natural resources of whatever nature found on, within and below the said seas, placing within the control of the government especially all fisheries and whaling activities with the object of preventing the exploitation of natural riches of this kind to the detriment of the inhabitants of Chile and to prevent the spoiling or destruction of the said riches to the detriment of the country and the American continent.

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

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

38. The relevant paragraphs of Peru's 1947 Decree provide as follows:

"The President of the Republic

Considering:

.....

That the shelf contains certain natural resources which must be proclaimed as our national heritage;

That it is deemed equally necessary that the State protect, maintain and establish a control of fisheries and other natural resources found in the continental waters which cover the submerged shelf and the adjacent continental seas in order that these resources which are so essential to our national life may continue to be exploited now and in the future in such a way as to cause no detriment to the country's economy or to its food production;

.....

That the right to proclaim sovereignty and national jurisdiction over the entire extension of the submerged shelf as well as over the continental waters which cover it and the adjacent seas in the area required for the maintenance and vigilance of the resources therein contained, has been claimed by other countries and practically admitted in international law (Declaration of the President of the United States of 28 September 1945; Declaration of the President of Mexico of 29 October 1945; Decree of the President of the Argentine Nation of 11 October 1946; Declaration of the President of Chile of 23 June 1947);

.....

With the advisory vote of the Cabinet:

Decrees:

1. To declare that national sovereignty and jurisdiction are extended to the submerged continental or insular shelf adjacent to the continental or insular shores of national territory, whatever the depth and extension of this shelf may be.
2. National sovereignty and jurisdiction are exercised as well over the sea adjoining the shores of national territory whatever its depth and in the extension necessary to reserve, protect, maintain and utilize natural resources and wealth of any kind which may be found in or below those waters.
3. As a result of previous declarations the State reserves the right to establish the limits of the zones of control and protection of natural resources in continental or insular seas which are controlled by the Peruvian Government and to modify such limits in accordance with supervening circumstances which may originate as a result of further discoveries, studies or national interests which may become apparent in the future and at the same time declares that it will exercise the same control and protection on the seas adjacent to the Peruvian coast over the area covered between the coast and an imaginary parallel line to it at a distance of two hundred (200) nautical miles measured following the line of the geographical parallels. As regards islands pertaining to the Nation, this demarcation will be traced to include the sea area adjacent to the shores of these islands to a distance of two hundred (200) nautical miles, measured from all points on the contour of these islands.
4. The present declaration does not affect the right to free navigation of ships of all nations according to international law."

39. The Court notes that the Parties are in agreement that the 1947 Proclamations do not themselves establish an international maritime boundary. The Court therefore will consider the 1947 Proclamations only for the purpose of ascertaining whether the texts evidence the Parties' understanding as far as the establishment of a future maritime boundary between them is concerned.

40. The Court observes that paragraph 3 of Chile's 1947 Declaration referred to a "mathematical parallel" projected into the sea to a distance of 200 nautical miles

from the Chilean coast. Such a mathematical parallel limited the seaward extent of the projection, but did not fix its lateral limits. The 1947 Declaration nonetheless stated that it concerned the continental shelf and the seas "adjacent" to the Chilean coasts. It implied the need to fix, in the future, the lateral limits of the jurisdiction that it was seeking to establish within a specified perimeter. The Court further notes that Peru's 1947 Decree, in paragraph 3, referred to "geographical parallels" in identifying its maritime zone. The description of the relevant maritime zones in the 1947 Proclamations appears to use a *tracé parallèle* method. However, the utilization of such method is not sufficient to evidence a clear intention of the Parties that their eventual maritime boundary would be a parallel.

41. The Court recalls that paragraph 3 of Chile's 1947 Declaration provides for the establishment of protective zones for whaling and deep sea fishery, considering that these may be modified in any way "to conform with the knowledge, discoveries, studies and interests of Chile as required in the future". This conditional language cannot be seen as committing Chile to a particular method of delimiting a future lateral boundary with its neighbouring States; rather, Chile's concern relates to the establishment of a zone of protection and control so as to ensure the exploitation and preservation of natural resources.

42. The language of Peru's 1947 Decree is equally conditional. In paragraph 3, Peru reserves the right to modify its "zones of control and protection" as a result of "national interests which may become apparent in the future".

43. In view of the above, the language of the 1947 Proclamations, as well as their provisional nature, precludes an interpretation of them as reflecting a shared understanding of the Parties concerning maritime delimitation. At the same time, the Court observes that the Parties' 1947 Proclamations contain similar claims concerning their rights and jurisdiction in the maritime zones, giving rise to the necessity of establishing the lateral limits of these zones in the future.

44. Having reached this conclusion, the Court does not need to address Chile's argument concerning the relevance of the communication of the 1947 Proclamations *inter se* and Peru's response to that argument. The Court notes, however, that both Peru and Chile simply acknowledged receipt of each other's notification without making any reference to the possible establishment of an international maritime boundary between them.

2. The 1952 Santiago Declaration

45. As noted above (see paragraph 20), the Santiago Declaration was signed by Chile, Ecuador and Peru during the 1952 Conference held in Santiago de Chile on the Exploitation and Conservation of the Marine Resources of the South Pacific.

46. According to Chile, the 1952 Santiago Declaration has been a treaty from its inception and was always intended by its signatories to be legally binding. Chile further notes that the United Nations *Treaty Series* indicates that the 1952 Santiago Declaration

entered into force upon signature on 18 August 1952, with there being no record of any objection by Peru to such indication.

47. Peru considers that the 1952 Santiago Declaration was not conceived as a treaty, but rather as a proclamation of the international maritime policy of the three States. Peru claims that it was thus "declarative" in character, but accepts that it later acquired the status of a treaty after being ratified by each signatory (Chile in 1954, Ecuador and Peru in 1955) and registered as such with the United Nations Secretariat on 12 May 1976, pursuant to Article 102, paragraph 1, of the Charter of the United Nations.

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48. In view of the above, the Court observes that it is no longer contested that the 1952 Santiago Declaration is an international treaty. The Court's task now is to ascertain whether it established a maritime boundary between the Parties.

49. The 1952 Santiago Declaration provides as follows:

"1. Governments have the obligation to ensure for their peoples the necesssary conditions of subsistence, and to provide them with the resources for their economic development.

2. Consequently, they are responsible for the conservation and protection of their natural resources and for the regulation of the development of these resources in order to secure the best possible advantages for their respective countries.

3. Thus, it is also their duty to prevent any exploitation of these resources, beyond the scope of their jurisdiction, which endangers the existence, integrity and conservation of these resources to the detriment of the peoples who, because of their geographical situation, possess irreplaceable means of subsistence and vital economic resources in their seas.

In view of the foregoing considerations, the Governments of Chile, Ecuador and Peru, determined to conserve and safeguard for their respective peoples the natural resources of the maritime zones adjacent to their coasts, formulate the following Declaration:

I. The geological and biological factors which determine the existence, conservation and development of marine fauna and flora in the waters along the coasts of the countries making the Declaration are such that the former extension of the territorial sea and the contiguous zone are inadequate for the purposes of the conservation, development and exploitation of these resources, to which the coastal countries are entitled.

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

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

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

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

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

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50. Peru asserts that the 1952 Santiago Declaration lacks characteristics which might be expected of a boundary agreement, namely, an appropriate format, a definition or description of a boundary, cartographic material and a requirement for ratification. Chile disagrees with Peru's arguments concerning the characteristics of boundary agreements, pointing out that a treaty effecting a boundary delimitation can take any form.

51. According to Chile, it follows from paragraph IV of the 1952 Santiago Declaration that the maritime boundary between neighbouring States parties is the parallel of latitude passing through the point at which the land boundary between them reaches the sea. Chile contends that paragraph IV delimits both the general and insular maritime zones of the States parties, arguing that the reference to islands in this provision is a specific applicatin of a generally agreed rule, the specification of which is explained by the particular importance of islands to Ecuador's geographical circumstances. In support of this claim, Chile relies upon the Minutes of the 1952 Conference dated 11 August 1952, asserting that the Ecuadorean delegate requested clarification that the boundary line of the jurisdictional zone of each country be the respective parallel from the point at which the border of the countries touches or reaches the sea and that all States expressed their mutual consent to such an understanding. Chile argues that such an understanding, as recorded in the Minutes, constitutes an agreement relating to the conclusion of the 1952 Santiago Declaration, within the meaning of Article 31, paragraph 2 *(a)* of the Vienna

Convention on the Law of Treaties. Although Chile recognizes that the issue of islands was of particular concern to Ecuador, it also stresses that there are relevant islands in the vicinity of the Peru-Chile border.

52. Chile maintains that the relationship between general and insular maritime zones must be understood in light of the fact that the delimitation of insular zones along a line of parallel is only coherent and effective if there is also a general maritime delimitation along such parallel. Further, Chile points out that, in order to determine if an island is situated less than 200 nautical miles from the general maritime zone of another State party to the 1952 Santiago Declaration, the perimeter of such general maritime zone must have already been defined.

53. Peru argues that in so far as the continental coasts of the States parties are concerned, the 1952 Santiago Declaration simply claims a maritime zone extending to a minimum distance of 200 nautical miles, addressing only seaward and not lateral boundaries. In Peru's view, paragraph IV of the 1952 Santiago Declaration refers only to the entitlement generated by certain islands and not to the entitlement generated by continental coasts, with the issue of islands being relevant only between Ecuador and Peru, not between Peru and Chile. Peru contends that even if some very small islands exist in the vicinity of the Peru-Chile border these are immediately adjacent to the coast and do not have any effect on maritime entitlements distinct from the coast itself, nor were they of concern during the 1952 Conference.

54. Peru rejects Chile's argument that a general maritime delimitation must be assumed in paragraph IV so as to make the reference to insular delimitation effective. It also questions that a maritime boundary could result from an alleged practice implying or presupposing its existence. Peru argues that, if it were true that parallels had been established as international maritime boundaries prior to 1952, there would have been no need to include paragraph IV as such boundaries would have already settled the question of the extent of the maritime entitlements of islands. Peru further claims that the purpose of paragraph IV is to provide a protective zone for insular maritime entitlements so that even if an eventual maritime delimitation occurred in a manner otherwise detrimental to such insular entitlements, it could only do so as far as the line of parallel referred to therein. Finally, Peru contests Chile's interpretation of the Minutes of the 1952 Conference, arguing also that these do not constitute any form of "recorded agreement" but could only amount to *travaux préparatoires*.

55. According to Chile, the object and purpose of the 1952 Santiago Declaration can be stated at varying levels of specificity. Its most generally stated object and purpose is "to conserve and safeguard for their respective peoples the natural resources of the maritime zones adjacent to [the parties'] coasts". It also has a more specific object and purpose, namely to set forth zones of "exclusive sovereignty and jurisdiction". This object and purpose is naturally concerned with identifying the physical perimeter of each State's maritime zone within which such sovereignty and jurisdiction would be exercised. Chile further emphasizes that, although the 1952 Santiago Declaration constitutes a joint proclamation of sovereignty, it is made by each of the three States parties, each claiming sovereignty over a maritime zone which is distinct from that claimed by the other two.

56. Peru agrees with Chile to the extent that the 1952 Santiago Declaration involves joint action to declare the maritime rights of States parties to a minimum distance of 200 nautical miles from their coasts so as to protect and preserve the natural resources adjacent to their territories. Yet, Peru focuses on the 1952 Conference's purpose as being to address collectively the problem of whaling in South Pacific waters, arguing that, in order to do so, it was necessary that "between them" the States parties police the 200-nautical-mile zone effectively. According to Peru, the object and purpose of the 1952 Santiago Declaration was not the division of fishing grounds between its States parties, but to create a zone functioning "as a single biological unit" — an exercise of regional solidarity — designed to address the threat posed by foreign whaling. Thus, Peru stresses that the 1952 Santiago Declaration does not include any stipulation as to how the States parties' maritime zones are delimited from each other.

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57. The Court is required to analyse the terms of the 1952 Santiago Declaration in accordance with the customary international law of treaty interpretation, as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (see *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 812, para. 23; *Territorial Dispute (Libyan Arab Jamahiriya/ Chad), Judgment, I.C.J. Reports 1994*, pp. 21-22, para. 41). The Court applied these rules to the interpretation of treaties which pre-date the Vienna Convention on the Law of Treaties (*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 237, para. 47; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, pp. 645-646, paras. 37-38; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1059, para. 18).

58. The Court commences by considering the ordinary meaning to be given to the terms of the 1952 Santiago Declaration in their context, in accordance with Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties. The 1952 Santiago Declaration does not make express reference to the delimitation of maritime boundaries of the zones generated by the continental coasts of its States parties. This is compounded by the lack of such information which might be expected in an agreement determining maritime boundaries, namely, specific co-ordinates or cartographic material. Nevertheless, the 1952 Santiago Declaration contains certain elements (in its paragraph IV) which are relevant to the issue of maritime delimitation (see paragraph 60 below).

59. The Court notes that in paragraph II, the States parties "proclaim as a norm of their international maritime policy that they each possess exclusive sovereignty and jurisdiction over the sea along the coasts of their respective countries to a minimum distance of 200 nautical miles from these coasts". This provision establishes only a seaward claim and makes no reference to the need to distinguish the lateral limits of the maritime zones of each State party. Paragraph III states that "[t]he exclusive jurisdiction and sovereignty over this maritime zone shall also encompass exclusive sovereignty and jurisdiction over the seabed and the subsoil thereof". Such a reference to jurisdiction

and sovereignty does not necessarily require any delimitation to have already occurred. Paragraph VI expresses the intention of the States parties to establish by agreement in the future general norms of regulation and protection to be applied in their respective maritime zones. Accordingly, although a description of the distance of maritime zones and reference to the exercise of jurisdiction and sovereignty might indicate that the States parties were not unaware of issues of general delimitation, the Court concludes that neither paragraph II nor paragraph III refers explicitly to any lateral boundaries of the proclaimed 200-nautical-mile maritime zones, nor can the need for such boundaries be implied by the references to jurisdiction and sovereignty.

60. The Court turns now to paragraph IV of the 1952 Santiago Declaration. The first sentence of paragraph IV specifies that the proclaimed 200-nautical-mile maritime zones apply also in the case of island territories. The second sentence of that paragraph addresses the situation where an island or group of islands of one State party is located less than 200 nautical miles from the general maritime zone of another State party. In this situation, the limit of the respective zones shall be the parallel at the point at which the land frontier of the State concerned reaches the sea. The Court observes that this provision, the only one in the 1952 Santiago Declaration making any reference to the limits of the States parties' maritime zones, is silent regarding the lateral limits of the maritime zones which are not derived from island territories and which do not abut them.

61. The Court is not convinced by Chile's argument that paragraph IV can be understood solely if it is considered to delimit not only insular maritime zones but also the entirety of the general maritime zones of the States parties. The ordinary meaning of paragraph IV reveals a particular interest in the maritime zones of islands which may be relevant even if a general maritime zone has not yet been established. In effect, it appears that the States parties intended to resolve a specific issue which could obviously create possible future tension between them by agreeing that the parallel would limit insular zones.

62. In light of the foregoing, the Court concludes that the ordinary meaning of paragraph IV, read in its context, goes no further than establishing the Parties' agreement concerning the limits between certain insular maritime zones and those zones generated by the continental coasts which abut such insular maritime zones.

63. The Court now turns to consider the object and purpose of the 1952 Santiago Declaration. It recalls that both Parties state such object and purpose narrowly: Peru argues that the Declaration is primarily concerned with addressing issues of large-scale whaling, whereas Chile argues that it can be most specifically understood as concerned with identifying the perimeters of the maritime zone of each State party. The Court observes that the Preamble of the 1952 Santiago Declaration focuses on the conservation and protection of the necessary natural resources for the subsistence and economic development of the peoples of Chile, Ecuador and Peru, through the extension of the maritime zones adjacent to their coasts.

64. The Court further considers that it is not necessary for it to address the existence of small islands located close to the coast in the region of the Peru-Chile land boundary.

The case file demonstrates that the issue of insular zones in the context of the 1952 Santiago Declaration arose from a concern expressed by Ecuador. It is equally clear from the case file that the small islands do not appear to have been of concern to the Parties. As stated by Chile in its Rejoinder, referring to these small islands, "[n]one of them was mentioned in the negotiating record related to the 1952 Santiago Declaration . . . The only islands that were mentioned in the context of the Santiago Declaration were Ecuador's Galápagos Islands." Peru did not contest this.

65. The Court recalls Chile's argument, based on Article 31, paragraph 2 *(a)*, of the Vienna Convention on the Law of Treaties, that the Minutes of the 1952 Conference constitute an "agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty". The Court considers that the Minutes of the 1952 Conference summarize the discussions leading to the adoption of the 1952 Santiago Declaration, rather than record an agreement of the negotiating States. Thus, they are more appropriately characterized as *travaux préparatoires* which constitute supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention on the Law of Treaties.

66. In light of the above, the Court does not need, in principle, to resort to supplementary means of interpretation, such as the *travaux préparatoires* of the 1952 Santiago Declaration and the circumstances of its conclusion, to determine the meaning of that Declaration. However, as in other cases (see, for example, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 653, para. 53; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 21, para. 40; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 27, para. 55), the Court has considered the relevant material, which confirms the above interpretation of the 1952 Santiago Declaration.

67. Chile's original proposal presented to the 1952 Conference provided as follows:

> "The zone indicated comprises all waters within the perimeter formed by the coasts of each country and a mathematical parallel projected into the sea to 200 nautical miles away from the mainland, along the coastal fringe.
>
> In the case of island territories, the zone of 200 nautical miles will apply all around the island or island group.
>
> If an island or group of islands belonging to one of the countries making the declaration is situated less than 200 nautical miles from the general maritime zone belonging to another of those countries, according to what has been established in the first paragraph of this article, the maritime zone of the said island or group of islands shall be limited, in the corresponding part, to the distance that separates it from the maritime zone of the other State or country."

The Court notes that this original Chilean proposal appears intended to effect a general delimitation of the maritime zones along lateral lines. However, this proposal was not adopted.

68. Further, the Minutes of the 1952 Conference indicate that the delegate for Ecuador:

> "observed that it would be advisable to provide more clarity to article 3 [which became paragraph IV of the final text of the 1952 Santiago Declaration], in order to avoid any error in the interpretation of the interference zone in the case of islands, and suggested that the declaration be drafted on the basis that the boundary line of the jurisdictional zone of each country be the respective parallel from the point at which the frontier of the countries touches or reaches the sea".

According to the Minutes, this proposition met with the agreement of all of the delegates.

Ecuador's intervention, with which the Parties agreed, is limited in its concern to clarification "in the case of islands". Thus the Court is of the view that it can be understood as saying no more than that which is already stated in the final text of paragraph IV. The Court considers from the foregoing that the *travaux préparatoires* confirm its conclusion that the 1952 Santiago Declaration did not effect a general maritime delimitation.

69. Nevertheless, various factors mentioned in the preceding paragraphs, such as the original Chilean proposal and the use of the parallel as the limit of the maritime zone of an island of one State party located less than 200 nautical miles from the general maritime zone of another State party, suggest that there might have been some sort of shared understanding among the States parties of a more general nature concerning their maritime boundaries. The Court will return to this matter later.

70. The Court has concluded, contrary to Chile's submissions, that Chile and Peru did not, by adopting the 1952 Santiago Declaration, agree to the establishment of a lateral maritime boundary between them along the line of latitude running into the Pacific Ocean from the seaward terminus of their land boundary. However, in support of its claim that that line constitutes the maritime boundary, Chile also invokes agreements and arrangements which it signed later with Ecuador and Peru, and with Peru alone.

3. The various 1954 Agreements

71. Among the agreements adopted in 1954, Chile emphasizes, in particular, the Complementary Convention to the 1952 Santiago Declaration and the Special Maritime Frontier Zone Agreement. It puts the meetings that led to those agreements and the agreements themselves in the context of the challenges which six maritime powers had made to the 1952 Santiago Declaration in the period running from August to late October 1954 and of the planned whale hunting by a fleet operating under the Panamanian flag.

72. The meeting of the CPPS, preparatory to the Inter-State conference of December 1954, was held between 4 and 8 October 1954. The provisional agenda items correspond to five of the six agreements which were drafted and adopted at the December Inter-State Conference: the Complementary Convention to the 1952 Santiago Declaration, the Convention on the System of Sanctions, the Agreement on the Annual Meeting of the CPPS, the Convention on Supervision and Control, and the Convention on the Granting of Permits for the Exploitation of the Resources of the South Pacific.

73. The 1954 Special Maritime Frontier Zone Agreement also resulted from the meetings that took place in 1954. In addition to considering the matters listed on the provisional agenda described above, the October 1954 meeting of the CPPS also considered a proposal by the Delegations of Ecuador and Peru to establish a "neutral zone . . . on either side of the parallel which passes through the point of the coast that signals the boundary between the two countries". The Permanent Commission approved the proposal unanimously "and, consequently, entrusted its Secretariat-General to transmit this recommendation to the signatory countries so that they put into practice this norm of tolerance on fishing activities". As a consequence, at the inaugural session of "The Second Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific", the proposed Agreement appeared in the agenda as the last of the six Agreements to be considered and signed in December 1954. The draft text relating to the proposal to establish a "neutral zone" along the parallel was then amended in certain respects. The term "neutral zone" was replaced with the term "special maritime frontier zone" and the reference to "the parallel which passes through the point of the coast that signals the boundary between the two countries" was replaced with "the parallel which constitutes the maritime boundary between the two countries". This is the language that appears in the first paragraph of the final text of the 1954 Special Maritime Frontier Zone Agreement, which was adopted along with the other five agreements referred to in the preceding paragraph. All of the agreements included a standard clause, added late in the drafting process without any explanation recorded in the Minutes.

According to this clause, the provisions contained in the agreements were "deemed to be an integral and supplementary part" of the resolutions and agreements adopted in 1952 and were "not in any way to abrogate" them. Of these six Agreements only the 1954 Complementary Convention and the 1954 Special Maritime Frontier Zone Agreement were given any real attention by the Parties in the course of these proceedings, except for brief references by Chile to the Supervision and Control Convention (see paragraph 78 below). The Court notes that the 1954 Special Maritime Frontier Zone Agreement is still in force.

A. The Complementary Convention to the 1952 Santiago Declaration

74. According to Chile, "the main instrument" prepared at the 1954 Inter-State Conference was the Complementary Convention, "[t]he primary purpose [of which] was to reassert the claim of sovereignty and jurisdiction that had been made two years earlier in Santiago and to defend jointly the claim against protests by third States". It quotes its Foreign Minister speaking at the inaugural session of the 1954 CPPS Meeting:

> "The right to proclaim our sovereignty over the sea zone that extends to two hundred miles from the coast is thus undeniable and inalienable. We gather now to reaffirm our decision to defend, whatever the cost, this sovereignty and to exercise it in accordance with the high national interests of the signatory countries to the Declaration.
>
> .....

> We strongly believe that, little by little, the legal statement that has been formulated by our countries into the 1952 Agreement [the Santiago Declaration] will find its place in International Law until it is accepted by all Governments that wish to preserve, for mankind, resources that today are ruthlessly destroyed by the unregulated exercise of exploitative activities that pursue diminished individual interests and not collective needs."

75. Peru similarly contends that the purpose of the 1954 Complementary Convention was to reinforce regional solidarity in the face of opposition from third States to the 200-nautical-mile claim. It observes that in 1954, as in 1952, the primary focus of the three States was on maintaining a united front towards third States, "rather than upon the development of an internal legal régime defining their rights *inter se*". It also contends that the 1954 instruments were adopted in the context of regional solidarity vis-à-vis third States and that they were essentially an integral part of the agreements and resolutions adopted in 1952. The Inter-State Conference was in fact held less than a month after the Peruvian Navy, with the co-operation of its air force, had seized vessels of the Onassis whaling fleet, under the Panamanian flag, more than 100 nautical miles off shore (for extracts from the Peruvian Judgment imposing fines see *American Journal of International Law*, 1955, Vol. 49, p. 575). Peru notes that when it rejected a United Kingdom protest against the seizure of the Onassis vessels, the Chilean Foreign Minister sent a congratulatory message to his Peruvian counterpart — according to Peru this was "an indication of the regional solidarity which the zone embodied". In its Reply, Peru recalls Chile's characterization in its Counter-Memorial of the 1954 Complementary Convention as "the main instrument" prepared at the 1954 Inter-State Conference.

76. The Parties also refer to the agreed responses which they made, after careful preparation in the first part of 1955, to the protests made by maritime powers against the 1952 Santiago Declaration. Those responses were made in accordance with the spirit of the Complementary Convention even though Chile was not then or later a party to it. Similar co-ordinated action was taken in May 1955 in response to related proposals made by the United States of America. *

77. The Court observes that it is common ground that the proposed Complementary Convention was the main instrument addressed by Chile, Ecuador and Peru as they prepared for the CPPS meeting and the Inter-State Conference in Lima in the final months of 1954. Given the challenges being made by several States to the 1952 Santiago Declaration, the primary purpose of that Convention was to assert, particularly against the major maritime powers, their claim of sovereignty and jurisdiction made jointly in 1952. It was also designed to help prepare their common defence of the claim against the protests by those States, which was the subject-matter of the second agenda item of the 1954 Inter-State Conference. It does not follow, however, that the "primary purpose" was the sole purpose or even less that the primary purpose determined the sole outcome of the 1954 meetings and the Inter-State Conference.

B. The Agreement relating to Measures of Supervision and Control of the Maritime Zones of the Signatory Countries

78. Chile seeks support from another of the 1954 Agreements, the Agreement relating to Measures of Supervision and Control of the Maritime Zones of the Signatory Countries. It quotes the first and second articles:

> "First
>
> It shall be the function of each signatory country to supervise and control the exploitation of the resources *in its Maritime Zone* by the use of such organs and means as it considers necessary.
>
> Second
>
> The supervision and control referred to in article one shall be exercised by each country *exclusively in the waters of its jurisdiction*." (Emphasis added by Chile.)

Chile contends that the second article proceeds on the basis that each State's maritime zone had been delimited. Peru made no reference to the substance of this Agreement. Chile also referred in this context to the 1955 Agreement for the Regulation of Permits for Exploitation of the Resources of the South Pacific (see paragraph 21 above) and to its 1959 Decree providing for that regulation.

79. The Court considers that at this early stage there were at least in practice distinct maritime zones in which each of the three States might, in terms of the 1952 Santiago Declaration, take action as indeed was exemplified by the action taken by Peru against the Onassis whaling fleet shortly before the Lima Conference; other instances of enforcement by the two Parties are discussed later. However the Agreements on Supervision and Control and on the Regulation of Permits give no indication about the location or nature of boundaries of the zones. On the matter of boundaries, the Court now turns to the 1954 Special Maritime Frontier Zone Agreement.

C. The Agreement relating to a Special Maritime Frontier Zone

80. The Preamble to the 1954 Special Maritime Frontier Zone Agreement reads as follows:

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

81. The substantive provisions of the Agreement read as follows:

> "1. A special zone is hereby established, at a distance of ['a partir de']
>
> 12 nautical miles from the coast, extending to a breadth of 10 nautical miles on either side of the parallel which constitutes the maritime boundary ['el límite marítimo'] between the two countries.
>
> 2. The accidental presence in the said zone of a vessel of either of the adjacent countries, which is a vessel of the nature described in the paragraph beginning with the words 'Experience has shown' in the preamble hereto, shall not be considered to be a violation of the waters of the maritime zone, though this provision shall not be construed as recognizing any right to engage, with deliberate intent, in hunting or fishing in the said special zone.
>
> 3. Fishing or hunting within the zone of 12 nautical miles from the coast shall be reserved exclusively to the nationals of each country."

Article 4 is the standard provision, included in all six of the 1954 Agreements, deeming it to be "an integral and supplementary part" of the 1952 instruments which it was not in any way to abrogate (see paragraph 73 above).

82. According to Chile, the 1954 Special Maritime Frontier Zone Agreement was "the most relevant instrument adopted at the December 1954 Conference". Its "basic predicate" was that the three States "already had lateral boundaries, or 'frontiers', in place between them". Chile continues, citing the Judgment in the case concerning *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, that in the 1954 Special Maritime Frontier Zone Agreement "the existence of a determined frontier was accepted and acted upon" (*I.C.J. Reports 1994*, p. 35, para. 66). It points out that Article 1 uses the present tense, referring to a maritime boundary already in existence, and the first recital indicates that it was violations of that existing boundary that prompted the Agreement.

83. Peru contends (1) that the Agreement was applicable only to Peru's northern maritime border, that is, with Ecuador, and not also to the southern one, with Chile; (2) that Chile's delay in ratifying (in 1967) and registering (in 2004) the Agreement shows that it did not regard it as of major importance such as establishing a maritime boundary; and (3) that the Agreement had a very special and temporary purpose and that the Parties were claiming a limited functional jurisdiction. Peru in its written pleadings, in support of its contention that the 1954 Special Maritime Frontier Zone Agreement applied only to its boundary with Ecuador and not to that with Chile, said that the "rather opaque formula" — the reference to the parallel in Article 1, introduced on the proposal of Ecuador — referred to only one parallel between two countries; it seems clear, Peru says, that the focus was on the waters between Peru and Ecuador.

84. With regard to Peru's first argument, Chile in reply points out that the 1954 Special Maritime Frontier Zone Agreement has three States parties and that the ordinary meaning of "the two countries" in Article 1 is a reference to the States on either side of their shared maritime boundary. Chile notes that there is no qualification of the "maritime frontier" (in the Preamble), nor is there any suggestion that the term

"adjacent States" refers only to Ecuador and Peru. Chile also points out that in 1962 Peru complained to Chile about "the frequency with which Chilean fishing vessels have trespassed into Peruvian waters", stating that "the Government of Peru, taking strongly into account the sense and provisions of 'the Agreement'" wished that the Government of Chile take certain steps particularly through the competent authorities at the port of Arica. As Chile noted, Peru did not at that stage make any reference to the argument that the 1954 Special Maritime Frontier Zone Agreement applied only to its northern maritime boundary.

85. In the view of the Court, there is nothing at all in the terms of the 1954 Special Maritime Frontier Zone Agreement which would limit it only to the Ecuador-Peru maritime boundary. Moreover Peru did not in practice accord it that limited meaning which would preclude its application to Peru's southern maritime boundary with Chile. The Court further notes that the 1954 Special Maritime Frontier Zone Agreement was negotiated and signed by the representatives of all three States, both in the Commission and at the Inter-State Conference. All three States then proceeded to ratify it. They included it among the twelve treaties which they jointly submitted to the United Nations Secretariat for registration in 1973 (see paragraph 21 above).

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86. With regard to Peru's second argument, Chile responds by pointing out that delay in ratification is common and contends that of itself the delay in ratification has no consequence for the legal effect of a treaty once it has entered into force. Further, it submits that the fact that registration of an Agreement is delayed is of no relevance.

87. The Court is of the view that Chile's delay in ratifying the 1954 Special Maritime Frontier Zone Agreement and submitting it for registration does not support Peru's argument that Chile considered that the Agreement lacked major importance. In any event, this delay has no bearing on the scope and effect of the Agreement. Once ratified by Chile the Agreement became binding on it. In terms of the argument about Chile's delay in submitting the Agreement for registration, the Court recalls that, in 1973, all three States signatory to the 1952 and 1954 treaties, including the 1954 Special Maritime Frontier Zone Agreement, simultaneously submitted all of them for registration (see paragraphs 20 to 21 above).

88. With regard to Peru's third argument that the 1954 Special Maritime Frontier Zone Agreement had a special and temporary purpose and that the Parties were claiming a limited functional jurisdiction, Chile's central contention is that the "basic predicate" of the Agreement was that the three States "already had lateral boundaries, or 'frontiers', in place between them" (see paragraph 82 above). The reference in the title of the Agreement to a Special Maritime Frontier Zone and in the recitals to violations of the maritime frontier between adjacent States demonstrates, Chile contends, that a maritime frontier or boundary already existed when the three States concluded the Agreement in December 1954. The granting to small vessels of the benefit of a zone of tolerance was, in terms of the Preamble, intended to avoid "friction between the

countries concerned, which may affect adversely the spirit of co-operation and unity which should at all times prevail among the countries signatories to the instruments signed at Santiago". According to Chile, this was an inter-State problem and "not a problem relating to itinerant fishermen". The States wished to eliminate obstacles to their complete co-operation in defence of their maritime claims. Chile emphasizes that Article 1, the primary substantive provision, is in the present tense: the ten-nautical-mile zones are being created to the north and south of a maritime boundary which already exists. Article 2, it says, also supports its position. The "accidental presence" in that zone of the vessels referred to in the Agreement is not considered a "violation" of the adjacent State's maritime zone. Chile claims that although its ratification of the 1954 Special Maritime Frontier Zone Agreement came some time after its signature, the boundary whose existence was acknowledged and acted upon was already in place throughout the period leading to its ratification.

89. According to Peru, the aim of the 1954 Special Maritime Frontier Zone Agreement "was narrow and specific", establishing a "zone of tolerance" for small and ill-equipped fishing vessels. Defining that zone by reference to a parallel of latitude was a practical approach for the crew of such vessels. The 1954 Special Maritime Frontier Zone Agreement did not have a larger purpose, such as establishing a comprehensive régime for the exploitation of fisheries or adding to the content of the 200-nautical-mile zones or setting out their limits and borders. Peru also maintains that "the 1954 Agreement was a practical arrangement, of a technical nature, and of limited geographical scope, not one dealing in any sense with political matters".

90. In the view of the Court, the operative terms and purpose of the 1954 Special Maritime Frontier Zone Agreement are indeed narrow and specific. That is not however the matter under consideration by the Court at this stage. Rather, its focus is on one central issue, namely, the existence of a maritime boundary. On that issue the terms of the 1954 Special Maritime Frontier Zone Agreement, especially Article 1 read with the preambular paragraphs, are clear. They acknowledge in a binding international agreement that a maritime boundary already exists. The Parties did not see any difference in this context between the expression "límite marítimo" in Article 1 and the expression "frontera marítima" in the Preamble, nor does the Court.

91. The 1954 Special Maritime Frontier Zone Agreement does not indicate when and by what means that boundary was agreed upon. The Parties' express acknowledgment of its existence can only reflect a tacit agreement which they had reached earlier. In this connection, the Court has already mentioned that certain elements of the 1947 Proclamations and the 1952 Santiago Declaration suggested an evolving understanding between the Parties concerning their maritime boundary (see paragraphs 43 and 69 above). In an earlier case, the Court, recognizing that "[t]he establishment of a permanent maritime boundary is a matter of grave importance", underlined that "[e]vidence of a tacit legal agreement must be compelling" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 735, para. 253). In this case, the Court has before it an Agreement which makes clear that the maritime boundary along a parallel already existed between

the Parties. The 1954 Agreement is decisive in this respect. That Agreement cements the tacit agreement.

92. The 1954 Special Maritime Frontier Zone Agreement gives no indication of the nature of the maritime boundary. Nor does it indicate its extent, except that its provisions make it clear that the maritime boundary extends beyond 12 nautical miles from the coast.

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93. In this context, the Parties referred to an Opinion prepared in 1964 by Mr. Raúl Bazán Dávila, Head of the Legal Advisory Office of the Chilean Ministry of Foreign Affairs, in response to a request from the Chilean Boundaries Directorate regarding "the delimitation of the frontier between the Chilean and Peruvian territorial seas". Having recalled the relevant rules of international law, Mr. Bazán examined the question whether some specific agreement on maritime delimitation existed between the two States. He believed that it did, but was not able to determine "when and how this agreement was reached". Paragraph IV of the 1952 Santiago Declaration was not "an express pact" on the boundary, but it "assum[ed] that this boundary coincides with the parallel that passes through the point at which the land frontier reaches the sea". It was possible to presume, he continued, that the agreement on the boundary preceded and conditioned the signing of the 1952 Santiago Declaration.

94. According to Peru, the fact that such a request was addressed to the Head of the Legal Advisory Office illustrates that the Chilean Government was unsure about whether there was a pre-existing boundary. Chile emphasizes Mr. Bazán's conclusion that the maritime boundary between the Parties is the parallel which passes through the point where the land boundary reaches the sea. Chile also notes that this was a publicly available document and that Peru would have responded if it had disagreed with the conclusion the document stated, but did not do so.

95. Nothing in the Opinion prepared by Mr. Bazán, or the fact that such an Opinion was requested in the first place, leads the Court to alter the conclusion it reached above (see paragraphs 90 to 91), namely, that by 1954 the Parties acknowledged that there existed an agreed maritime boundary.

4. The 1968-1969 lighthouse arrangements

96. In 1968-1969, the Parties entered into arrangements to build one lighthouse each, "at the point at which the common border reaches the sea, near boundary marker number one". At this point, the Court observes that on 26 April 1968, following communication between the Peruvian Ministry of Foreign Affairs and the Chilean chargé d'affaires earlier that year, delegates of both Parties signed a document whereby they undertook the task of carrying out "an on-site study for the installation of leading marks visible from the sea to materialise the parallel of the maritime frontier originating at Boundary Marker number one (No. 1)".

That document concluded as follows:

> "Finally, given that the parallel which it is intended to materialise is that which corresponds to the geographical location indicated in the Act signed in Lima on 1 August 1930 for Boundary Marker No. 1, the Representatives suggest that the positions of this pyramid be verified by a Joint Commission before the execution of the recommended works."

97. Chile sees the Parties, in taking this action, as explicitly recording their understanding that there was a "maritime frontier" between the two States and that it followed the line of latitude passing through Boundary Marker No. 1 (referred to in Spanish as "Hito No. 1"). Chile states that the Parties' delegates "recorded their joint understanding that their task was to signal the existing maritime boundary". Chile quotes the terms of the approval in August 1968 by the Secretary-General of the Peruvian Ministry of Foreign Affairs of the Minutes of an earlier meeting that the signalling marks were to materialize ("materializar") the parallel of the maritime frontier. Chile further relies on an August 1969 Peruvian Note, according to which the Mixed Commission entrusted with demarcation was to verify the position of Boundary Marker No. 1 and to "fix the definitive location of the two alignment towers that were to signal the maritime boundary". The Joint Report of the Commission recorded its task in the same terms.

98. In Peru's view, the beacons erected under these arrangements were evidently a pragmatic device intended to address the practical problems arising from the coastal fishing incidents in the 1960s. It calls attention to the beacons' limited range — not more than 15 nautical miles offshore. Peru argues that they were plainly not intended to establish a maritime boundary. Throughout the process, according to Peru, there is no indication whatsoever that the two States were engaged in the drawing of a definitive and permanent international boundary, nor did any of the correspondence refer to any pre-existent delimitation agreement. The focus was consistently, and exclusively, upon the practical task of keeping Peruvian and Chilean fishermen apart and solving a very specific problem within the 15-nautical-mile range of the lights.

99. The Court is of the opinion that the purpose and geographical scope of the arrangements were limited, as indeed the Parties recognize. The Court also observes that the record of the process leading to the arrangements and the building of the lighthouses does not refer to any pre-existent delimitation agreement. What is important in the Court's view, however, is that the arrangements proceed on the basis that a maritime boundary extending along the parallel beyond 12 nautical miles already exists. Along with the 1954 Special Maritime Frontier Zone Agreement, the arrangements acknowledge that fact. Also, like that Agreement, they do not indicate the extent and nature of that maritime boundary. The arrangements seek to give effect to it for a specific purpose.

5. The nature of the agreed maritime boundary

100. As the Court has just said, it is the case that the 1954 Special Maritime Frontier Zone Agreement refers to the existing boundary for a particular purpose; that is also true of the 1968-1969 arrangements for the lighthouses. The Court must now determine the nature of the maritime boundary, the existence of which was acknowledged in the 1954

Agreement, that is, whether it is a single maritime boundary applicable to the water column, the sea-bed and its subsoil, or a boundary applicable only to the water column.

101. Chile contends that the boundary is an all-purpose one, applying to the sea-bed and subsoil as well as to the waters above them with rights to their resources in accordance with customary law as reflected in the United Nations Convention on the Law of the Sea (UNCLOS). Peru submits that the line to which the 1954 Special Maritime Frontier Zone Agreement refers is related only to aspects of the policing of coastal fisheries and facilitating safe shipping and fishing in near-shore areas.

102. The Court is concerned at this stage with the 1954 Special Maritime Frontier Zone Agreement only to the extent that it acknowledged the existence of a maritime boundary. The tacit agreement, acknowledged in the 1954 Agreement, must be understood in the context of the 1947 Proclamations and the 1952 Santiago Declaration. These instruments expressed claims to the sea-bed and to waters above the sea-bed and their resources. In this regard the Parties drew no distinction, at that time or subsequently, between these spaces. The Court concludes that the boundary is an all-purpose one.

6. The extent of the agreed maritime boundary

103. The Court now turns to consider the extent of the agreed maritime boundary. It recalls that the purpose of the 1954 Agreement was narrow and specific (see paragraph 90 above): it refers to the existing maritime boundary for a particular purpose, namely to establish a zone of tolerance for fishing activity operated by small vessels. Consequently, it must be considered that the maritime boundary whose existence it recognizes, along a parallel, necessarily extends at least to the distance up to which, at the time considered, such activity took place. That activity is one element of the Parties' relevant practice which the Court will consider, but it is not the only element warranting consideration. The Court will examine other relevant practice of the Parties in the early and mid-1950s, as well as the wider context including developments in the law of the sea at that time. It will also assess the practice of the two Parties subsequent to 1954. This analysis could contribute to the determination of the content of the tacit agreement which the Parties reached concerning the extent of their maritime boundary.

A. Fishing potential and activity

104. The Court will begin with the geography and biology in the area of the maritime boundary. Peru described Ilo as its principal port along this part of the coast. It is about 120 km north-west of the land boundary. On the Chilean side, the port city of Arica lies 15 km to the south of the land boundary and Iquique about 200 km further south (see sketch-map No. 1: Geographical context).

105. Peru, in submissions not challenged by Chile, emphasizes that the areas lying off the coasts of Peru and Chile are rich in marine resources, pointing out that the area in dispute is located in the Humboldt Current Large Maritime Ecosystem. That Current, according to Peru, supports an abundance of marine life, with approximately 18 to 20 per cent of the world's fish catch coming from this ecosystem. The Peruvian representative at the 1958 United Nations Conference on the Law of the Sea (paragraph

106 below) referred to the opinion of a Peruvian expert (writing in a book published in 1947), according to which the "biological limit" of the Current was to be found at a distance of 80 to 100 nautical miles from the shore in the summer, and 200 to 250 nautical miles in the winter.

Peru recalls that it was the "enormous whaling and fishing potential" of the areas situated off their coasts which led the three States to proclaim 200-nautical-mile zones in 1952. Industrial fishing is carried out nowadays at significant levels in southern areas of Peru, notably from the ports of Ilo and Matarani: the former is "one of Peru's main fishing ports and the most important fishing centre in southern Peru".

106. Chilean and Peruvian representatives emphasized the richness and value of the fish stocks as preparations were being made for the first United Nations Conference on the Law of the Sea and at that Conference itself. In 1956 the Chilean delegate in the Sixth (Legal) Committee of the United Nations General Assembly, declaring that it was tragic to see large foreign fishing fleets exhausting resources necessary for the livelihood of coastal populations and expressing the hope that the rules established by the three States, including Ecuador, would be endorsed by international law, observed that "[t]he distance of 200 miles was explained by the need to protect all the marine flora and fauna living in the Humboldt current, as all the various species depended on one another for their existence and have constituted a biological unit which had to be preserved". At the 1958 Conference, the Peruvian representative (who was the Foreign Minister at the time of the 1947 Declaration), in supporting the 200-nautical-mile limit, stated that what the countries had proclaimed was a biological limit:

> "Species such as tunny and barrilete were mostly caught 20 to 80 miles from the coast; the same anchovetas of the coastal waters sometimes went 60 or more miles away; and the cachalot and whales were usually to be found more than 100 miles off."

He then continued:

> "The requests formulated by Peru met the conditions necessary for their recognition as legally binding and applicable since first, they were the expression of principles recognized by law; secondly, they had a scientific basis; and thirdly, they responded to national vital necessities."

107. Chile referred the Court to statistics produced by the Food and Agricultural Organization of the United Nations (FAO) to demonstrate the extent of the fishery activities of Chile and Peru in the early 1950s and later years for the purpose of showing, as Chile saw the matter, the benefits of the 1952 Santiago Declaration to Peru. Those statistics reveal two facts which the Court sees as helpful in identifying the maritime areas with which the Parties were concerned in the period when they acknowledged the existence of their maritime boundary. The first is the relatively limited fishing activity by both Chile and Peru in the early 1950s. In 1950, Chile's catch at about 90,000 tonnes was slightly larger than Peru's at 74,000 tonnes. In the early 1950s, the Parties' catches of anchovy were exceeded by the catch of other species. In 1950, for instance, Peru's take

of anchovy was 500 tonnes, while its catch of tuna and bonito was 44,600 tonnes; Chile caught 600 tonnes of anchovy that year, and 3,300 tonnes of tuna and bonito.

Second, in the years leading up to 1954, the Parties' respective catches in the Pacific Ocean included large amounts of bonito/barrilete and tuna. While it is true that through the 1950s the take of anchovy, especially by Peru, increased very rapidly, the catch of the other species continued at a high and increasing level. In 1954 the Peruvian catch of tuna and bonito was 65,900, and of anchovy 43,100, while Chile caught 5,200 and 1,300 tonnes of those species, respectively.

The Parties also referred to the hunting of whales by their fleets and by foreign fleets as one of the factors leading to the adoption of the 1947 and 1952 instruments. The FAO statistics provide some information about the extent of whale catches by the Parties; there is no indication of where those catches occurred.

108. The above information shows that the species which were being taken in the early 1950s were generally to be found within a range of 60 nautical miles from the coast. In that context, the Court takes note of the orientation of the coast in this region, and the location of the most important relevant ports of the Parties at the time. Ilo, situated about 120 km north-west of the seaward terminus of the land boundary, is described by Peru as "one of [its] main fishing ports and the most important fishing centre in Southern Peru". On the Chilean side, the port of Arica lies just 15 km to the south of the seaward terminus of the land boundary. According to Chile, "[a] significant proportion of the country's small and medium-sized fishing vessels, of crucial importance to the economy of the region, are registered at Arica", while the next significant port is at Iquique, 200 km further south.

The purpose of the 1954 Special Maritime Frontier Zone Agreement was to establish a zone of tolerance along the parallel for small fishing boats, which were not sufficiently equipped (see paragraphs 88 to 90 and 103). Boats departing from Arica to catch the above-mentioned species, in a west-north-west direction, in the range of 60 nautical miles from the coast, which runs essentially from north to south at this point, would not cross the parallel beyond a point approximately 57 nautical miles from the starting-point of the maritime boundary. The orientation of the coast turns sharply to the north-west in this region (see sketch-maps Nos. 1 and 2), such that, on the Peruvian side, fishing boats departing seaward from Ilo, in a south-west direction, to the range of those same species would cross the parallel of latitude at a point up to approximately 100 nautical miles from the starting-point of the maritime boundary.

109. The Court, in assessing the extent of the lateral maritime boundary which the Parties acknowledged existed in 1954, is aware of the importance that fishing has had for the coastal populations of both Parties. It does not see as of great significance their knowledge of the likely or possible extent of the resources out to 200 nautical miles nor the extent of their fishing in later years. The catch figures indicate that the principal maritime activity in the early 1950s was fishing undertaken by small vessels, such as those specifically mentioned in the 1954 Special Maritime Frontier Zone Agreement and which were also to benefit from the 1968-1969 arrangements relating to the lighthouses.

110. A central concern of the three States in the early 1950s was with long-distance foreign fishing, which they wanted to bring to an end. That concern, and the Parties' growing understanding of the extent of the fish stocks in the Humboldt Current off their coasts, were major factors in the decisions made by Chile and Peru to declare, unilaterally, their 200-nautical-mile zones in 1947, and, with Ecuador, to adopt the 1952 Santiago Declaration and other texts in 1952 and to take the further measures in 1954 and 1955. To repeat, the emphasis in this period, especially in respect of the more distant waters, was, as Chile asserts, on "[t]he exclusion of unauthorized foreign fleets ... to facilitate the development of the fishing industries of [the three States]".

111. The Court recalls that the all-purpose nature of the maritime boundary (see paragraph 102 above) means that evidence concerning fisheries activity, in itself, cannot be determinative of the extent of that boundary. Nevertheless, the fisheries activity provides some support for the view that the Parties, at the time when they acknowledged the existence of an agreed maritime boundary between them, were unlikely to have considered that it extended all the way to the 200-nautical-mile limit.

B. Contemporaneous developments in the law of the sea

112. The Court now moves from the specific, regional context to the broader context as it existed in the 1950s, at the time of the acknowledgment by the Parties of the existence of the maritime boundary. That context is provided by the State practice and related studies in, and proposals coming from, the International Law Commission and reactions by States or groups of States to those proposals concerning the establishment of maritime zones beyond the territorial sea and the delimitation of those zones. By the 1950s that practice included several unilateral State declarations.

113. Those declarations, all adopted between 1945 and 1956, may be divided into two categories. The first category is limited to claims in respect of the sea-bed and its subsoil, the continental shelf, and their resources. They include declarations made by the United States (28 September 1945), Mexico (29 October 1945), Argentina (11 October 1946), Saudi Arabia (28 May 1949), Philippines (18 June 1949), Pakistan (9 March 1950), Brazil (8 November 1950), Israel (3 August 1952), Australia (11 September 1953), India (30 August 1955), Portugal (21 March 1956) and those made in respect of several territories then under United Kingdom authority: Jamaica (26 November 1948), Bahamas (26 November 1948), British Honduras (9 October 1950), North Borneo (1953), British Guiana (1954), Brunei (1954) and Sarawak (1954), as well as nine Arab States then under the protection of the United Kingdom (Abu Dhabi (10 June 1949), Ajman (20 June 1949), Bahrain (5 June 1949), Dubai (14 June 1949), Kuwait (12 June 1949), Qatar (8 June 1949), Ras al Khaimah (17 June 1949), Sharjah (16 June 1949), and Umm al Qaiwain (20 June 1949)). Other declarations, the second category, also claim the waters above the shelf or sea-bed or make claims in respect of the resources of those waters. In addition to the three claims in issue in this case, those claims include those made by the United States of America (28 September 1945), Panama (17 December 1946), Iceland (5 April 1948), Costa Rica (5 November 1949), Honduras (7 March 1950), El Salvador (7 September 1950) and Nicaragua (1 November 1950). The above-mentioned acts are reproduced in the United Nations collection, *Laws and*

Regulations on the High Seas, Vol. I, 1951, Part 1, Chap. 1, and *Supplement*, 1959, Part 1, Chap. 1, and in the Parties' Pleadings.

114. Some of the declarations did address the issue of establishing maritime boundaries. The first was the continental shelf declaration of the United States, which provided that, whenever the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. Those of Mexico and Costa Rica (like that of Chile, see paragraph 37 above) stated that the particular declaration each had made did not mean that that Government sought to disregard the lawful rights of other States, based on reciprocity. The wording in the Argentinean decree accorded conditional recognition to the right of each nation to the same entitlements as it claimed. Proclamations made by the Arab States then under United Kingdom protection all provided in similar terms that their exclusive jurisdiction and control of the sea-bed and subsoil extended to boundaries to be determined more precisely, as occasion arises, on equitable or, in one case, just principles, after consultation with the neighbouring States.

115. Those declarations were part of the background against which the International Law Commission worked in preparing its 1956 draft articles for the United Nations Conference on the Law of the Sea, held in 1958. On the basis, among other things, of the material summarized above, the report of a committee of experts, and comments by a significant range of States, the Commission proposed that, in the absence of an agreement or special circumstances, an equidistance line be used for delimitation of both the territorial sea and the continental shelf. The Commission in particular rejected, in the absence of an agreement, as a basis for the line the geographical parallel passing through the point at which the land frontier meets the coast. Chile and Ecuador in their observations submitted to the Commission contended that the rights of the coastal State over its continental shelf went beyond just "control" and "jurisdiction"; Chile, in addition, called for "sovereignty" over both the continental shelf and superjacent waters. However, neither State made any comment on the matter of delimitation. Peru made no comment of any kind. This further supports the view that the chief concern of the three States in this period was defending their 200-nautical-mile claims as against third States. The Commission's proposals were adopted by the 1958 Conference and incorporated, with drafting amendments, in the Convention on the Territorial Sea and Contiguous Zone (Art. 12) and the Convention on the Continental Shelf (Art. 6). The territorial sea was not seen by the International Law Commission, and would not have been seen at that time by most nations, as extending beyond 6 nautical miles and the continental shelf line was for the sea-bed and subsoil, extending to a 200-metre depth or beyond to the limit of exploitability, and not for the resources of the water above the shelf.

116. The Court observes that, during the period under consideration, the proposal in respect of the rights of a State over its waters which came nearest to general international acceptance was for a 6-nautical-mile territorial sea with a further fishing zone of 6 nautical miles and some reservation of established fishing rights. As the Court has noted previously, in this period the concept of an exclusive economic zone of 200 nautical miles was "still some long years away" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 87, para. 70), while its general acceptance in

practice and in the 1982 United Nations Convention on the Law of the Sea was about 30 years into the future. In answering a question from a Member of the Court, both Parties recognized that their claim made in the 1952 Santiago Declaration did not correspond to the international law of that time and was not enforceable against third parties, at least not initially.

117. On the basis of the fishing activities of the Parties at that time, which were conducted up to a distance of some 60 nautical miles from the main ports in the area, the relevant practice of other States and the work of the International Law Commission on the Law of the Sea, the Court considers that the evidence at its disposal does not allow it to conclude that the agreed maritime boundary along the parallel extended beyond 80 nautical miles from its starting-point.

118. In light of this tentative conclusion, the Court now considers further elements of practice, for the most part subsequent to 1954, which may be of relevance to the issue of the extent of the agreed maritime boundary.

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C. Legislative practice

119. In examining the legislative practice, the Court first turns to the adoption by Peru in 1955 of a Supreme Resolution on the Maritime Zone of 200 Miles. Its Preamble recites the need to specify, in cartographic and geodesic work, the manner of determining the Peruvian maritime zone of 200 nautical miles referred to in the 1947 Decree and the 1952 Santiago Declaration. Its first article states that the line was to be limited at sea by a line parallel to the Peruvian coast and at a constant distance of 200 nautical miles from it. Article 2 provides:

> "In accordance with clause IV ['el inciso IV'] of the Declaration of Santiago, the said line may not extend beyond that of the corresponding parallel at the point where the frontier of Peru ['la frontera del Perú'] reaches the sea."

Peru contends that Article 1 employs an arc of circles method, as, it says, was also the case with its 1952 Petroleum Law. Chile rejects that interpretation of both instruments and submits that both use the *tracé parallèle* method, supporting the use of the parallel of latitude for the maritime boundary. Chile also places considerable weight on the reference in the Resolution to paragraph IV of the 1952 Santiago Declaration.

120. In this regard, the Court has already concluded that paragraph IV of the 1952 Santiago Declaration does not determine the maritime boundary separating the general maritime zones of Peru and Chile. It need not consider that matter further in the present context. The Court does not see the requirement in Article 1 of the 1955 Supreme Resolution that the line be "at a constant distance of 200 nautical miles from [the coast]" and parallel to it as using the *tracé parallèle* method in the sense that Chile appears to understand it. Some points on a line drawn on that basis (using the parallel lines of latitude) would in certain areas of Peruvian coastal waters, especially near the land

boundary of the two States, be barely 100 nautical miles from the closest point on the coast. That would not be in conformity with the plain words of the 1955 Supreme Resolution. Hence, the Peruvian 1955 Supreme Resolution is of no assistance when it comes to determining the extent of the maritime frontier whose existence the Parties acknowledged in 1954.

121. In respect of Chilean legislation, Peru highlights the absence of references to a lateral maritime boundary in five Chilean texts: a 25 July 1953 Decree which defined the maritime jurisdiction of the Directorate General of Maritime Territory and Merchant Marine; a 26 July 1954 Message from the Chilean Executive to the Congress for the Approval of the 1952 Agreements; a 23 September 1954 Supreme Decree by which Chile approved the 1952 Santiago Declaration; an 11 February 1959 Decree on Permits for Fishing by Foreign Vessels in Chilean Territorial Waters; and a 4 June 1963 Decree on the Appointment of the Authority which Grants Fishing Permits to Foreign Flag Vessels in Chilean Jurisdictional Waters. In response, Chile contends that the 1952 Santiago Declaration became part of Chilean law upon ratification and so there was no need to reaffirm the existence of the maritime boundary in subsequent legislation.

122. The Court finds that these five Chilean instruments are of no assistance as to the extent of the maritime frontier whose existence the Parties acknowledged in 1954, for the following reasons. The 1953 Decree relates to the territorial sea out to 12 nautical miles. The 1954 Message recalls the 200-nautical-mile claim made by the three States in 1952 but makes no mention of boundaries between those States. The 1954 Supreme Decree simply reproduces the text of the instruments adopted at the Lima Conference without commenting on their effect. The 1959 Decree refers repeatedly to "Chilean territorial waters" without defining the limits — lateral or seaward — of these waters. Finally, the 1963 Decree speaks of the 200-nautical-mile zone established under the 1952 Santiago Declaration but makes no reference to a lateral boundary within that zone.

D. The 1955 Protocol of Accession

123. In 1955 the three States adopted a Protocol of Accession to the 1952 Santiago Declaration. In that Protocol they agree "to open the accession of Latin American States to [the 1952 Santiago Declaration] with regard to its fundamental principles" contained in the paragraphs of the Preamble. The three States then reproduce substantive paragraphs I, II, III and V, but not paragraph IV. On the matter of boundaries they declare that

> "the adhesion to the principle stating that the coastal States have the right and duty to protect, conserve and use the resources of the sea along their coasts, shall not be constrained by the assertion of the right of every State to determine the extension and boundaries of its Maritime Zone. Therefore, at the moment of accession, every State shall be able to determine the extension and form of delimitation of its respective zone whether opposite to one part or to the entirety of its coastline, according to the peculiar geographic conditions, the extension of each sea and the geological and biological factors that condition the existence, conservation and development of the maritime fauna and flora in its waters."

The only other provision of the 1952 Santiago Declaration which was the subject of an express exclusion from the 1955 Protocol was paragraph VI which concerns the possibility of future agreements in application of these principles. This provision was excluded on the basis that it was "determined by the geographic and biological similarity of the coastal maritime zones of the signatory countries" to the Declaration. It is common ground that no State in fact ever took advantage of the 1955 Protocol.

124. Peru sees the affirmation of the power of an acceding State to determine the extension and limits of its zone as confirming that the 1952 Santiago Declaration had not settled the question of the maritime boundaries between the States parties. Chile reads the positions of the two Parties on paragraph IV in the contrary sense: by that exclusion they indicated their understanding that their maritime boundary was already determined.

125. Given the conclusion that the Court has already reached on paragraph IV, its exclusion from the text of the 1955 Protocol, and the fact that no State has taken advantage of the Protocol, the Court does not see the Protocol as having any real significance. It may however be seen as providing some support to Peru's position that the use of lateral maritime boundaries depended on the particular circumstances of the States wishing to accede to the 1952 Santiago Declaration. More significantly, the 1955 Protocol may also be seen as an attempt to reinforce solidarity for the reasons given by Peru, Chile and Ecuador in their own national legal measures and in the 1952 Santiago Declaration, and as manifested in their other actions in 1955, in response to the protests of maritime powers (see paragraphs 76 to 77 above).

E. Enforcement activities

126. Much of the enforcement practice relevant to the maritime boundary can be divided between that concerning vessels of third States and that involving Peru and Chile, and by reference to time. In respect of the second distinction the Court recalls that its primary, but not exclusive, interest is with practice in the early 1950s when the Parties acknowledged the existence of their maritime boundary.

127. In respect of vessels of third States, Chile draws on a 1972 report of the CPPS Secretary-General on Infractions in the Maritime Zone between 1951 and 1971. The data, the report says, are incomplete for the first ten years. According to the report, in the course of the 20 years it covers, Peru arrested 53 vessels, Chile five and Ecuador 122, the final figure explained by the fact that the interest of foreign fishing fleets had focused, especially in more recent years, on tuna, the catch of which was greater in Ecuadorean waters. All but six of the 53 vessels arrested in Peruvian waters carried the United States flag; five (in the Onassis fleet) carried the Panamanian; and one the Japanese. In the case of 20 of the 53 arrests, the report records or indicates the place at which the arrests took place and all of those places are far to the north of the parallel of latitude extending from the land boundary between Peru and Chile, and closer to the boundary between Peru and Ecuador. For 36, the distance from the coast is indicated. They include the Onassis fleet which on one account was arrested 126 nautical miles offshore (see paragraph 75 above). Of the other arrests, only one (in 1965) was beyond 60 nautical miles of the coast of Peru

and only two others (in 1965 and 1968) were beyond 35 nautical miles; all three of these arrests occurred more than 500 nautical miles to the north of that latitudinal parallel.

128. Until the mid-1980s, all the practice involving incidents between the two Parties was within about 60 nautical miles of the coasts and usually much closer. In 1954 and 1961, Chile proposed that fishing vessels of the Parties be permitted to fish in certain areas of the maritime zone of the other State, up to 50 nautical miles north/south of the parallel, but the exchanges between the Parties do not indicate how far seaward such arrangements would have operated; in any event Chile's proposals were not accepted by Peru. In December 1962, Peru complained about "the frequency with which Chilean fishing vessels have trespassed into Peruvian waters, at times up to 300 metres from the beach". In March 1966, the Peruvian patrol ship *Diez Canseco* was reported to have intercepted two Chilean fishing vessels and fired warning shots at them, but the entire incident took place within 2 nautical miles of the coast. Two incidents in September 1967 — the sighting by Peru of several Chilean trawlers "north of the jurisdictional boundary" and the sighting by Chile of a Peruvian patrol boat "south of the Chile-Peru boundary parallel" — both occurred within 10 nautical miles of Point Concordia. Following a third incident that month, Peru complained about a Chilean fishing net found 2 nautical miles west of Point Concordia. In respect of these incidents, the Court recalls that the zone of tolerance established under the 1954 Agreement starts at a distance of 12 nautical miles from the coast along the parallel of latitude.

129. The practice just reviewed does not provide any basis for putting into question the tentative conclusion that the Court expressed earlier. That conclusion was based on the fishing activity of the Parties and contemporaneous developments in the law of the sea in the early and mid-1950s.

F. The 1968-1969 lighthouse arrangements

130. The Court recalls its discussion of the 1968-1969 lighthouse arrangements (see paragraphs 96 to 99 above). The record before the Court indicates that the lights would have been visible from a maximum distance of approximately 15 nautical miles; as Chile acknowledges, the Parties were particularly concerned with visibility within the first 12 nautical miles from the coast, up to the point where the zone of tolerance under the 1954 Special Maritime Frontier Zone Agreement commenced, and where many of the incursions were reported. There are indications in the case file that the towers had radar reflectors but there is no information at all of their effective range or their use in practice. The Court does not see these arrangements as having any significance for the issue of the extent of the maritime boundary.

G. Negotiations with Bolivia (1975-1976)

131. In 1975-1976, Chile entered into negotiations with Bolivia regarding a proposed exchange of territory that would provide Bolivia with a "corridor to the sea" and an adjacent maritime zone. The record before the Court comprises the Chilean proposal to Bolivia of December 1975, Peru's reply of January 1976, Chile's record (but not Peru's) of discussions between the Parties in July 1976 and Peru's counter-

proposal of November 1976. Chile's proposal of December 1975 stated that the cession would include, in addition to a strip of land between Arica and the Chile-Peru land boundary, "the maritime territory between the parallels of the extreme points of the coast that will be ceded (territorial sea, economic zone and continental shelf)". This proposal was conditional, among other things, on Bolivia ceding to Chile an area of territory as compensation. The record before the Court does not include the Bolivian-Chilean exchanges of December 1975. As required under Article 1 of the Supplementary Protocol to the 1929 Treaty of Lima, Peru was formally consulted on these negotiations. In January 1976, Peru acknowledged receipt of documents from Chile regarding the proposed cession. Peru's response was cautious, noting a number of "substantial elements" arising, including the consequences of "the fundamental alteration of the legal status, the territorial distribution, and the socio-economic structure of an entire region". According to Chile's record of discussions between the Parties, in July 1976 Chile informed Peru that it would seek assurances from Bolivia that the latter would comply with the 1954 Special Maritime Frontier Zone Agreement, while Peru confirmed that it had not identified in Chile's proposal any "major problems with respect to the sea". On 18 November 1976, Peru made a counter-proposal to Chile which contemplated a different territorial régime: cession by Chile to Bolivia of a sovereign corridor to the north of Arica; an area of shared Chilean-Peruvian-Bolivian sovereignty over territory between that corridor and the sea; and exclusive Bolivian sovereignty over the sea adjacent to the shared territory.

132. According to Chile, its negotiations with Bolivia proceeded on the explicit basis that the existing maritime boundary, following the latitudinal parallel, would delimit the envisaged maritime zone of Bolivia vis-à-vis Peru. Chile submits that Peru was specifically consulted on this matter, and expressed no objection or reservation, but rather "acknowledged the existence and course of the Chile-Peru maritime boundary" at one of the sessions between the Parties in 1976. For its part, Peru stresses that neither its Note of January 1976 nor its alternative proposal of November 1976 mentioned a parallel of latitude or suggested any method of maritime delimitation for Bolivia's prospective maritime zone. Peru further contends that Chile's records of the 1976 discussions are unreliable and incomplete, and that its own position at the time was clearly that the territorial divisions in the area were still to be negotiated.

133. The Court does not find these negotiations significant for the issue of the extent of the maritime boundary between the Parties. While Chile's proposal referred to the territorial sea, economic zone and continental shelf, Peru did not accept this proposal. Peru's January 1976 acknowledgment did not mention any existing maritime boundary between the Parties, while its counter-proposal from November of that year did not indicate the extent or nature of the maritime area proposed to be accorded to Bolivia.

H. Positions of the Parties at the Third United Nations Conference on the Law of the Sea

134. The Parties also directed the Court to certain statements made by their representatives during the Third United Nations Conference on the Law of the Sea. First, both referred to a joint declaration on 28 April 1982 made by Chile, Ecuador and

Peru, together with Colombia, which had joined the CPPS in 1979, wherein those States pointed out that:

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

The Court notes that this statement did not mention delimitation, nor refer to any existing maritime boundaries between those States.

135. A second matter raised by the Parties is Peru's involvement in the negotiations relating to maritime delimitation of States with adjacent or opposite coasts. The Peruvian position on that matter was expressed at various points during the negotiations; on 27 August 1980, the Head of the Peruvian Delegation stated it as follows:

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

Peru contends that its "active participation" in the negotiations on this matter illustrates that it had yet to resolve its own delimitation issues. Given the conclusions reached above, however, the Court need not consider that matter. The statements by Peruvian representatives at the Third United Nations Conference on the Law of the Sea relate to prospective maritime boundary agreements between States (and provisional arrangements to be made pending such agreements); they do not shed light on the extent of the existing maritime boundary between Peru and Chile.

I. The 1986 Bákula Memorandum

136. It is convenient to consider at this point a memorandum sent by Peruvian Ambassador Bákula to the Chilean Ministry of Foreign Affairs on 23 May 1986, following his audience with the Chilean Foreign Minister earlier that day ("the Bákula Memorandum"). Peru contends that in that Memorandum it "invites Chile to agree an international maritime boundary". Chile, to the contrary, submits that the Bákula Memorandum was an attempt to renegotiate the existing maritime boundary.

137. According to the Memorandum, Ambassador Bákula had handed the Chilean Minister a personal message from his Peruvian counterpart. The strengthening of the ties of friendship between the two countries

> "must be complemented by the timely and direct solution of problems which are the result of new circumstances, with a view to enhancing the climate of reciprocal confidence which underlies every constructive policy.

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

At that time, the Memorandum continued, the special zone established by the 1954 Agreement

> "is not adequate to satisfy the requirements of safety nor for the better attention to the administration of marine resources, with the aggravating circumstance that an extensive interpretation could generate a notorious situation of inequity and risk, to the detriment of the legitimate interests of Peru, that would come forth as seriously damaged".

It referred to the various zones recognized in UNCLOS and said this:

> "The current '200-mile maritime zone' — as defined at the Meeting of the Permanent Commission for the South Pacific in 1954 — is, without doubt, a space which is different from any of the abovementioned ones in respect of which domestic legislation is practically non-existent as regards international delimitation. The one exception might be, in the case of Peru, the Petroleum Law (No. 11780 of 12 March 1952), which established as an external limit for the exercise of the competences of the State over the continental shelf 'an imaginary line drawn seaward at a constant distance of 200 miles'. This law is in force and it should be noted that it was issued five months prior to the Declaration of Santiago.
>
> There is no need to underline the convenience of preventing the difficulties which would arise in the absence of an express and appropriate maritime demarcation, or as the result of some deficiency therein which could affect the amicable conduct of relations between Chile and Peru."

138. On 13 June 1986, in an official communiqué, the Chilean Foreign Ministry said that:

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

139. Peru contends that the Bákula Memorandum is perfectly clear. In it Peru spelled out the need for "the formal and definitive delimitation" of their maritime spaces, distinguishing it from the *ad hoc* arrangements for specific purposes, such as the 1954 fisheries policing tolerance zone. It called for negotiations, not "renegotiations". And, Peru continues, Chile did not respond by saying that there was no need for such a delimitation because there was already such a boundary in existence. Rather "studies .. . are to be carried out". Peru, based on the Memorandum and this response, also contends that the practice after that date which Chile invokes cannot be significant.

140. Chile, in addition to submitting that the Bákula Memorandum called for a renegotiation of an existing boundary, said that it did that on the (wrong) assumption that the maritime zones newly recognized in UNCLOS called for the existing delimitation to be revisited. As well, Peru did not renew its request to negotiate. Chile submits that the fact that Peru was seeking a renegotiation was reflected in contemporaneous comments by the Peruvian Foreign Minister, reported in the Chilean and Peruvian press.

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141. The Court does not read the Bákula Memorandum as a request for a renegotiation of an existing maritime boundary. Rather, it calls for "the formal and definitive delimitation of the marine spaces". While Peru does recognize the existence of the special zone, in its view that zone did not satisfy the requirements of safety nor did it allow an appropriate administration of marine resources; further, an extensive interpretation of the Special Maritime Frontier Zone Agreement would negatively affect Peru's legitimate interests. In the Court's view, the terms used in that Memorandum do acknowledge that there is a maritime boundary, without giving precise information about its extent. The Court does not see the newspaper accounts as helpful. They do not purport to report the speech of the Peruvian Minister in full.

142. There is force in the Chilean contention about Peru's failure to follow up on the issues raised in the Bákula Memorandum in a timely manner: according to the record before the Court, Peru did not take the matter up with Chile at the diplomatic level again until 20 October 2000, before repeating its position in a Note to the United Nations Secretary-General in January 2001 and to Chile again in July 2004. However, the Court considers that the visit by Ambassador Bákula and his Memorandum do reduce in a major way the significance of the practice of the Parties after that date. The Court recalls as well that its primary concern is with the practice of an earlier time, that of the 1950s, as indicating the extent of the maritime boundary at the time the Parties acknowledged that it existed.

J. Practice after 1986

143. The Court has already considered the Parties' legislative practice from the 1950s and 1960s (see paragraphs 119 to 122 above). Chile also relies on two pieces of legislation from 1987: a Peruvian Supreme Decree adopted on 11 June 1987 and a Chilean Supreme Decree adopted on 26 October of that year. Chile sees these instruments as evidence that, in defining the areas of sovereign control by their navies, the Parties respected the maritime boundary.

144. The Court notes that these Decrees define the limits of the Parties' internal maritime districts. However, as Peru points out in respect of its own Decree, while these instruments define the northern and southern limits of districts with some specificity (by reference to parallels of latitude), that is not the case for those limits abutting international boundaries between Ecuador and Peru, Peru and Chile, or Chile and Argentina. These Decrees define the internal limits of the jurisdiction of certain domestic authorities within Chile and within Peru; they do not purport to define the international limits of

either State. In view also of the temporal considerations mentioned above, the Court does not see these Decrees as significant.

145. Peru in addition referred the Court to a Chilean Decree of 1998 defining benthonic areas of the Chilean coast; the northern limit ran to the south-west. But, as Chile says, the Decree was concerned only with the harvesting of living resources on and under the sea-bed within its "territorial seas". The Court does not see this Decree as significant for present purposes.

146. The Court returns to evidence of enforcement measures between the Parties. The next capture recorded in the case file after May 1986 is from 1989: the Peruvian interception and capture of two Chilean fishing vessels within Peruvian waters, 9.5 nautical miles from land and 1.5 nautical miles north of the parallel.

147. Chile also provided information, plotted on a chart, of Peruvian vessels captured in 1984 and from 1994 in the waters which, in Chile's view, are on its side of the maritime boundary. The information relating to 1984 records 14 vessels but all were captured within 20 nautical miles of the coast; in 1994 and 1995, 15, all within 40 nautical miles; and it is only starting in 1996 that arrests frequently occurred beyond 60 nautical miles. Those incidents all occurred long after the 1950s and even after 1986. The Court notes, however, that Chile's arrests of Peruvian vessels south of the parallel, whether they took place within the special zone or further south, provide some support to Chile's position, although only to the extent that such arrests were met without protest by Peru. This is the case even with respect to arrests taking place after 1986.

148. Given its date, the Court does not consider as significant a sketch-map said to be part of the Chilean Navy's Rules of Engagement in the early 1990s and which depicts a Special Maritime Frontier Zone stretching out to the 200-nautical-mile limit, or information provided by Chile in respect of reports to the Peruvian authorities by foreign commercial vessels between 2005 and 2010 and to the Chilean authorities by Peruvian fishing vessels across the parallel.

K. The extent of the agreed maritime boundary: conclusion

149. The tentative conclusion that the Court reached above was that the evidence at its disposal does not allow it to conclude that the maritime boundary, the existence of which the Parties acknowledged at that time, extended beyond 80 nautical miles along the parallel from its starting-point. The later practice which it has reviewed does not lead the Court to change that position. The Court has also had regard to the consideration that the acknowledgment, without more, in 1954 that a "maritime boundary" exists is too weak a basis for holding that it extended far beyond the Parties' extractive and enforcement capacity at that time.

150. Broader considerations relating to the positions of the three States parties to the 1954 Special Maritime Frontier Zone Agreement, particularly the two Parties in this case, in the early 1950s demonstrates that the primary concern of the States parties regarding the more distant waters, demonstrated in 1947, in 1952, in 1954 (in their enforcement activities at sea as well as in their own negotiations), in 1955 and throughout the United

Nations process which led to the 1958 Conventions on the Law of the Sea, was with presenting a position of solidarity, in particular, in respect of the major third countries involved in long distance fisheries. The States parties were concerned, as they greatly increased their fishing capacity, that the stock was not depleted by those foreign fleets.

The seizure of the Onassis whaling fleet, undertaken by Peru in defence of the claims made by the three signatories to the 1952 Santiago Declaration (see paragraph 75 above), was indicative of these concerns. This action occurred 126 nautical miles off of the Peruvian coast. Prior to its seizure, the fleet unsuccessfully sought permission from Peru that it be allowed to hunt between 15 and 100 nautical miles from the Peruvian coast.

151. The material before the Court concerning the Parties' focus on solidarity in respect of long distance fisheries does not provide it with precise information as to the exact extent of the maritime boundary which existed between the Parties. This issue could be expected to have been resolved by the Parties in the context of their tacit agreement and reflected in the treaty which acknowledges that tacit agreement, namely the 1954 Special Maritime Frontier Zone Agreement. This did not happen. This left some uncertainty as to the precise length of the agreed maritime boundary. However, based on an assessment of the entirety of the relevant evidence presented to it, the Court concludes that the agreed maritime boundary between the Parties extended to a distance of 80 nautical miles along the parallel from its starting-point.

V. The starting-point of the agreed maritime boundary

152. Having concluded that there exists a maritime boundary between the Parties, the Court must now identify the location of the starting-point of that boundary.

153. Both Parties agree that the land boundary between them was settled and delimited more than 80 years ago in accordance with Article 2 of the 1929 Treaty of Lima (see paragraph 18) which specifies that "the frontier between the territories of Chile and Peru . . . shall start from a point on the coast to be named 'Concordia', ten kilometres to the north of the bridge over the river Lluta". Article 3 of the 1929 Treaty of Lima stipulates that the frontier is subject to demarcation by a Mixed Commission consisting of one member appointed by each Party.

154. According to Peru, the delegates of the Parties to the Mixed Commission could not agree on the exact location of Point Concordia. Peru recalls that this was resolved through instructions issued by the Ministers of Foreign Affairs of each State to their delegates in April 1930 (hereinafter the "Joint Instructions"), specifying to the delegates that Point Concordia was to be the point of intersection between the Pacific Ocean and an arc with a radius of 10 km having its centre on the bridge over the River Lluta, with the land frontier thus approaching the sea as an arc tending southward. Peru notes that the Joint Instructions also provided that "[a] boundary marker shall be placed at any point of the arc, as close to the sea as allows preventing it from being destroyed by the ocean waters".

155. Peru recalls that the Final Act of the Commission of Limits Containing the Description of Placed Boundary Markers dated 21 July 1930 (hereinafter the "Final

Act"), agreed by the Parties, records that "[t]he demarcated boundary line starts from the Pacific Ocean *at a point* on the seashore ten kilometres northwest from the first bridge over the River Lluta of the Arica-La Paz railway" (emphasis added). Peru argues that the Final Act then indicates that the first marker along the physical demarcation of the land boundary is Boundary Marker No. 1 (Hito No. 1), located some distance from the low-water line so as to prevent its destruction by ocean waters at 18° 21' 03" S, 70° 22' 56" W. Peru thus considers that the Final Act distinguishes between a "point" as an abstract concept representing the geographical location of the starting-point of the land boundary (i.e., Point Concordia) and "markers" which are actual physical structures along the land boundary. In Peru's view, as the Final Act refers to both the point derived from Article 2 of the 1929 Treaty of Lima and Boundary Marker No. 1, these two locations must be distinct. Thus, relying on both the Joint Instructions and the Final Act, Peru maintains that Boundary Marker No. 1 was not intended to mark the start of the agreed land boundary but was simply intended to mark, in a practical way, a point on the arc constituting such boundary. Peru moreover refers to contemporaneous sketch-maps which are said to clearly demonstrate that the land boundary does not start at Boundary Marker No. 1. Peru further contends that the reference in the Final Act to Boundary Marker No. 1 as being located on the "seashore" is a mere general description, with this being consistent with the general manner in which other boundary markers are described in the same document. Finally, Peru clarifies that the Final Act agrees to give Boundary Marker No. 9, located near the railway line, the name of "Concordia" for symbolic reasons, an explanation with which Chile agrees.

156. In Chile's view, the outcome of the 1929 Treaty of Lima and 1930 demarcation process was that the Parties agreed that Boundary Marker No. 1 was placed on the seashore with astronomical co-ordinates 18° 21' 03" S, 70° 22' 56" W and that the land boundary started from this Marker. Chile characterizes the Joint Instructions as indicating that there would be a starting-point on the coast of the land boundary, instructing the delegates to ensure the placement of a marker to indicate such starting-point. Chile relies on an Act of Plenipotentiaries dated 5 August 1930 signed by the Ambassador of Chile to Peru and the Minister of Foreign Affairs of Peru, claiming that it records the "definitive location and characteristics" of each boundary marker and acknowledges that the boundary markers, beginning in order from the Pacific Ocean, demarcate the Peruvian-Chilean land boundary.

157. Peru considers that Chile's claim that Boundary Marker No. 1 is the starting-point of the land boundary faces two insurmountable problems. For Peru, the first such problem is that it means that an area of the land boundary of approximately 200 metres in length has not been delimited, which is not the intention of the 1929 Treaty of Lima and the Final Act. The second problem, according to Peru, is that a maritime boundary cannot start on dry land some 200 metres inland from the coast, referring to what it claims to be a "cardinal principle" of maritime entitlement that the "land dominates the sea". Alternatively, Peru notes that Chile's interpretation requires that the maritime boundary starts where the parallel passing through Boundary Marker No. 1 reaches the sea, with this being inconsistent with the 1929 Treaty of Lima and the Joint Instructions which clearly refer to the land boundary as following an arc southward from Boundary

Marker No. 1. Peru argues that, at least until the 1990s, Chile's own cartographic and other practice clearly acknowledges the starting-point of the land boundary as being Point Concordia, a point recognized as distinct from Boundary Marker No. 1.

158. Chile argues that the lighthouse arrangements of 1968-1969 are also relevant in that they involved a joint verification of the exact physical location of Boundary Marker No. 1. According to Chile, the 1952 Santiago Declaration did not identify the parallel running through the point where the land frontier reaches the sea. The observance and identification of such parallel by mariners gave rise to practical difficulties between the Parties, as a result of which they agreed to signal such parallel with two lighthouses aligned through Boundary Marker No. 1. Chile refers to a document dated 26 April 1968, signed by both Parties, which it claims represents an agreement that it is the parallel of the maritime frontier which would be marked by the lighthouses. Thus, Chile claims that "[t]he 1968-1969 arrangements and the signalling process as a whole confirmed Hito No. 1 as the reference point for the parallel of latitude constituting the maritime boundary between the Parties", further contending that the Parties have also used the parallel passing through this point as the maritime boundary for the capture and prosecution of foreign vessels. Chile further argues that there is corresponding Peruvian practice between 1982 and 2001 treating the parallel running through Boundary Marker No. 1 as the southernmost point of Peruvian territory.

159. Peru recalls that when it proposed to Chile, in 1968, to conclude the lighthouse arrangements, it suggested that it could be "convenient, for both countries, to proceed to build posts or signs of considerable dimensions and visible at a great distance, at the point at which the common border reaches the sea, near boundary marker number one", with Peru submitting that the language of "*near* Boundary Marker No. 1" clearly indicates that this point was distinct from the seaward terminus of the land boundary at Point Concordia. Peru then continues to explain that the placement of the Peruvian lighthouse at Boundary Marker No. 1 was motivated by practical purposes, arguing that as the purpose of the arrangement was to provide general orientation to artisanal fishermen operating near the coast, not to delimit a maritime boundary, aligning the lights along Boundary Marker No. 1 proved sufficient.

160. The Peruvian Maritime Domain Baselines Law, Law No. 28621 dated 3 November 2005, identifies the co-ordinates of Point Concordia as 18° 21' 08" S, 70° 22' 39" W, as measured on the WGS 84 datum. The Law sets out 266 geographical co-ordinates used to measure Peru's baselines, culminating in so-called "Point 266", which Peru claims coincides with Point Concordia.

161. Peru contends that Chile has sought, in recent years, to unsettle what it claims to be the Parties' previous agreement that the starting-point of the land boundary is Point Concordia, referring in this regard to an incident in early 2001 in which Chile is alleged to have placed a surveillance booth between Boundary Marker No. 1 and the seashore, an action which elicited an immediate protest from Peru, with this booth being subsequently removed. Chile claims that its decision to remove this booth was motivated by the proposals of the armies of both Parties that no surveillance patrols occur within 100 metres of the international land boundary, with Chile claiming that it duly reserved

its position regarding the course of the land boundary. Peru refers also in this regard to Chilean attempts to pass internal legislation in 2006-2007 referring to the starting-point of the land boundary as the intersection with the seashore of the parallel passing through Boundary Marker No. 1, rather than Point Concordia. Chile considers that its failure to pass the relevant legislation in its originally proposed form was not connected to the substance of the aforementioned reference.

*

162. The Court notes that on 20 October 2000, Peru communicated to Chile that the Parties disagreed concerning the status of the parallel passing through Boundary Marker No. 1 as a maritime boundary. On 9 January 2001, Peru informed the Secretary-General of the United Nations that it did not agree with Chile's understanding that a parallel constituted the maritime boundary between them at 18° 21' 00" S. On 19 July 2004, Peru described the situation as being one in which exchanges between the Parties had revealed "totally dissenting and opposed juridical positions about the maritime delimitation which, in accordance with International Law, evidence a juridical dispute". In such circumstances, the Court will not consider the arguments of the Parties concerning an incident involving a surveillance booth in 2001, the Peruvian Maritime Domain Baselines Law dated 3 November 2005 or the Chilean legislative initiatives in 2006-2007, as such events occurred after it had become evident that a dispute concerning this issue had arisen and thus these actions could be perceived as motivated by the Parties' positions in relation thereto.

163. The Court observes that a considerable number of the arguments presented by the Parties concern an issue which is clearly not before it, namely, the location of the starting-point of the land boundary identified as "Concordia" in Article 2 of the 1929 Treaty of Lima. The Court's task is to ascertain whether the Parties have agreed to any starting-point of their maritime boundary. The jurisdiction of the Court to deal with the issue of the maritime boundary is not contested.

164. The Court notes that during the early preparations for the lighthouse arrangements in April 1968 (discussed at paragraph 96 above) delegates of both Parties understood that they were preparing for the materialization of the parallel running through Boundary Marker No. 1, which the delegates understood to be the maritime frontier, and that the delegates communicated such understanding to their respective Governments.

165. The Governments of both Parties then confirmed this understanding. The Note of 5 August 1968 from the Secretary-General of Foreign Affairs of Peru to the chargé d'affaires of Chile states:

> "I am pleased to inform Your Honour that the Government of Peru approves in their entirety the terms of the document 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.

> As soon as Your Honour informs me that the Government of Chile is in agreement, we will be pleased to enter into the necessary discussions in order to determine the date on which the Joint Commission may meet in order to verify the position of Boundary Marker No. 1 and indicate the definitive location of the towers or leading marks . . .”

The Court notes Peru’s approval of the entirety of the document dated 26 April 1968.

166. The Chilean response of 29 August 1968 from the Embassy of Chile to the Ministry of Foreign Affairs of Peru is in the following terms:

> “The Embassy of Chile presents its compliments to the Honourable Ministry of Foreign Affairs and has the honour to refer to the Meeting of the Joint Chilean-Peruvian Commission held on 25 and 26 April 1968 in relation to the study of the installation of the leading marks visible from the sea to materialise the parallel of the maritime frontier originating at Boundary Marker No. 1.
>
> On this point, the Embassy of Chile is pleased to accept on behalf of the Government of Chile the proposals which the technical representatives of both countries included in the Act which they signed on 28 *[sic]* April 1968 with a view to taking the measures for the abovementioned signalling in order to act as a warning to fishing vessels that normally navigate in the maritime frontier zone.
>
> Given that the parallel which it is intended to materialise is the one which corresponds to the geographical situation indicated by Boundary Marker No. 1 as referred to in the Act signed in Lima on 1 August 1930, the Chilean Government agrees that an *ad hoc* Joint Commission should be constituted as soon as possible for the purpose of verifying the position of this pyramid and that, in addition, the said Commission should determine the position of the sites where the leading marks are to be installed.”

167. The Act of the Chile-Peru Mixed Commission in Charge of Verifying the Location of Boundary Marker No. 1 and Signalling the Maritime Boundary of 22 August 1969 (hereinafter the “1969 Act”), signed by the delegates of both Parties, introduces its task using the following language:

> “The undersigned Representatives of Chile and of Peru, appointed by their respective Governments for the purposes of verifying the original geographical position of the concrete-made Boundary Marker number one (No. 1) of the common frontier and for determining the points of location of the Alignment Marks that both countries have agreed to install *in order to signal the maritime boundary and physically to give effect to the parallel that passes through the aforementioned Boundary Marker number one* ...” (Emphasis added.)

168. The 1969 Act recommends the rebuilding of the damaged Boundary Marker No. 1 on its original location, which remained visible. The 1969 Act also includes a section entitled Joint Report signed by the Heads of each Party’s Delegation, describing their task as follows:

> "The undersigned Heads of Delegations of Chile and of Peru submit to their respective Governments the present Report on the state of repair of the boundary markers in the section of the Chile-Peru frontier which they have had the opportunity to inspect on the occasion of the works which they have been instructed to conduct in order to verify the location of Boundary Marker number one and to signal the maritime boundary."

169. The Court observes that both Parties thus clearly refer to their understanding that the task which they are jointly undertaking involves the materialization of the parallel of the existing maritime frontier, with such parallel understood to run through Boundary Marker No. 1.

170. In order to determine the starting-point of the maritime boundary, the Court has considered certain cartographic evidence presented by the Parties. The Court observes that Peru presents a number of official maps of Arica, dated 1965 and 1966, and of Chile, dated 1955, 1961 and 1963, published by the *Instituto Geográfico Militar de Chile*, as well as an excerpt from Chilean Nautical Chart 101 of 1989. However, these materials largely focus on the location of the point "Concordia" on the coast and do not purport to depict any maritime boundary.

171. The Court similarly notes that a number of instances of Peruvian practice subsequent to 1968 relied upon by Chile are not relevant as they address the issue of the location of the Peru-Chile land boundary.

172. The only Chilean map referred to by Peru which appears to depict the maritime boundary along a parallel passing through Boundary Marker No. 1 is an excerpt from Chilean Nautical Chart 1111 of 1998. This map, however, confirms the agreement between the Parties of 1968-1969. The Court considers that it is unable to draw any inference from the 30-year delay in such cartographic depiction by Chile.

173. The evidence presented in relation to fishing and other maritime practice in the region does not contain sufficient detail to be useful in the present circumstances where the starting-points of the maritime boundary claimed by each of the Parties are separated by a mere 8 seconds of latitude, nor is this evidence legally significant.

174. The Court considers that the maritime boundary which the Parties intended to signal with the lighthouse arrangements was constituted by the parallel passing through Boundary Marker No. 1. Both Parties subsequently implemented the recommendations of the 1969 Act by building the lighthouses as agreed, thus signalling the parallel passing through Boundary Marker No. 1. The 1968-1969 lighthouse arrangements therefore serve as compelling evidence that the agreed maritime boundary follows the parallel that passes through Boundary Marker No. 1.

175. The Court is not called upon to take a position as to the location of Point Concordia, where the land frontier between the Parties starts. It notes that it could be possible for the aforementioned point not to coincide with the starting-point of the maritime boundary, as it was just defined. The Court observes, however, that such a situation would be the consequence of the agreements reached between the Parties.

176. The Court thus concludes that the starting-point of the maritime boundary between the Parties is the intersection of the parallel of latitude passing through Boundary Marker No. 1 with the low-water line.

VI. The course of the maritime boundary from Point A

177. Having concluded that an agreed single maritime boundary exists between the Parties, and that that boundary starts at the intersection of the parallel of latitude passing through Boundary Marker No. 1 with the low-water line, and continues for 80 nautical miles along that parallel, the Court will now determine the course of the maritime boundary from that point on.

178. While Chile has signed and ratified UNCLOS, Peru is not a party to this instrument. Both Parties claim 200-nautical-mile maritime entitlements. Neither Party claims an extended continental shelf in the area with which this case is concerned. Chile's claim consists of a 12-nautical-mile territorial sea and an exclusive economic zone and continental shelf extending to 200 nautical miles from the coast. Peru claims a 200-nautical-mile "maritime domain". Peru's Agent formally declared on behalf of his Government that "[t]he term 'maritime domain' used in [Peru's] Constitution is applied in a manner consistent with the maritime zones set out in the 1982 Convention". The Court takes note of this declaration which expresses a formal undertaking by Peru.

179. The Court proceeds on the basis of the provisions of Articles 74, paragraph 1, and 83, paragraph 1, of UNCLOS which, as the Court has recognized, reflect customary international law (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 91, para. 167; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 674, para. 139). The texts of these provisions are identical, the only difference being that Article 74 refers to the exclusive economic zone and Article 83 to the continental shelf. They read as follows:

> "The delimitation of the exclusive economic zone [continental shelf] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

180. The methodology which the Court usually employs in seeking an equitable solution involves three stages. In the first, it constructs a provisional equidistance line unless there are compelling reasons preventing that. At the second stage, it considers whether there are relevant circumstances which may call for an adjustment of that line to achieve an equitable result. At the third stage, the Court conducts a disproportionality test in which it assesses whether the effect of the line, as adjusted, is such that the Parties' respective shares of the relevant area are markedly disproportionate to the lengths of their relevant coasts (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, pp. 101-103, paras. 115-122; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, pp. 695-696, paras. 190-193).

181. In the present case, Peru proposed that the three-step approach be followed in the delimitation of the maritime boundary between the two States. Peru makes the three following points. First, the relevant coasts and the relevant area within which the delimitation is to be effected are circumscribed by the coasts of each Party lying within 200 nautical miles of the starting-point of their land boundary. The construction of a provisional equidistance line within that area is a straightforward exercise. Secondly, there are no special circumstances calling for an adjustment of the provisional equidistance line and it therefore represents an equitable maritime delimitation: the resulting line effects an equal division of the Parties' overlapping maritime entitlements and does not result in any undue encroachment on the projections of their respective coasts or any cut-off effect. Thirdly, the application of the element of proportionality as an *ex post facto* test confirms the equitable nature of the equidistance line.

182. Chile advanced no arguments on this matter. Its position throughout the proceedings was that the Parties had already delimited the whole maritime area in dispute, by agreement, in 1952, and that, accordingly, no maritime delimitation should be performed by the Court.

183. In the present case, the delimitation of the maritime area must begin at the endpoint of the agreed maritime boundary which the Court has determined is 80 nautical miles long (Point A). In practice, a number of delimitations begin not at the low-water line but at a point further seaward, as a result of a pre-existing agreement between the parties (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, pp. 332-333, para. 212; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, pp. 431-432, paras. 268-269; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 130, para. 218). The situation the Court faces is, however, unusual in that the starting-point for the delimitation in this case is much further from the coast: 80 nautical miles from the closest point on the Chilean coast and about 45 nautical miles from the closest point on the Peruvian coast.

184. The usual methodology applied by the Court has the aim of achieving an equitable solution. In terms of that methodology, the Court now proceeds to the construction of a provisional equidistance line which starts at the endpoint of the existing maritime boundary (Point A).

185. In order to construct such a line, the Court first selects appropriate base points. In view of the location of Point A at a distance of 80 nautical miles from the coast along the parallel, the nearest initial base point on the Chilean coast will be situated near the starting-point of the maritime boundary between Chile and Peru, and on the Peruvian coast at a point where the arc of a circle with an 80-nautical-mile radius from Point A intersects with the Peruvian coast. For the purpose of constructing a provisional equidistance line, only those points on the Peruvian coast which are more than 80 nautical miles from Point A can be matched with points at an equivalent distance on the Chilean coast. The arc of a circle indicated on sketch-map No. 3 is used to identify the first Peruvian base point. Further base points for the construction of the provisional

equidistance line have been selected as the most seaward coastal points "situated nearest to the area to be delimited" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 101, para. 117). These base points are situated to the north-west of the initial base point on the Peruvian coast and south of the initial base point on the Chilean coast. No points on the Peruvian coast which lie to the south-east of that initial point on that coast can be matched with points on the Chilean coast, as they are all situated less than 80 nautical miles from Point A (see sketch-map No. 3: Construction of the provisional equidistance line).

186. The provisional equidistance line thus constructed runs in a general south-west direction, almost in a straight line, reflecting the smooth character of the two coasts, until it reaches the 200-nautical-mile limit measured from the Chilean baselines (Point B). Seaward of this point the 200-nautical-mile projections of the Parties' coasts no longer overlap.

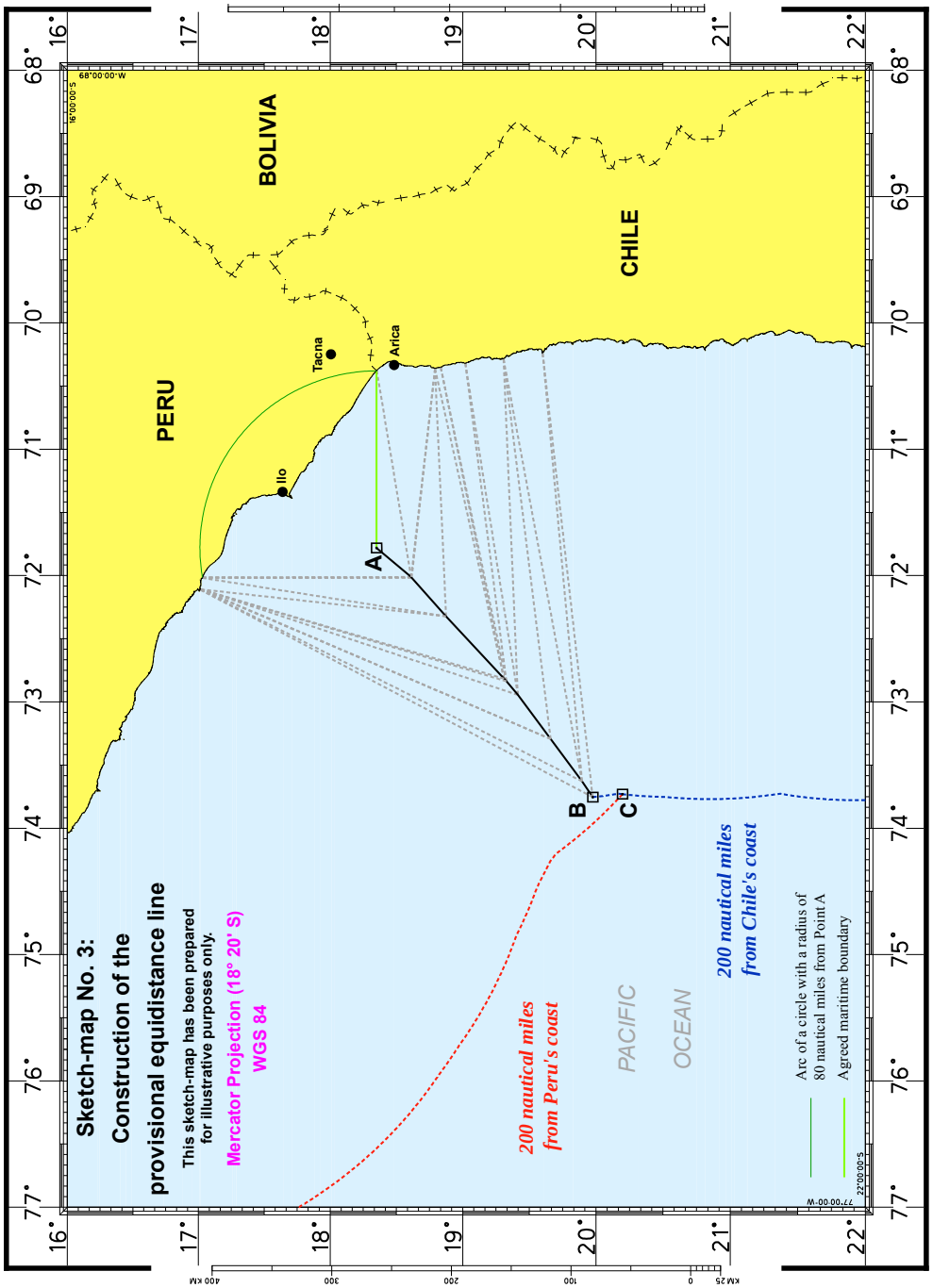
187. Before continuing the application of the usual methodology, the Court recalls that, in its second submission, Peru requested the Court to adjudge and declare that, beyond the point where the common maritime boundary ends, Peru is entitled to exercise sovereign rights over a maritime area lying out to a distance of 200 nautical miles from its baselines (see paragraphs 14 to 15 above). This claim is in relation to the area in a darker shade of blue in sketch-map No. 2 (see paragraph 22 above).

188. Peru contends that, in the maritime area beyond 200 nautical miles from the Chilean coast but within 200 nautical miles of its own coast, it has the rights which are accorded to a coastal State by general international law and that Chile has no such rights.

Chile in response contends that the 1952 Santiago Declaration establishes a single lateral limit for all maritime areas of its States parties whether actual or prospective, invoking the reference in paragraph II of the Declaration to "a minimum distance of 200 nautical miles".

189. Since the Court has already concluded that the agreed boundary line along the parallel of latitude ends at 80 nautical miles from the coast, the foundation for the Chilean argument does not exist. Moreover, since the Court has decided that it will proceed with the delimitation of the overlapping maritime entitlements of the Parties by drawing an equidistance line, Peru's second submission has become moot and the Court need not rule on it.

190. After Point B (see paragraph 186 above), the 200-nautical-mile limits of the Parties' maritime entitlements delimited on the basis of equidistance no longer overlap. The Court observes that, from Point B, the 200-nautical-mile limit of Chile's maritime entitlement runs in a generally southward direction. The final segment of the maritime boundary therefore proceeds from Point B to Point C, where the 200-nautical-mile limits of the Parties' maritime entitlements intersect.


Sketch-map No. 3:
Construction of the
provisional equidistance line
This sketch-map has been prepared
for illustrative purposes only.
Mercator Projection (18° 20' S)
WGS 84
PERU
BOLIVIA
CHILE
Tacna
Arica
Ilo
A
B
C
200 nautical miles
from Peru's coast
200 nautical miles
from Chile's coast
PACIFIC
OCEAN
Arc of a circle with a radius of
80 nautical miles from Point A
Agreed maritime boundary

191. The Court must now determine whether there are any relevant circumstances calling for an adjustment of the provisional equidistance line, with the purpose, it must always be recalled, of achieving an equitable result. In this case, the equidistance line avoids any excessive amputation of either State's maritime projections. No relevant circumstances appear in the record before the Court. There is accordingly no basis for adjusting the provisional equidistance line.

192. The next step is to determine whether the provisional equidistance line drawn from Point A produces a result which is significantly disproportionate in terms of the lengths of the relevant coasts and the division of the relevant area. The purpose is to assess the equitable nature of the result.

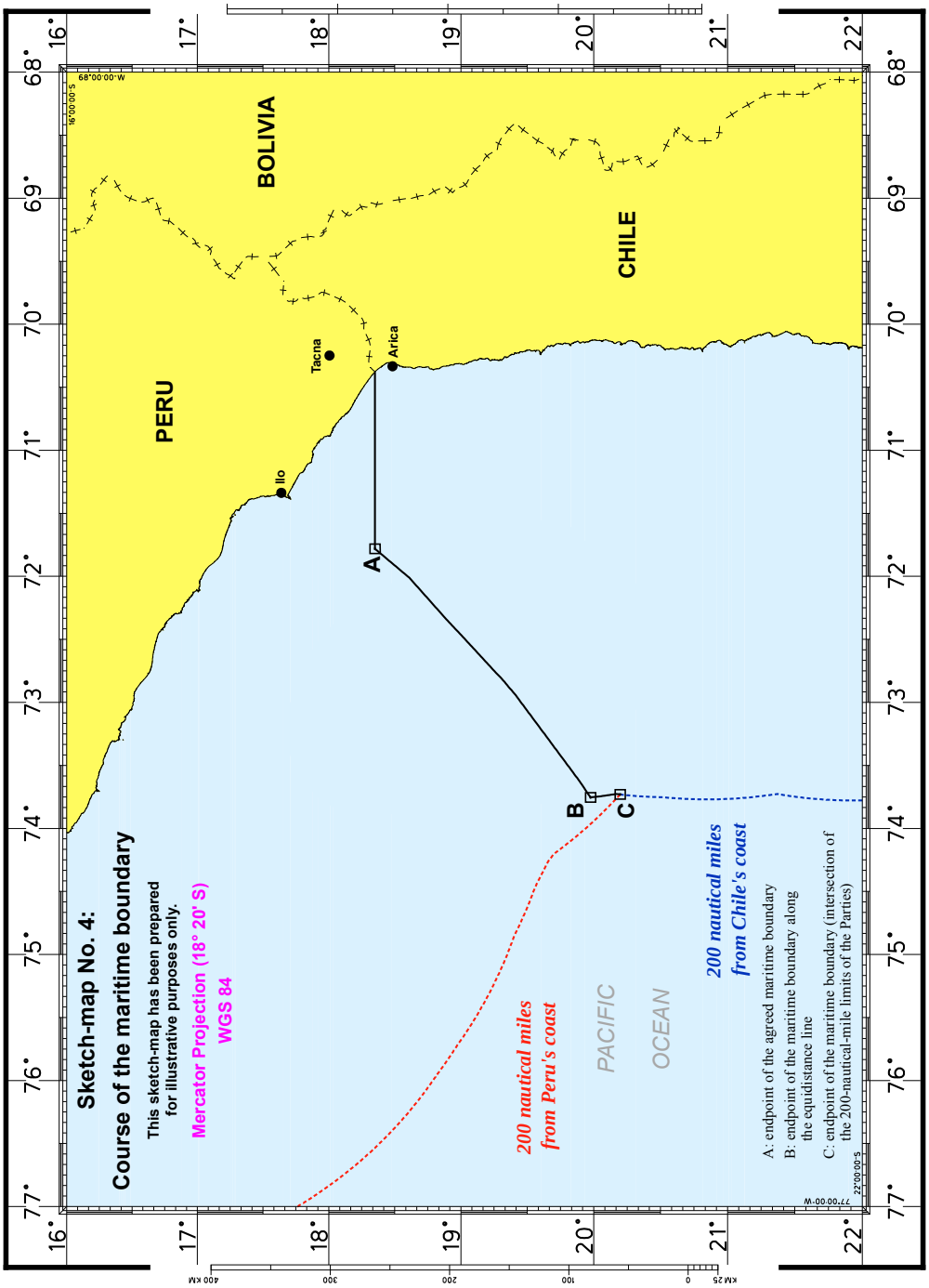
193. As the Court has already noted (see paragraph 183 above), the existence of an agreed line running for 80 nautical miles along the parallel of latitude presents it with an unusual situation. The existence of that line would make difficult, if not impossible, the calculation of the length of the relevant coasts and of the extent of the relevant area, were the usual mathematical calculation of the proportions to be undertaken. The Court recalls that in some instances in the past, because of the practical difficulties arising from the particular circumstances of the case, it has not undertaken that calculation. Having made that point in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/ Malta)* (*Judgment, I.C.J. Reports 1985*, p. 53, para. 74), it continued in these terms:

> "if the Court turns its attention to the extent of the areas of shelf lying on each side of the line, it is possible for it to make a broad assessment of the equitableness of the result, without seeking to define the equities in arithmetical terms" (*ibid.*, p. 55, para. 75).

More recently, the Court observed that, in this final phase of the delimitation process, the calculation does not purport to be precise and is approximate; "[t]he object of delimitation is to achieve a delimitation that is equitable, not an equal apportionment of maritime areas" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 100, para. 111; see similarly *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, pp. 66-67, para. 64, and p. 68, para. 67, referring to difficulties, as in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, in defining with sufficient precision which coasts and which areas were to be treated as relevant; and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, pp. 433-448, paras. 272-307, where although the Court referred to the relevant coastlines and the relevant area, it made no precise calculation of them). In such cases, the Court engages in a broad assessment of disproportionality.

194. Given the unusual circumstances of this case, the Court follows the same approach here and concludes that no significant disproportion is evident, such as would call into question the equitable nature of the provisional equidistance line.

195. The Court accordingly concludes that the maritime boundary between the two Parties from Point A runs along the equidistance line to Point B, and then along the 200-nautical-mile limit measured from the Chilean baselines to Point C (see sketch-map No. 4: Course of the maritime boundary).


Sketch-map No. 4:
Course of the maritime boundary
This sketch-map has been prepared for illustrative purposes only.
Mercator Projection (18° 20' S)
WGS 84
PERU
BOLIVIA
CHILE
Tacna
Arica
Ilo
A
B
C
200 nautical miles from Peru's coast
200 nautical miles from Chile's coast
PACIFIC
OCEAN
A: endpoint of the agreed maritime boundary
B: endpoint of the maritime boundary along the equidistance line
C: endpoint of the maritime boundary (intersection of the 200-nautical-mile limits of the Parties)

VII. Conclusion

196. The Court concludes that the maritime boundary between the Parties starts at the intersection of the parallel of latitude passing through Boundary Marker No. 1 with the low-water line, and extends for 80 nautical miles along that parallel of latitude to Point A. From this point, the maritime boundary runs along the equidistance line to Point B, and then along the 200-nautical-mile limit measured from the Chilean baselines to Point C. *

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197. In view of the circumstances of the present case, the Court has defined the course of the maritime boundary between the Parties without determining the precise geographical co-ordinates. Moreover, the Court has not been asked to do so in the Parties' final submissions. The Court expects that the Parties will determine these co-ordinates in accordance with the present Judgment, in the spirit of good neighbourliness.

*

* *

198. For these reasons,

THE COURT,

(1) By fifteen votes to one,

Decides that the starting-point of the single maritime boundary delimiting the respective maritime areas between the Republic of Peru and the Republic of Chile is the intersection of the parallel of latitude passing through Boundary Marker No. 1 with the low-water line;

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Xue, Donoghue, Sebutinde, Bhandari; *Judges* ad hoc Guillaume, Orrego Vicuña;

AGAINST: *Judge* Gaja;

(2) By fifteen votes to one,

Decides that the initial segment of the single maritime boundary follows the parallel of latitude passing through Boundary Marker No. 1 westward;

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Xue, Donoghue, Gaja, Bhandari; *Judges* ad hoc Guillaume, Orrego Vicuña;

AGAINST: *Judge* Sebutinde;

(3) By ten votes to six,

Decides that this initial segment runs up to a point (Point A) situated at a distance of 80 nautical miles from the starting-point of the single maritime boundary;

IN FAVOUR: *Vice-President* Sepúlveda-Amor; *Judges* Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Donoghue; *Judge* ad hoc Guillaume;

AGAINST: *President* Tomka; *Judges* Xue, Gaja, Sebutinde, Bhandari; *Judge* ad hoc Orrego Vicuña;

(4) By ten votes to six,

Decides that from Point A, the single maritime boundary shall continue south-westward along the line equidistant from the coasts of the Republic of Peru and the Republic of Chile, as measured from that point, until its intersection (at Point B) with the 200-nautical-mile limit measured from the baselines from which the territorial sea of the Republic of Chile is measured. From Point B, the single maritime boundary shall continue southward along that limit until it reaches the point of intersection (Point C) of the 200-nautical-mile limits measured from the baselines from which the territorial seas of the Republic of Peru and the Republic of Chile, respectively, are measured;

IN FAVOUR: *Vice-President* Sepúlveda-Amor; *Judges* Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Donoghue; *Judge* ad hoc Guillaume;

AGAINST: *President* Tomka; *Judges* Xue, Gaja, Sebutinde, Bhandari; *Judge* ad hoc Orrego Vicuña;

(5) By fifteen votes to one,

Decides that, for the reasons given in paragraph 189 above, it does not need to rule on the second final submission of the Republic of Peru.

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Xue, Donoghue, Gaja, Sebutinde, Bhandari; *Judge* ad hoc Guillaume;

AGAINST: *Judge* ad hoc Orrego Vicuña.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-seventh day of January, two thousand and fourteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Peru and the Government of the Republic of Chile, respectively.

(Signed) Peter TOMKA,
President.

(Signed) Philippe COUVREUR,
Registrar.

President Tomka and Vice-President Sepúlveda-Amor append declarations to the Judgment of the Court; Judge Owada appends a separate opinion to the Judgment of the Court; Judge Skotnikov appends a declaration to the Judgment of the Court; Judges Xue, Gaja, Bhandari and Judge *ad hoc* Orrego Vicuña append a joint dissenting opinion to the Judgment of the Court; Judges Donoghue and Gaja append declarations to the Judgment of the Court; Judge Sebutinde appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* Guillaume appends a declaration to the Judgment of the Court; Judge *ad hoc* Orrego Vicuña appends a separate, partly concurring and partly dissenting, opinion to the Judgment of the Court.

(Initialled) P. T.

(Initialled) Ph. C.

.....

Declaration of President Tomka

The single maritime boundary between the Parties starts at the intersection of the parallel of latitude passing through Boundary Marker No. 1 with the low-water line, and follows that parallel of latitude — Such boundary did not stop at a distance of 80 nautical miles — The 1954 Agreement Relating to a Special Maritime Frontier Zone unquestionably recognizes the existence of a maritime boundary between the Parties along that parallel, without establishing it — Rather, the boundary was intended to extend to a distance corresponding to the maritime zones claimed by the Parties at the time, that is to say, at least 200 nautical miles — The Court's Judgment will have the effect of closing the zone of tolerance established by the 1954 Agreement at a distance of just 80 nautical miles from the coast, which seems to run counter to the intention of the Parties — The Parties specified the eastern, southern and northern limits of this zone of tolerance, without fixing its western limit — The negotiating history of the 1952 Santiago Declaration and domestic acts by which the Parties formulated their maritime claims support the view that the boundary extended to 200 nautical miles — The travaux préparatoires *surrounding the Lima Conference of 1954, and the resulting texts, further support this construction and must be taken into account when interpreting the Santiago Declaration — Paragraph IV of the Santiago Declaration did not effect a general maritime delimitation of the Parties' respective maritime zones — The Santiago Declaration assumes that the delimitation had been settled by way of a general maritime boundary along the parallel, thereby serving as evidence of the Parties' recognition of a settlement but not as its legal source — Some of the evidence referred to by the Court, particularly that pertaining to the Humboldt Current, points to a distance much longer than 80 nautical miles — Disagreement with the insufficient extent of the agreed maritime boundary on the parallel in the Court's decision, rather than the methodology the Court employed in drawing the continuation of the boundary — The Court need not rule on Peru's submission regarding the "outer triangle", as a result of the way in which the Court has drawn the maritime boundary — Peru has an entitlement to an exclusive economic zone and continental shelf in the outer triangle area.*

1. To my regret, I have not been able to support two of the conclusions reached by the Court in this case. While concurring with the findings that the starting-point of the single maritime boundary delimiting the respective maritime areas between the Republic of Peru and the Republic of Chile is the intersection of the parallel of latitude passing through Boundary Marker No. 1 with the low-water line, and that the single maritime boundary follows that parallel of latitude, I parted company with my ten colleagues when they decided that such agreed boundary stops at a distance of 80 nautical miles from the starting-point at the coast. Consequently, I was not able to support the Court's position on the drawing of the maritime boundary from that point *de novo*. This Declaration thus constitutes a partly concurring and partly dissenting opinion.

2. In the 1954 Agreement on a Special Zone, the Parties acknowledged the existence of the maritime boundary between them (United Nations, *Treaty Series (UNTS)*, Vol. 2274, p. 527). The text of Article 1 of that Agreement leaves no doubt on this point when it states that "[a] special zone is hereby established, at a distance of 12 nautical miles from the coast, extending to a breadth of 10 nautical miles on either side of *the parallel*

which constitutes the maritime boundary between the two countries" (emphasis added). As the Court concluded, "[t]he 1954 Agreement is decisive in this respect" (Judgment, paragraph 91).

The 1954 Agreement on a Special Zone does not establish the maritime boundary but recognizes its existence. I do not consider as relevant the practice of the Parties under that Agreement in determining the extent of that maritime boundary. Boundaries are not established just for fishermen conducting their activities from small boats. Boundaries serve more general purposes. Rather, in my view, the maritime boundary between Peru and Chile extends to a distance corresponding to that which the Parties have been maintaining in their claims to exclusive sovereignty and jurisdiction over the sea and sea-bed along the coasts of their respective mainland territories.

3. In its Judgment, the Court has determined, by specifying the westernmost point on the parallel, which according to it, constitutes the endpoint of the agreed maritime boundary, the western limit of the special maritime zone, while the Parties in their 1954 Agreement refrained from setting such a limit. By contrast, they specified the eastern limit of the special maritime zone (at a distance of 12 nautical miles from the coast), the northern and southern limits (at 10 nautical miles from the parallel), leaving the zone open on its western side. In my view, this deliberate choice by the Parties can only lead to the conclusion that the special maritime zone was meant to extend seaward along the parallel up until the limit of the Parties' maritime entitlements, for a distance which also corresponded to their claimed maritime zones at that time. By its Judgment, the Court closes the special maritime zone at a distance of just 80 nautical miles from the coast.

In my view, there is insufficient evidence to conclude that the agreed maritime boundary extends only to 80 nautical miles. The evidence rather points to a different conclusion.

4. The fundamental issue is whether an agreement concluded for a particular purpose, namely the Agreement establishing a special maritime zone, that is to say, a zone of tolerance for small fishing vessels with insufficient navigation equipment, could have implicitly determined the outer limit of the pre-existing maritime boundary at a distance of 80 nautical miles when the Parties openly and publicly claimed maritime zones extending at least to 200 nautical miles. Such an interpretation seems to run counter to the intention of the Parties when the evidence is appreciated as a whole.

5. It is now common ground between the Parties that the Santiago Declaration (hereinafter "Declaration") *is* a treaty (*UNTS*, Vol. 1006, p. 323). The Declaration was adopted because the Governments of Chile, Peru and Ecuador were "determined to conserve and safeguard for their respective peoples the natural resources of the maritime zones adjacent to their coasts" as "the former extension of the territorial sea and the contiguous zone [were] inadequate for the purposes of the conservation, development and exploitation of these resources" (paragraph I of the Declaration). Therefore, the three Governments proclaimed "as a norm of their international maritime policy that they each possess exclusive sovereignty and jurisdiction over the sea along the coasts of their respective countries to a minimum distance of 200 nautical miles from these coasts" (paragraph II of the Declaration). As further specified in that instrument, "[t]he exclusive jurisdiction

and sovereignty over this maritime zone shall also encompass exclusive sovereignty and jurisdiction over the seabed and the subsoil thereof" (paragraph III of the Declaration). By adopting these two provisions, the three States laid their claim to 200-nautical-mile territorial seas as they claimed therein not only jurisdiction but also sovereignty. These claims were certainly "novel" and it took almost three decades for international law to develop and recognize 200-nautical-mile jurisdictional rights for the coastal State in the form of the exclusive economic zone and the continental shelf. As for sovereignty, the present-day law of the sea allows the coastal State to exercise it only up to 12 nautical miles from its coast; that distance represents the outer limit of the territorial sea.

6. Although at the moment of its adoption, the Declaration was not in conformity with general international law of that epoch, and still remains so in relation to extant general international law as regards the claim to sovereignty up to 200 nautical miles from the coast, this does not mean that the Declaration has been void *ab initio*. It has produced legal effects between the Parties to it.

7. According to Chile, it is paragraph IV of the Declaration which is relevant for the establishment of the maritime boundary between the two Parties. This provision reads as follows:

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

8. This provision, as its introductory part clearly states, concerns the delimitation of the maritime zones generated by islands; either the boundaries around the islands, or the boundaries in areas where the claims generated by the islands overlap with the claims generated by the mainland coast of another country. It is only in the latter scenario that the concept of "the parallel" is referred to.

9. The *travaux préparatoires* of the Declaration1 reveal that the original draft of this text did not limit an overlapping insular maritime zone by reference to the parallel; rather, the insular maritime zone would be limited, "in the corresponding part, to the distance that separates it from the maritime zone of the other State or country". It was the Ecuadorian delegate, Mr. Fernández, who "observed that it would be advisable to provide more clarity to article 3 [which later became paragraph IV], in order to avoid any error in the interpretation of the interference zone in the case of islands", and suggested "that the declaration be drafted on the basis that the boundary line of the jurisdictional zone of each country be the respective parallel from the point at which the frontier of the countries touches or reaches the sea" *(ibid.*, see footnote 1). All delegates were in agreement with that proposal (*ibid.*, p. 319).

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[1] Act of the First Session of the Juridical Affairs Commission of the First Conference of the Exploitation and Conservation of the Marine Resources of the South Pacific, Memorial of Peru, Ann. 56 (Memorial of Peru, Vol. II, p. 320, agreed revised translation).

10. Draft Article 3 also provided that "[t]he zone . . . comprises all waters within the perimeter formed by the coasts of each country and a mathematical parallel projected into the sea to 200 nautical miles away from the mainland, along the coastal fringe" (*ibid.*, p. 318).

11. The text is almost identical to that contained in the Presidential Declaration of Chile concerning Continental Shelf of 23 June 1947 (Memorial of Peru, Vol. II, Ann. 27). The contemporaneous Peruvian act contained a similar text. The Supreme Decree No. 781 of 1 August 1947, in its relevant part, reads as follows:

> "[Peru] will exercise the same control and protection on the seas adjacent to the Peruvian coast over the area covered between the coast and an imaginary parallel line to it at a distance of two hundred (200) nautical miles measured following the line of the geographical parallels." (Memorial of Peru, Vol. II, Ann. 6, pp. 26-27.)

12. The concept of parallels is thus used in both domestic acts by which Peru and Chile formulated their maritime claims in 1947. It is true that the parallel is used to describe the outer limit of the claimed maritime zones, following a line which is parallel with the lines of the coast. What is of interest to note is the Chilean Presidential Declaration's reference to "*the perimeter* formed by the coast and the mathematical parallel projected into the sea at a distance of 200 nautical miles from the coasts of Chilean territory" (emphasis added).

The word "perimeter" clearly implies that the zone would have limits on all its sides. The word "perimeter" is defined as "the continuous line or lines forming the boundary of a closed geometrical figure or of any area or surface"2.

Therefore, it seems that when the Parties originally formulated their maritime claims in a unilateral way, they envisaged that their resulting maritime zones would have limits, not just on their western side, for the determination of which they used a *tracé parallèle* methodology.

13. It would be, however, a step too far to assert that the 1952 Declaration expressly established the parallel as the boundary between the zones of Chile and Peru, respectively. Paragraph IV of that Declaration is limited to "the case of island territories". On the other side, the question can be asked whether the boundary separating the zone generated by an island and the zone generated by the mainland coast of another State would continue once the parallel used for separating them reaches its endpoint, the point where it will be 200 nautical miles from the island. Does it mean that there would be a boundary solely between the maritime zone generated by the island and the zone generated by the mainland coast of another State, but there would not be a boundary separating the two zones generated by the adjacent mainland coasts of the two neighbouring States?

14. What happened in the Second Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific, held in December 1954, sheds a little bit

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[2] *Shorter Oxford English Dictionary*, Fifth Edition, Vol. 2, 2002, p. 2159; in the original Spanish text of the Declaration the word used is "perímetro". Similarly, a Spanish language dictionary defines "perímetro" as "[el] [c]ontorno de una superficie", or as "[el] [c]ontorno de una figura" (*Diccionario de la Lengua Española*, Vigésima Segunda Edición, 2001, p. 1732).

more light on the issue. During discussions regarding the Complementary Convention to the Declaration of Sovereignty on the Two-Hundred-Mile Maritime Zone (hereinafter "Complementary Convention"), the Ecuadorian delegate proposed including an article "clarifying the concept of the dividing line of the jurisdictional sea". He added that the concept "ha[d] already been expounded at the Conference of Santiago, but which would not be redundant to *repeat* herein" (Counter-Memorial of Chile, Vol. II, Ann. 38, p. 341, revised translation; emphasis added).

15. The Peruvian and Chilean delegates believed that "Article 4 [i.e., paragraph IV in the Court's language] of the Declaration of Santiago [was] already sufficiently clear and [did] not require a new exposition" *(ibid.)*.

Since the Ecuadorian delegate insisted that "a declaration to that effect should be included in the Convention, because Article 4 of the Declaration of Santiago [was] aimed at establishing the principle of delimitation of waters regarding the islands", the President of the Conference asked him whether "he would accept, instead of a new article, that a record [be] kept in the Minutes" *(ibid.)*.

The Minutes further show that

> "[t]he Delegate of Ecuador state[d] that if the other *countries* consider[ed] that no explicit record [was] necessary in the Convention, he agree[d] to record in the Minutes that *the three countries consider[ed] the matter on the dividing line of the jurisdictional waters resolved* and that *said line [was] the parallel* starting at the point at which the land frontier between both countries reaches the sea" (*ibid*.; emphasis added).

The delegate of *Peru* expressed "his agreement with doing that, but clarifie[d] that this *agreement was already established* in the Conference of Santiago" (*ibid*., p. 342; emphasis added).

16. On the basis of the above, one can conclude that the Parties agreed in 1954 to confirm that their 1952 Santiago Declaration was adopted on the understanding that the parallel starting at the point where their land frontier reaches the sea constituted the line dividing the zones they respectively claimed.

17. Moreover, the Complementary Convention expressly states that "[a]ll the provisions of this Convention shall be deemed to be an integral and complementary part of, and shall not abrogate in any way, the resolutions and agreements adopted at the Conference . . . held at Santiago de Chile in August 1952".

18. The 1954 Lima Conference also adopted the Agreement Relating to a Special Maritime Frontier Zone. According to Article 1 of that instrument, "[a] special zone is hereby established, at a distance of 12 nautical miles from the coast, extending to a breadth of 10 nautical miles on either side of *the parallel which constitutes the maritime boundary between the two countries*"[3]. Similarly, the preamble of this Agreement also

[3] Emphasis added, revised translation. The authentic text in Spanish reads as follows: "Establécese una Zona Especial, a partir de las 12 millas marinas de la costa, de 10 millas marinas de ancho a cada lado del paralelo que constituye el límite marítimo entre los dos países." (Memorial of Peru, Vol. II, Ann. 50, p. 274.)

references the existence of the maritime boundary by highlighting that "[e]xperience has shown that innocent and inadvertent *violations of the maritime frontier between adjacent States* occur frequently" by small vessels (emphasis added).

19. The *travaux préparatoires* reveal that the Agreement on a Special Maritime Zone was negotiated following the adoption of the Minutes described above, and that the current text incorporated a proposal by the Ecuadorian delegate to include in this provision "the concept already declared in Santiago that the parallel starting at the boundary point on the coast constitutes the maritime boundary between the neighbouring signatory countries" (Counter-Memorial of Chile, Vol. II, Ann. 39, p. 356).

20. The Agreement also stipulates that all its provisions "shall be deemed to be an *integral and complementary part of*, and not in any way to abrogate, the resolutions and *agreements* adopted at the Conference . . . held in Santiago de Chile in August 1952" (emphasis added; revised translation, see footnote 3). Thus, on the basis of this provision, "the parallel which constitutes the maritime boundary between the two countries", contained in Article 1 of the Agreement, "shall be deemed to be an integral and complementary part of" the Santiago Declaration.

21. In January 1955, Peru adopted a Supreme Resolution, which had as its purpose "to specify in cartographic and geodesic work the manner of determining the Peruvian maritime zone of 200 [nautical] miles referred to in the Supreme Decree of 1 August 1947 and the Joint

Declaration signed in Santiago on 18 August 1952 by Peru, Chile and Ecuador" (Memorial of Peru, Vol. II, Ann. 9, p. 39). That zone is defined as follows:

> "1. The said zone shall be limited at sea by a line parallel to the Peruvian coast and at a constant distance of 200 nautical miles from it;
>
> 2. In accordance with clause IV of the Declaration of Santiago, the said *line may not extend beyond that of the corresponding parallel at the point where the frontier of Peru reaches the sea*." (*Ibid.*; emphasis added.)

Although the text of the Resolution does not expressly determine the boundary line of the two adjacent zones, it again implies that the boundary line would follow the parallel, otherwise it would not be possible for the western "line parallel to the Peruvian coast" to meet "the corresponding parallel at the point where the frontier of Peru reaches the sea".

22. In light of all the above, my view is that the Parties considered the Santiago Declaration to have settled issues relating to the delimitation of their general maritime zones. While it is true that a look at the text of the Santiago Declaration reveals that the general maritime frontier is not expressly determined in any of its provisions, the 1954 Minutes and the Agreement on a Special Zone have to be taken into account and are relevant for the interpretation of the Santiago Declaration. Its paragraph IV makes an assumption about the general maritime frontier when establishing the Parties' agreement on another matter, namely limiting the entitlements of islands situated less than 200 nautical miles from the general maritime zone of the other State. Apparently, in 1952 the Parties thought the issue of their general maritime frontiers, separating their

general maritime zones adjacent to their mainland coasts, was so clear that there was no need for an explicit agreement in that regard, and just moved on to deal with a logically subsequent matter, namely the delimitation of insular zones in special cases. The Santiago Declaration should serve as *evidence* of the Parties' recognition of a settlement, and not as the actual *legal source* of that settlement.

23. In my view, it was well established by 1955 that Peru and Chile considered the Santiago Declaration to have legally settled the issue of the lateral delimitation of their 200-nautical-mile zones of exclusive "sovereignty" and jurisdiction, as declared separately by each of them in 1947 and jointly in 1952. Whether paragraph IV of the Santiago Declaration, viewed in isolation, is capable of sustaining this interpretation is less relevant. The important point is that officials who represented the Parties in their international relations agreed and declared that the issue was settled. And the fundamental point is that the 1954 Agreement on a Special Zone, which is deemed to be an integral and complementary part of the Santiago Declaration, confirms the existence of the maritime boundary between the two countries, along the parallel of latitude.

24. Some of the evidence, referred to by the Court in determining the extent of the agreed maritime boundary along the parallel, points in my view to a distance much longer than 80 nautical miles from the coast. Both Chilean and Peruvian delegates emphasized in relevant United Nations fora in 1956 and 1958, when the first codification of the law of the sea was on their agenda, the need to protect "all the marine flora and fauna living in the Humboldt current" (Judgment, paragraph 106). That Current, according to the information mentioned in the Judgment (paragraph 105), "was to be found at a distance of 80 to 100 nautical miles from the shore in the summer, and 200 to 250 nautical miles in the winter".

25. Not having been able to support the conclusion of the majority that the agreed maritime boundary, which follows the parallel of latitude passing through Boundary Marker No. 1, extends only to a distance of 80 nautical miles from its starting-point, I was not in a position to support the

Court's consequential conclusion on the way the boundary then continues. I wish to make clear that I do not take issue with the methodology employed by the Court for the construction of that continuation of the maritime boundary line, but rather with the distance at which the maritime boundary departs from the parallel.

26. Now that the maritime boundary between the Parties has been determined by the Court, and its decisions are to be respected, I agree with the Court's conclusion that it need not rule on Peru's submission concerning the so-called "outer triangle". The rights of Peru to that maritime space have been recognized in the Judgment by the way in which the Court has drawn the maritime boundary. The outer triangle is part of Peru's exclusive economic zone and continental shelf.

That would have been the result even if the Court had concluded that the agreed maritime boundary extended to 200 nautical miles from the coast. The outer triangle area lies beyond 200 nautical miles from the Chilean coast. That area, on the other hand, is within 200 nautical miles of Peru's coast. There is no evidence that Peru has

relinquished any entitlements under customary international law in areas beyond the 200-nautical-mile lateral boundary but still within 200 nautical miles of its coast. Thus, in my view, Peru has an entitlement under general international law to an exclusive economic zone and continental shelf in the outer triangle.

(Signed) Peter Tomka.

Declaration of Judge Sepúlveda-Amor

By itself, the 1954 Special Maritime Frontier Zone Agreement does not support the existence of a tacit agreement on maritime delimitation between Peru and Chile — Evidence of the establishment of a permanent maritime boundary on the basis of tacit agreement must be compelling — The Court's findings would rest on stronger grounds if they had been based on a thorough analysis of State practice.

1. Although I have voted with the majority in respect of all the operative clauses of the Judgment, I have serious reservations with regard to the approach adopted by the Court in relation to the initial segment of the maritime boundary. My misgivings concern, in particular, the Court's reasoning in support of the existence of a tacit agreement on delimitation.

2. In my view, the record does not support the conclusion that, by the time the 1954 Special Maritime Frontier Zone Agreement (henceforth, the 1954 Agreement) was adopted, a maritime boundary was already in existence along a parallel of latitude between Peru and Chile.

3. As a matter of principle, I do not take issue with the proposition that, in appropriate circumstances, a maritime boundary may be grounded upon tacit agreement. Likewise, I acknowledge that the fact that Chile deliberately and expressly refrained from invoking tacit agreement as a basis for its claims is no bar to the Court founding its decision on such legal grounds, for, in reaching its conclusions, the Court is not bound by the legal arguments advanced by either Party.

4. The fact remains, however, that the establishment of a permanent maritime boundary on the basis of tacit agreement is subject to a stringent standard of proof. As the Court stated in *Nicaragua* v. *Honduras*:

> "Evidence of a tacit legal agreement must be compelling. The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed. A *de facto* line might in certain circumstances correspond to the existence of an agreed legal boundary or might be more in the nature of a provisional line or of a line for a specific, limited purpose, such as sharing a scarce resource. Even if there had been a provisional line found convenient for a period of time, this is to be distinguished from an international boundary." (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 735, para. 253.)

5. In view of the above, I cannot subscribe to the conclusion that the 1954 Agreement alone "cements the tacit agreement" or that it otherwise decisively establishes its existence (Judgment, paragraph 91).

6. In assessing the scope and significance of the 1954 Agreement, one should keep in mind the narrow and specific purpose for which it was adopted, namely to establish a zone of tolerance for fishing activity operated by small vessels, not to confirm the

existence of a maritime boundary or to effect a maritime delimitation between the contracting parties.

7. Admittedly, the wording of Articles 1 to 3 suggests the acknowledgement of a maritime boundary of some sort along an undetermined parallel running beyond a distance of 12 nautical miles from the coast. At the same time, however, the 1954 Agreement — which was not ratified by Chile until the year 1967 — contains no indication whatsoever of the extent and nature of the alleged maritime boundary, or when and by what means it came into existence.

8. In this regard, I find the Court's inability to trace the origin of the Parties' delimitation agreement particularly telling. By the Court's own admission, the main official instruments dealing with maritime issues that preceded the 1954 Agreement, namely the 1947 Proclamations and the 1952 Santiago Declaration, did not effect a maritime delimitation between Peru and Chile (Judgment, paragraphs 43 and 62). However, the Court finds that a tacit agreement was in existence by the time that the 1954 Agreement was adopted. What specifically happened then, between 1952 and 1954, to warrant such a conclusion?

9. In connection with the circumstances surrounding the Santiago Declaration, the Court surmises that "there might have been some sort of shared understanding among the States parties of a more general nature concerning their maritime boundary" (Judgment, paragraph 69). And yet, nothing about the Parties' conduct or practice in the relevant period indicates that they reached a common understanding on the limits of their respective maritime spaces. No such suggestion emerges from the meeting of the Permanent Commission of the Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific, held in October 1954, or from the Second Conference on the Exploitation and Conservation of the Marine Resources of the South Pacific, held in December 1954. Nor does the domestic legislation of the Parties provide such evidence, be it prior or subsequent to the 1954 Agreement.

10. Although international law does not impose any particular form on the means and ways by which States may express their agreement on maritime delimitation, on such important a matter as the establishment of a maritime boundary one would expect to find additional evidence as to the Parties' intentions outside of the isolated and limited reference contained in the 1954 Agreement, particularly at a time when Peru and Chile were so actively engaged with maritime matters at the international level.

11. In short, whilst the importance of the 1954 Agreement should not be denied or diminished, neither should its relevance as evidence of a tacit agreement be overstated. In my opinion, there are strong reasons to interpret its provisions with caution and circumspection so as to avoid unwarranted legal inferences.

12. Paramount amongst those reasons is the historical context in which the 1954 Agreement was adopted, namely at a time when the concept of a 12-nautical-mile territorial sea entitlement had not attained general recognition and the very notion of an exclusive economic zone as later defined by the 1982 United Nations Convention on the Law of the Sea was foreign to international law. As noted by the Court in paragraph

116 of the Judgment, in the context of the 1958 Conference on the Law of the Sea, the proposal that came nearest to general international acceptance was "for a 6-nautical-mile territorial sea with a further fishing zone of 6 nautical miles and some reservation of established fishing rights".

13. This means that, in so far as it was supposed to extend beyond a distance of 12 nautical miles from the coast, the "maritime boundary" referred to in Article 1 of the 1954 Agreement largely concerned what at the time were considered the high seas, and thus not maritime zones over which the Parties had exclusive sovereign rights under international law or over which they could claim overlapping maritime entitlements. This circumstance alone casts a shadow of doubt on the true scope and significance of the "maritime boundary" acknowledged by the 1954 Agreement and limits the presumptions that can be reasonably drawn from that reference.

14. The inquiry into the possible existence of a tacit agreement on maritime delimitation should have led the Court to undertake a systematic and rigorous analysis of the Parties' conduct well beyond the terms of the 1954 Agreement.

15. This instrument merely suggests a possible agreement between the Parties, but falls short of proving its existence in compelling terms. On its own, it cannot ground a finding of tacit agreement on maritime delimitation between Peru and Chile.

16. Tacit agreement did not manifest itself overnight in the year 1954, as the Judgment seems to imply. Given the evidence before the Court in this case, it is only through the scrutiny of years of relevant State practice that it is possible to discern the existence of an agreed maritime boundary of a specific nature and extent between the Parties. The Court approaches these legal inquiries as separate when, in fact, they are inextricably linked in law and in fact. Unfortunately, the analysis of State conduct remains underdeveloped and peripheral to the Court's arguments when it should be at the centre of its reasoning.

17. The legal bar for establishing a permanent maritime boundary on the basis of tacit agreement has been set very high by the Court, and rightly so. I fear the approach adopted by the Court in the present case may be interpreted as a retreat from the stringent standard of proof formulated in *Nicaragua* v. *Honduras*. This is not, however, how the present Judgment is to be read, as it is not predicated upon a departure from the Court's previous jurisprudence.

18. Maritime disputes count, without doubt, amongst the most sensitive issues submitted by States to international adjudication. I hope the present Judgment will contribute to the maintenance of peaceful and friendly relations between Peru and Chile and, thereby, strengthen the public order of the oceans in Latin America.

(Signed) Bernardo Sepúlveda-Amor.

SEPARATE OPINION OF JUDGE OWADA

1. The Judgment, in its operative part *(dispositif)* states the decision of the Court, *inter alia*, as follows:

"The Court,

(1) . . .

Decides that the starting-point of the single maritime boundary delimiting the respective maritime areas between the Republic of Peru and the Republic of Chile is the intersection of the parallel of latitude passing through Boundary Marker No. 1 with the low-water line; . . .

(2) . . .

Decides that the initial segment of the single maritime boundary follows the parallel of latitude passing through Boundary Marker No. 1 westward; . . .

(3) . . .

Decides that this initial segment runs up to a point (Point A) situated at a distance of 80 nautical miles from the starting-point of the single maritime boundary; . . .

(4) . . .

Decides that from Point A, the single maritime boundary shall continue south-westward along the line equidistant from the coasts of the Republic of Peru and the Republic of Chile, as measured from that point, until its intersection (at Point B) with the 200-nautical-mile limit measured from the baselines from which the territorial sea of the Republic of Chile is measured; . . ." (Judgment, paragraph 198).

2. Although I have accepted the conclusions contained in these operative paragraphs, I have not been able to associate myself fully with the reasoning which has led the Court to this conclusion relating to the concrete delimitation of the single maritime boundary between Peru and Chile. I wish to explain in some detail my reasons why I have to maintain my reservations with regard to some aspects of the Judgment, in spite of my vote in favour of the final conclusions that the Judgment has reached.

3. The Judgment comes to the above conclusions on the basis of a number of findings it made as explained in its reasoning part. They can be summarized as follows:

(1) The Judgment rejects the position of the Respondent, developed in its contention that "the respective maritime zone entitlements of Chile and Peru have been fully delimited by agreement" (Judgment, paragraph 14; Final Submissions of Chile *(b)* (i)), more specifically, by the 1952 Santiago Declaration. I fully endorse this position of the Judgment.

(2) The Judgment does not accept the position of the Applicant either, as based on its contention that "[t]he maritime zones between Chile and Peru have never been delimited by agreement or otherwise" (Application, para. 2), and that therefore

> "[t]he delimitation between the respective maritime zones between [Peru] and [Chile], is a line starting at 'Point Concordia' . . . and equidistant from the baselines of both Parties, up to a point situated at a distance of 200 nautical miles from those baselines" (Judgment, paragraph 14; Final Submissions of Peru (1)).

I equally support this position of the Judgment.

(3) In their stead, the Judgment finds in the contexts of the 1954 Agreement on the establishment of the "Special Maritime Frontier Zone" (hereinafter "1954 Agreement"), as well as the 1968-1969 arrangements for the construction of lighthouses, that the Parties acknowledge, in spite of, and separately from, the finding outlined in (1) above, the existence of an agreement between the Parties on a maritime (zone) boundary along the parallel of latitude up to 80 nautical miles from the starting-point. On this finding of the Court, however, I have to express my serious reservation.

4. On the basis of these findings, which form the legal premise from which the *dispositif* of the Judgment is derived, the Judgment comes to the conclusion that

> "the initial segment of the single maritime boundary follows the parallel of latitude passing through Boundary Marker No. 1 westward;
>
> . . . . . .
>
> that this initial segment runs up to a point (Point A) situated at a distance of 80 nautical miles from the starting-point of the single maritime boundary;
>
> . . . . . .
>
> [and] that from Point A, the single maritime boundary shall continue south-westward along the line equidistant from the coasts of [Peru] and [Chile], as measured from that point, until its intersection (at Point B) with the 200-nautical-mile limit measured from the baselines from which the territorial sea of [Chile] is measured." (Judgment, paragraph 198.)

5. Inasmuch as the Judgment takes the view that the 1952 Santiago Declaration did not contain an agreement on the delimitation of the zones of the respective maritime entitlements of the Parties to the Declaration, and that the 1954 Agreement acknowledges the existence of an agreement delimiting the zones of the respective maritime entitlements of the Parties to the present dispute, the Judgment has to establish:

(a) that there has been some new legal fact (acts/omissions) on the part of the Parties to the present dispute that legally created an agreement setting forth a single maritime boundary between the Parties along the parallel of latitude passing through Boundary Marker No. 1; and

(b) that this single maritime boundary, which follows the parallel of latitude, extends only to a distance of 80 nautical miles, beyond which there does not exist any delimited maritime boundary accepted by the Parties (by agreement or otherwise).

6. The present Judgment, however, does not seem to have substantiated these points with sufficiently convincing supporting evidence. Especially problematical to my mind are the following two points:

(a) the Judgment states quite categorically that the Parties acknowledge in the 1954 Agreement the existence of a maritime boundary for all purposes between them, without showing how and when such agreement came about and what concretely this agreement consists in;

(b) the Judgment observes in this connection that this maritime boundary acknowledged by the Parties as a line of parallel of latitude passing through Boundary Marker No. 1, should be regarded as extending up to a distance of 80 nautical miles but no further.

I shall try to focus my examination especially on these two issues.

(a) ***On what legal basis does the Judgment declare that the Parties acknowledge the existence of the maritime boundary along a parallel of latitude?***

7. Throughout the pleadings, Chile has consistently maintained its position that the 1952 Santiago Declaration was the legal basis, i.e., *fons et origo* of the maritime boundary between Chile and Peru, which "established an international maritime boundary along the parallel of latitude passing through the starting-point of the Peru-Chile land boundary and extending to a minimum of 200 nautical miles" (Judgment, paragraph 22). The Judgment, quite correctly in my view, has rejected this position, both as a matter of interpretation of the provisions of the Declaration and on the basis of its legislative history as revealed in the *travaux préparatoires* of the Santiago Conference.

8. Proceeding to the 1954 Agreement Relating to a Special Maritime Frontier Zone, however, the Judgment, in an almost Delphic manner, declares as follows:

> "In the view of the Court, the operative terms and purpose of the 1954 Special Maritime Frontier Zone Agreement are . . . narrow and specific [but] [t]hat is not however the matter under consideration by the Court at this stage. Rather, its focus is on one central issue, namely, the existence of a maritime boundary. On that issue *the terms of the 1954 Special Maritime Frontier Zone Agreement, especially Article 1 read with the preambular paragraphs, are clear*. They acknowledge in a binding international agreement that a maritime boundary already exists." (Judgment, paragraph 90; emphasis added.)

The Judgment concludes that "[t]he Parties' express acknowledgment of [the maritime boundary's] existence can only reflect a tacit agreement which they had reached earlier" (Judgment, paragraph 91).

9. After close scrutiny of "the terms of the 1954 Special Maritime Frontier Zone Agreement, especially Article 1 read with the preambular paragraphs" (Judgment,

paragraph 90), I fail to see how these provisions can be said to be so "clear" as to justify this conclusion.

10. The Preamble and Article 1 of the 1954 Agreement provide as follows:

"Considering that:

Experience has shown that innocent and inadvertent violations of the maritime frontier between adjacent States occur frequently because small vessels manned by crews with insufficient knowledge of navigation or not equipped with the necessary instruments have difficulty in determining accurately their position on the high seas;

The application of penalties in such cases always produces ill-feeling in the fishermen and friction between the countries concerned, which may affect adversely the spirit of co-operation and unity which should at all times prevail among the countries signatories to the instruments signed at Santiago; and

It is desirable to avoid the occurrence of such unintentional infringements, the consequences of which affect principally the fishermen;

Have agreed as follows:

1. A special zone is hereby established, at a distance of 12 nautical miles from the coast, extending to a breadth of 10 nautical miles on either side of the parallel which constitutes the maritime boundary between the two countries."

11. It should be clear from those passages quoted above, that the plain and ordinary meaning of the language used is anything but "clear". The crucial words in Article 1 state that "[a] special zone is hereby established . . . extending to a breadth of 10 nautical miles on either side of *the parallel which constitutes the maritime boundary between the two countries*" (1954 Agreement; emphasis added). This wording, however, can be read either as declaratory of the legal situation that already exists, as the Judgment claims, or as constitutive of a line which the Parties created for the implementation of the purposes of this functional agreement. There is no clue to clarify this point in the Preamble, which contains no language whatsoever that refers to this point.

12. In my view, this language, in its plain meaning, does not, as such and without additional evidence, warrant the existence of a tacit agreement establishing such a boundary for all purposes between the Parties. Tacit agreements establishing any type of international boundary, either land or maritime, are exceptional for the simple reason that when it comes to the question of territorial sovereignty, States almost always are extremely jealous of safeguarding their sovereignty, and, in a situation involving the issue of transfer of territorial sovereignty, normally act with particular care and caution. It is for this reason that the Court has always adopted a sceptical view towards the claim by a State that a tacit agreement exists establishing a maritime boundary in its favour. Thus the Court, in the recent cases involving territorial and maritime disputes, rejected the claim of one of the parties that a tacit agreement existed, stating that:

"[e]vidence of a tacit legal agreement must be *compelling*. The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not

> easily to be presumed." (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II),* p. 705, para. 219, quoting *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 735, para. 253; emphasis added.)

It is my view that this stringent standard is not met in the present case.

13. In the context of the present situation, where a provision of a treaty remains ambiguous or obscure after an effort to interpret it "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Vienna Convention on the Law of Treaties, Art. 31, para. 1) has not led to a satisfactory resolution, the natural course to follow is to have recourse to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion" (*ibid.*, Art. 32).

14. The *travaux préparatoires* of the 1954 Agreement reveal that the final version of the relevant language in Article 1 of the 1954 Agreement, relied upon by the Judgment to establish the existence of a tacit agreement on a maritime boundary, emerged in a murky situation which leads me to the conclusion that the Judgment rests on a factually quite dubious ground.

15. The 1954 Agreement establishing the "Zone of Tolerance" has its origin in a paper jointly submitted by the delegates of Ecuador and Peru at the Permanent Commission of the Conference on the Exploitation and Conservation of the Maritime Resources of the South Pacific (hereinafter "CPPS") on 8 October 1954. It is entitled the "Recommendation for the Establishment of a Neutral Zone for Fishing in the Maritime Frontier of the Neighbouring States" of the Santiago Conference. As originally proposed, the aim of this paper was stated as "[t]he creation of a neutral zone at a distance of 12 nautical miles from the coast, extending to a breadth of ten nautical miles on either side of the parallel which passes through *the point of the coast that signals the boundary between the two countries*" (emphasis added). This recommendation was adopted by the CPPS and later became the 1954 Agreement. This initial language explaining the goal of the 1954 Agreement gives no indication whatsoever for the existence of a tacit agreement establishing a maritime boundary. Rather, it refers to "the parallel which passes through the point of the *coast* that signals the boundary between the two countries" (Judgment, paragraph 73; emphasis added), suggesting that what the drafters were indicating was the *land* boundary between the countries concerned.

16. The case file before the Court submitted by the Parties does not contain any other document indicating that any changes had been made to this language subsequently, until two months later when this resolution adopted by the CPPS was presented as a draft for agreement to the 1954 Conference on 3 December 1954. At this Conference, the Ecuadorian delegate proposed that "the concept already declared in Santiago that the parallel starting at the boundary point on the coast constitutes the maritime boundary between the neighbouring signatory countries, [be] incorporated into this article", together with the change of the title of the agreement from "Establishment of a Neutral Fishing and Hunting Zone" to "Special Maritime Frontier Zone". Article I was thus "amended", apparently without any discussion, to its present wording, incorporating

the phrase "the parallel which constitutes the maritime boundary between the two countries" (Judgment, paragraph 73). Thus, the *travaux* of the Conference would seem to indicate that the language of Article 1 of the 1954 Agreement, relied upon by the Judgment to prove the existence of a tacit agreement, was to my mind drafted reflecting the perception of the delegate of Ecuador that what he was proposing was no more than what had already been "declared in Santiago" in 1952.

17. As the Judgment has concluded—correctly, in my view—that the 1952 Santiago Declaration in fact had *not* declared that the parallel starting at the boundary point on the coast constituted a maritime boundary, it seems reasonable to assume that what the Ecuadorian delegate was referring to in fact was the "principle of delimitation of waters regarding the islands", enshrined in Article 4 of the 1952 Santiago Declaration. Be that as it may, regardless of the thinking of the Ecuadorian delegate, the Judgment takes a position that no maritime boundary agreements had been reached in Santiago in 1952, other than those relating to islands. The *travaux* of the 1954 Agreement thus demonstrate that the language of Article I of the 1954 Agreement does not seem to endorse the reasoning on which the Judgment is based that a tacit agreement had arisen between the Parties during the period between 1952 to 1954. It is possible, though, that what took place in 1954 may have reflected some perception or confusion in the mind of some delegates at the CPPS conference as to exactly what had been "declared in Santiago" in 1952. But such perception or confusion has been dispelled and clarified by the Judgment.

18. The 1968-1969 lighthouses arrangements similarly do not provide "compelling" evidence of the existence of a tacit agreement establishing an all-purpose maritime boundary. As the Judgment itself acknowledges, what emerges from these arrangements is that the arrangements *proceeded* on the premise that a maritime boundary of some sort extending along the parallel beyond 12 nautical miles had "already exist[ed]" (Judgment, paragraph 99), without any specific language to that effect found in the arrangements concerned. The Judgment, quoting from the opening paragraph of a document which was signed by the delegates of the Parties to those negotiations for the purpose of making a number of practical submissions for the examination and determination of their respective Governments on the location of the lighthouses to be constructed, states as follows:

> "on 26 April 1968, following communication between the Peruvian Ministry of Foreign Affairs and the Chilean chargé d'affaires earlier that year, delegates of both Parties signed a document whereby they undertook the task of carrying out 'an on-site study for the installation of leading marks visible from the sea *to materialise the parallel of the maritime frontier* originating at Boundary Marker number one (No. 1)'" (Judgment, paragraph 96; emphasis added).

19. Based on this fact, the Judgment concludes that "[a]long with the 1954 Special Maritime Frontier Zone Agreement, the arrangements acknowledge that [a maritime boundary extending along the parallel beyond 12 nautical miles *already* exists]" (Judgment, paragraph 99; emphasis added). These arrangements are thus no more than a logical follow-up of the 1954 Agreement, and add nothing more (or less) to what the

1954 Agreement prescribes (or does not prescribe) about the nature of the parallel as a line of maritime demarcation.

20. In my view, for the Judgment to conclude from the language of the 1954 Agreement that the Parties reached a tacit agreement on their maritime boundary, it is essential that the Court is able to establish the following two points:

(a) that such agreement between the Parties on a maritime boundary extending along the parallel beyond 12 nautical miles came to exist between the Parties at some point in time on the basis of some legal acts or omissions of the Parties subsequent to the 1952 Santiago Declaration, but prior to the 1954 Agreement; and

(b) that the agreement on this maritime boundary is of such a nature as would amount to the definitive and all-purpose boundary constituting the lateral maritime border between the two neighbouring States of Peru and Chile for the purposes of the delimitation of their respective maritime zone entitlements (Judgment, paragraph 14; Final Submissions of Chile *(b)* (ii) and Final Submissions of Peru (1)).

21. It is my submission that the Judgment has not succeeded in establishing these two points.

(b) ***Where does this maritime boundary line terminate?***

22. The next question is the length to which this alleged maritime boundary line extends. This issue is inseparably linked with the first question. If the Parties, for whatever reason and under whatever circumstances, had come to accept the parallel of latitude as the definitive maritime boundary line for all purposes, as the Judgment assumes it to be on the basis of the 1954 Agreement and the 1968-1969 lighthouses arrangements, then there should be no reason to think that this line should terminate at a distance of 80 nautical miles from the starting-point. It could instead extend to the maximum of 200 nautical miles.

23. In this respect, a frequent reference is made in the Judgment to the fact that under the 1954 Agreement, whose purpose was specific and limited, such a line (or the acknowledgment of it) would not have been required beyond the distance of 80 nautical miles, because the maximum limit of the fisheries activities of Peru and Chile in those days did not go further than 80 nautical miles, as demonstrated by the statistics supplied by the United Nations Food and Agricultural Organization (FAO).

24. It is accepted that the real situation on the ground (or rather on the sea!) obtaining at the time of the 1954 Agreement and the 1968-1969 lighthouses arrangements at the relevant period — i.e., the period between the 1950s and 1970s — was as described in the Judgment. But "the real situation on the ground" relating to fishing activities should have no relevance to the consideration of this issue by the Judgment, if the reasoning of the Judgment were that a tacit agreement had come to exist as an all-purpose maritime boundary along the parallel of latitude. If the boundary which the Parties are supposed to have acknowledged were indeed an all-purpose one, it would be extremely difficult to argue that its length be limited by relying upon the evidence relating to fishing activities and to justify this conclusion that the boundary line along the parallel of latitude should

stop at a distance of 80 nautical miles. As the Judgment quite rightly acknowledges, "the all-purpose nature of the maritime boundary . . . means that evidence concerning fisheries activity, in itself, cannot be determinative of the extent of that boundary" (Judgment, paragraph 111). Logically there should be no reason why the line should stop at 80 nautical miles, rather than extending to the 200-nautical-mile limit, as each of the Parties claimed in the Santiago Declaration.

25. If we start, on the contrary, from the premise that this boundary line should stop at some point less than 200 nautical miles for the reason that the real situation on the ground relating to the actual fishing activities obtaining in the sea area extended only to a certain point, then the rationale for relying upon that distance has to be based on the legal nature of the line not as a line of a permanent delimitation of the maritime boundary for all purposes, but as a line of a maritime zone for the specific purposes of creating the regulatory régime for fisheries in line with the specific purposes of the 1954 Agreement and of the 1968-1969 lighthouses arrangements.

It seems to me that the Judgment in the present case cannot escape this dilemma created by its own reasoning, as long as the Judgment is based on the presumed (but not proven) existence of a tacit agreement on the permanent maritime boundary.

26. Instead of basing its reasoning for the existence of a line of demarcation on the acknowledgment of tacit agreement on a maritime boundary of an all-purpose nature, the Judgment should base itself on a slightly modified legal reasoning along the following lines:

(1) The Court should reject, as the present Judgment does, the contention of the Respondent that the 1952 Santiago Declaration constitutes an agreement on the part of the Parties thereto to recognize and accept a maritime boundary line, following a parallel of latitude drawn from the point of the intersection of the existing land boundary between the States concerned with the low-water line of the sea.

(2) The practice of the States involved in the field of exercising national jurisdiction in the sea, in particular, relating to the fishing activities of Chile and Peru in the region, which gradually emerged in the years through the Santiago Declaration and beyond, as reflected in the processes of creating a special "Zone of Tolerance" in 1954 and of establishing lighthouses in 1968-1969, demonstrates the gradual emergence of a tacit understanding among the Parties to accept some jurisdictional delimitation of the area of national competence in the sea along the line of latitude, especially for the purposes of the regulation of fisheries. This acceptance of the zoning of the maritime areas would appear to have developed *de facto* specifically in the lateral direction (along the coasts) to enclose sea areas belonging to each of the Parties for the purposes of fishing activities, which in those days were primarily focused on the fishing resources within the coastal waters (especially anchovy fishing). Those fishing activities were rapidly growing during this period in the waters within the distance of roughly 50 nautical miles off the coasts of Peru and Chile. This development of tacit acceptance took place, in addition to the Parties' explicit acceptance, achieved by the 1952 Santiago Declaration, of the extension of maritime zones in the horizontal (seaward) direction extending to 200 nautical miles for the joint defence of the

natural resources of fisheries against the foreign *ocean going fishing fleets* engaged in deep water fishing off their coasts (e.g., whaling and tuna fishing). This practical need to enclose coastal fishing areas off the coasts of Peru and Chile, developed through the years after the 1952 Santiago Declaration, led the Parties to come to a series of related agreements adopted in the 1954 Conference in implementation of the Santiago Declaration.

The process of this tacit acceptance through State practice in the regulatory régime, primarily for the regulation of fishing activities through enclosing the sea areas for the respective Parties, came to develop apparently without taking the form of an agreement, tacit or express, between the Parties. This tacit acceptance came to be reflected in the form of a *de facto* delimitation of the lateral maritime boundary along the coasts of the neighbouring States of Peru and Chile, primarily to deal with the practical need for regulating coastal fishing activities of the area, along the line of parallel of latitude.

(3) As this has been a process of tacit acceptance that came to emerge in the form of a gradual development through the practice of the States concerned, without involving any formal act of effecting an agreement, tacit or express, through the years of the 1950s to 1970s, it is not possible nor necessary in my view to pinpoint when and how this tacit acceptance crystallized into a normative rule that the Parties came to recognize as constituting the legal delimitation of their respective zones of maritime entitlement in the coastal areas close to both countries, nor to define in precise terms how far this legal delimitation extended. It would seem safe to state, however, that such a normative rule did indeed develop, especially in relation to the regulation of fisheries, during the period between the 1950s and 1970s.

(4) The 1954 Agreement on the Special Zone of Protection thus cannot be considered as an agreement which *de novo* created a new maritime zone boundary on the basis of a parallel of latitude to delimit the lateral boundary between the States involved. It was not the *fons et origo* of the new maritime title based on the parallel of latitude and as such not constitutive of a new title to the States concerned. In this sense the position taken by the Judgment in my view is justified.

(5) Nor in my view was the 1954 Agreement declaratory, conferring as such the maritime titles of the respective States created by an already existing (but not identified or identifiable) agreement, which the Judgment declares to have been acknowledged by the Parties in the 1954 Agreement. The Parties in the 1954 Agreement accepted this line as a maritime boundary line primarily for the practical purpose of regulating conflicts between fishermen of the region and the States enforcing fisheries laws in their respective jurisdictions, which had the practical purpose of clarifying the lateral extent of the limits of their respective maritime jurisdiction (specifically on fishing) in the relevant maritime areas of their respective coasts.

In my view, the 1954 Agreement did not purport to acknowledge an existing agreement for the maritime zone delimitation that would have definitively defined the limits of the Parties' maritime jurisdiction for all purposes.

(6) The 1954 Agreement nonetheless has had an important legal significance in the process of consolidating the legal title based on tacit acceptance through practice, as that agreement constitutes, to the extent of its practical application, a significant, or even decisive, element in the process of turning State practice into a normative rule. Together with the 1968-1969 lighthouses arrangements, the 1954 Agreement thus formed an important basis for the consolidation of a maritime title based on tacit acceptance by both Parties through their subsequent practice in the area during the period following the 1952 Santiago Conference until the 1970s.

(7) This analysis should be sufficient also for explaining the reason why there should be a limit for such delimitation line based on the parallel of latitude referred to in this Agreement of 1954. The tacit acceptance was based in its origin on State practice at that time and thus had to be limited to the extent of the actual fishing activities conducted by the coastal fishermen of the two States involved. It prompted the Parties to accept this development as a normative rule, inasmuch as such tacit acceptance had to be operative with regard to a certain sea area where fishermen of the States concerned were actually engaged in fishing.

(8) It is for this reason that the precise distance out to sea to which the sea area belonging to the two States was delimited between them has to be determined primarily in light of the reality of the State practice developed through these years, especially in the field of fishing activities in the relevant areas, since they formed the legal basis for the emergence of the tacit acceptance of the delimitation of the maritime areas. On the basis of this consideration, I come to the conclusion that a delimitation line along the parallel going beyond 80 nautical miles would be excessive in consideration of the reality of the fishing activities in the region, taking into account the predominant pattern of fishing activities by Peru and Chile in the relevant period. According to the opinion expressed in the literature regarding the analysis of the fishing pattern of those days of the 1950s to 1970s, together with the oceanographic and biological analysis of the flow of the Humboldt Current and the pattern of the fishing activities focusing predominantly on anchovy fishing in the area in those days, the reasonable geographic limit in which such fishing activities could be presumed to have been in operation would seem to be within the distance of 50 nautical miles from the respective coasts of Peru and Chile. When the *distance* from the coast is translated into the *length* of the line of parallel of latitude, this line corresponds roughly to 80 nautical miles from the point where the land boundary between Peru and Chile meets the sea (cf., Judgment, paragraphs 103-111).

27. I am therefore prepared to accept the figure of 80 nautical miles as the length of the parallel line to be drawn from the starting-point where the land boundary between the two countries reaches the sea as most faithfully reflecting the reality of State practice as primarily reflected in the fishing activities of the region in those days, when the parallel line of demarcation came to form a normative rule. On this reasoning, I find it difficult to accept the position that this line should extend to 100 nautical miles.

28. On this basis of analysis, the argument based on the consideration of equitable allocation of the entire sea area in dispute between the two contending States should

have no place in our consideration of the problem of how far this line of parallel of latitude should extend. As this line dividing the jurisdictional waters of the two Parties along the parallel is based on the tacit acceptance of the Parties, and thus to be regarded as the line of delimitation by agreement of the Parties and as such lying beyond the scope of the general principle of equitable allocation as enunciated by the United Nations Convention on the Law of the Sea (Arts. 74 and 83), the consideration of equitable principles in relation to this part of the area in question is irrelevant and should play no role in the Court's consideration of the issue as far as the maritime delimitation of this part of the maritime area in dispute between the parties is concerned. Such an approach cannot be justified as offering any legal justification on which the present Judgment should proceed in arriving at its conclusion.

(Signed) Hisashi OWADA.

Declaration of Judge Skotnikov

1. I have voted in favour of the Court's conclusions set forth in the operative clause. However, I do not agree with the Court's treatment of the issue of the extent of the maritime boundary between Peru and Chile.

2. I support the Court's conclusion that, prior to the signing of the 1954 Special Maritime Frontier Zone Agreement, there was a tacit agreement between the Parties concerning a maritime boundary between them along the parallel running through the point at which their land frontier reaches the sea. The emergence of such a tacit agreement is evidenced by certain elements of the 1947 Proclamations and the 1952 Santiago Declaration. This agreement was cemented in treaty form in the 1954 Special Maritime Frontier Zone Agreement, which states that the maritime boundary along a parallel already existed between the Parties (see Judgment, paragraphs 90 to 91).

3. I agree that the 1954 Special Maritime Frontier Zone Agreement, which acknowledged the existence of the tacit agreement, did leave some uncertainty as to the precise extent of the maritime boundary (see Judgment, paragraph 151). However, the Court could have dealt with this in the same manner that it resolved the issue of whether the maritime boundary is all-purpose in nature, namely, that "[t]he tacit agreement, acknowledged in the 1954 Agreement, must be understood in the context of the 1947 Proclamations and the 1952 Santiago Declaration" (Judgment, paragraph 102). Regrettably, the issue of the extent of the maritime boundary is considered by the Court outside this context.

4. To support its conclusion that the agreed maritime boundary does not extend to the length of the maritime zones claimed unilaterally through the 1947 Proclamations and then established in the 1952 Santiago Declaration, the Court makes, *inter alia*, an argument to the effect that the state of general international acceptance concerning a State's maritime entitlements during the 1950s indicates that the Parties were unlikely to have established their maritime boundary running to a distance of 200 nautical miles. I do not find this logic to be convincing. First, the 1947 Proclamations and the 1952 Santiago Declaration demonstrate that the Parties were willing to make maritime claims which did not enjoy widespread contemporaneous international acceptance. Second, establishing a maritime boundary between the Parties in the early 1950s to a distance of 200 nautical miles could only be understood as an agreement *inter partes*, enforceable primarily *inter se*. It is difficult to see why this would be more controversial than the 200-nautical-mile claims in the 1947 Proclamations and in the 1952 Santiago Declaration, which purport to create maritime zones to be defended against third States.

5. The Court treats the various practices discussed in the Judgment, such as fisheries and enforcement activities, as largely determinative of the extent of the agreed maritime boundary. I fail to see how the extent of an all-purpose maritime boundary can be determined by the Parties' "extractive and enforcement capacity" (Judgment, paragraph 149) at the time of the signing of the 1954 Agreement, which merely acknowledged the existing maritime boundary.

6. Even if one accepts the line of reasoning adopted by the Court, the determination of the figure of 80 nautical miles as the extent of the agreed maritime boundary does not seem to be supported by the evidence which the Court finds relevant. For example, the Court notes, basing this finding on the location of fish stocks and a reasonable estimation of the range of small fishing vessels, that Peruvian vessels in the early 1950s would have been operating approximately 100 nautical miles from the starting-point of the maritime boundary in the area which lies at a distance of 60 nautical miles from the principal Peruvian port of Ilo (see Judgment, paragraph 108). Accordingly, the evidence relied upon by the Court supports the notion that the extent of the agreed maritime boundary to be derived from the Parties' fishing practice would have been at least 100 nautical miles. As to the evidence concerning the potential location of fish stocks in the early 1950s (see Judgment, paragraphs 105 to 107), it does not convincingly demonstrate that the extent of the maritime boundary must have been 80 nautical miles, as opposed to any other figure.

7. However, given that the Parties' treatment of the extent of the agreed maritime boundary lacks the clarity which would have been expected in respect of an issue of that importance, it has been possible for me to join the majority in voting in favour of the third operative paragraph.

(Signed) Leonid Skotnikov.

Joint Dissenting Opinion of Judges Xue, Gaja, Bhandari and Judge *ad hoc* Orrego Vicuña

Introduction

1. According to the view of the majority of the Members of the Court, by 1954 some kind of tacit agreement had come into existence between Peru and Chile in order to define part of the lateral boundary between their respective maritime zones. However, the elements of that agreement have not been clearly identified. There is no indication as to when and how such an agreement was supposed to have been reached.

2. With regard to maritime boundaries, the only relevant agreement that was concluded between Peru and Chile before 1954 was the Santiago Declaration of 1952. Although this Declaration did not expressly define the boundary between the maritime zones generated by the continental coasts, it contains important elements of which any interpretation could not afford to lose sight, and which would give a more solid basis to the conclusion reached by the majority on the existence of an agreed boundary. This approach does not only have theoretical significance. While the majority labours to argue in favour of the idea that the agreement between Peru and Chile covers a distance of 80 nautical miles from the continental coast, the Santiago Declaration clearly indicates that the seaward end of the boundary extends to 200 nautical miles.

The 1952 Santiago Declaration

3. The Declaration on the Maritime Zone is a treaty, which was signed at the Santiago Conference on 18 August 1952 by the representatives of Chile, Ecuador and Peru (hereafter "the Santiago Declaration", or "the Declaration"), then approved by the respective Congresses and later registered with the UN Secretary-General by a joint request of the parties. During the proceedings, Peru had expressed doubts on the legal nature of the Santiago Declaration as a treaty, but later accepted this characterization.

4. The Santiago Declaration contains a specific provision on the delimitation of maritime zones. Paragraph IV of the Declaration states:

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

This provision explicitly refers only to the delimitation between maritime zones generated by islands and those generated by continental coasts. It first states that islands are entitled to a maritime zone extending for 200 nautical miles around their coasts. It then considers the case where an island or a group of islands belonging to one State is situated at a distance of less than 200 nautical miles from the general maritime zone of another State. This would create an overlap between maritime zones belonging to two different States.

In order to harmonize these claims, the Declaration adopts the criterion of cutting off the maritime zone pertaining to the island or the group of islands when it reaches the parallel passing through the point where the land frontier meets the sea *(el paralelo del punto en que llega al mar la frontera terrestre de los estados respectivos)*.

5. In paragraph IV the criterion for delimiting one general maritime zone from another such zone has not been explicitly set forth. However, when paragraph IV refers to an island or a group of islands at a distance less than 200 nautical miles from the general maritime zone of another State, it implies that some criterion has also been adopted for delimiting that general maritime zone, because it would otherwise be impossible to know whether an island or a group of islands is situated at less than 200 nautical miles from that zone.

6. Under the rules of treaty interpretation, treaty clauses must "be construed in a manner enabling the clauses themselves to have appropriate effects" (*Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13). Every term of a treaty should be given meaning and effect in light of the object and purpose of the treaty. As the Court has said in the *Territorial Dispute* between Libya and Chad, the principle of effectiveness constitutes "one of the fundamental principles of interpretation of treaties" (*Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 25, para. 51; see also *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 24). Paragraph IV of the Santiago Declaration not only establishes the maritime entitlement of islands, but also provides the delimitation criterion in case their entitlement overlaps with that of the coastal entitlement of another contracting State. The phrases in the paragraph referring to "the general maritime zone belonging to another of those countries" and determining that the maritime zone of islands "shall be limited by the parallel at the point at which the land frontier of the States concerned reaches the sea" have a direct bearing on the islands' entitlement as well as on the lateral boundaries between the parties.

7. It seems logical to infer from paragraph IV that the parallel passing through the endpoint of the land frontier on the continental coastline between adjacent States also marks the boundary between the maritime zones relating to the respective continental coasts of the same States. For instance, supposing that State A lies north of State B, it would make little sense for the maritime zone generated by an island of State A to be restricted to the south by the parallel running through the endpoint of the land border with State B if the maritime zone generated by the continental coast of the same State A could extend beyond that parallel. On the other hand, should the boundary between the maritime zones generated by the continental coasts run north of the parallel, disproportionate weight would be given to some small islands of State A if that boundary were displaced because the maritime zone of these islands had to reach the parallel running through the endpoint of the land border.

8. The minutes of the Juridical Affairs Committee of the Santiago Conference give some support to the above interpretation. The records (Memorial of Peru, Ann. 56) note that a proposal of the Ecuadorian delegate, Mr. Fernández, was unanimously approved. He had suggested that the Declaration "be drawn on the basis that the boundary line of the jurisdictional zone of each country be the respective parallel from the point at

which the borders of the countries touches or reaches the sea" *(el paralelo respectivo desde el punto en que la frontera de los paises toca o llega al mar)*. There was a concordant view among all the negotiators on this proposal *(Todos los delegados estuvieron conformes con esta proposición)*. Thus, they all agreed that the parallel would mark the lateral boundary between the maritime zones of the three States. Even if this view was reflected only in part in the final text, there is no indication in the preparatory work that the negotiators had changed their view on the boundary running between the maritime zones generated by the respective continental coasts.

9. Moreover, given that the parties publicly proclaimed that they each possessed exclusive sovereignty and jurisdiction over the sea along the continental coasts of their respective countries to a minimum distance of 200 nautical miles from their coasts, and that they provided explicitly in the Santiago Declaration that the islands off their coasts should be entitled to 200-nautical-mile maritime zones, it is unpersuasive to draw the conclusion that they could have reached a tacit agreement that their maritime boundary from *the coast* would only run for 80 nautical miles, which is clearly contrary to their position as stated in the Santiago Declaration.

10. One may assume that, while there was a need, in order to avoid an overlap of conflicting claims, to select a criterion for delimiting the maritime zones of islands which were in principle entitled to a zone extending to 200 nautical miles from their entire coasts, there was a lesser perceived need to state a criterion for delimiting the maritime zones generated by the continental coasts. This is because these maritime zones were arguably based on the method of *"tracé parallèle"*, with the outer limit reflecting the shape of the coast.

11. The 1947 Declaration of the President of Chile viewed the external limit of the claimed maritime zone as being constituted by "the mathematical parallel *(paralela matemática)* projected into the sea at a distance of 200 nautical miles from the coasts of Chilean territory", while the maritime zone generated by islands extended to a "projected parallel to these islands at a distance of 200 nautical miles around their coasts". The Peruvian Supreme Decree, which was enacted later in the same year, consisted in a claim over a maritime zone between the coast and an imaginary line at a distance of 200 nautical miles measured from the coast following the line of geographic parallels *(siguiendo la línea de los paralelos geográficos)*, while for the islands the area was meant to reach a distance of 200 nautical miles from their respective coasts.

12. According to the Chilean declaration, the external limit of its maritime zone ran as a parallel to the continental coast at a distance of 200 nautical miles westwards; on the basis of the Peruvian Supreme Decree, the line was composed of the points situated at the end of segments of a length of 200 nautical miles on the parallels starting from the various points on the continental coast. The resulting extension of the claims of the two countries was identical. In line with this method, the claims to maritime zones in the Santiago Declaration could be viewed as not extending beyond the parallels passing through the endpoint of the land border on the continental coastline. It should also be noted that the application of this method for defining the maritime boundary would not have required any complex cartographic exercise.

13. The Peruvian Petroleum Law of 1952 defined the seaward limit of the continental shelf as an imaginary line at a constant distance of 200 nautical miles from the low-water line along the continental coast. Peru argues that this statute and the similarly worded 1955 Supreme Resolution defined the external limit of the relevant zone on the basis of the "arcs-of-circles" method, considering the distance from any point of the continental coast. However, the wording of the Peruvian statute and that of the Supreme Resolution do not necessarily imply the use of this method. They are not inconsistent with the application of the method of *tracé parallèle*, which is also based on the idea of points at a "constant distance" from the continental coast, taking into account the point of the coast situated on the same parallel.

14. Supposing Peru indeed had the arcs-of-circles method in mind at that time, it would immediately have faced the situation of an overlap between its claim and that of Chile concerning their general maritime zones. This would have been much more significant than the overlap of the maritime areas generated by islands with the general zone. In fact, there is no single document in the records before the Court showing that this issue was envisaged at the Santiago Conference. Moreover, Peru, as indicated in its Note No. 5-20-M/18 addressed to the Minister of Foreign Affairs of Panama by the Peruvian Embassy in Panama on 13 August 1954 (Counter-Memorial of Chile, Ann. 61), consistently held that its position on its maritime zone was based on three instruments: the 1947 Supreme Decree, the 1952 Petroleum Law and the 1952 Santiago Declaration. If Peru had ever envisaged the arcs-of-circles method, it should have raised its concern over the potential overlapping claims with Chile and reserved its position on maritime delimitation. In view of all the evidence before the Court, Peru did not do so until 1986 and gave expression to such method only in its Law on Baselines of 2005.

15. It is also significant that the memorandum of 2000 by the Peruvian Navy concerning the United Nations Convention on the Law of the Sea, annexed to a letter of the Minister of Defence to the Foreign Minister, criticized the 1952 Petroleum Law, as well as the 1955 Supreme Resolution, precisely for having adopted the method of the *tracé parallèle* (Counter-Memorial of Chile, Ann. 189).

16. One may further consider that in 1952 the issue of delimitation between adjacent States was not given the importance that it has acquired in recent times. The attention of the three States parties to the Santiago Declaration was mainly directed at asserting their 200 nautical mile position towards those States which were hostile to such claims (see paras. II and III of the Declaration). It is true that Peru at that time could not foresee that the subsequent development of the law of the sea would render the *tracé parallèle* method unfavourable to itself, but that is a separate matter. What the Court has to decide in the present case is whether Peru and Chile did or did not reach in the Santiago Declaration an agreement on the maritime boundary.

17. According to paragraph II of the Santiago Declaration, the claims of Chile, Ecuador and Peru referred to a zone that would extend to a minimum of 200 nautical miles from their coasts *(hasta una distancia mínima de 200 millas marinas desde las referidas costas)*. While these claims could hardly find a basis in customary international law at the time they were made, a delimitation could be agreed by the three States even with regard to their potential entitlements. This was arguably done by the Santiago Declaration.

18. This interpretation finds support in the subsequent agreements concluded between the parties to the Santiago Declaration.

The 1954 Agreement relating to a Special Maritime Frontier Zone

19. In December 1954, the three parties to the Santiago Declaration adopted in Lima six additional legal instruments. These instruments further shed light on the object and purpose of the Santiago Declaration.

20. The most relevant of these instruments is the Agreement relating to a Special Maritime Frontier Zone done on 4 December 1954 (hereafter "the 1954 Agreement", or "the Agreement"). According to its final clause, the 1954 Agreement constitutes an integral and supplementary part of the Santiago instruments, including the Santiago Declaration.

21. Under the 1954 Agreement, the three parties decided to establish a special zone extending for 10 nautical miles on each side of the maritime frontier between the adjacent States. Paragraph 1 of the Agreement provides that "[a] special zone is hereby established, at a distance of 12 nautical miles from the coast, extending to a breadth of 10 nautical miles on either side of the parallel which constitutes the maritime boundary between the two countries". On the eastern end, the special zone started at 12 nautical miles from the coast, while its western seaward end was left open without any defined limit. In order to maintain the spirit of co-operation and unity among the countries signatories to the Santiago instruments, it was provided that "innocent and inadvertent violations of the maritime frontier between adjacent States" in the special zone by small fishing boats that did not have sufficient knowledge of navigation or necessary instruments to determine accurately their position on the high seas were not to be subject to penalties. Such special measure, however, was not to be construed as recognizing any right of the wrongful party to engage in fishing activities in the said special zone.

22. In order to establish such a tolerance zone, it is apparent that the existence of a maritime boundary between the parties was a prerequisite; otherwise it would have been impossible for the parties to determine which acts constituted infringements or violations of the "waters of the maritime zone". In identifying the maritime frontier between the parties, paragraph 1 of the 1954 Agreement explicitly refers to "the parallel which constitutes the maritime boundary between the two countries". The definite article "the" before the word "parallel" indicates a pre-existing line as agreed on by the parties. As noted above, the only relevant agreement on their maritime zones that existed between the parties before 1954 was the Santiago Declaration. Given the context of the 1954 Agreement, the parallel referred to can be no other line than that running through the endpoint of the land boundary, i.e., the parallel identified in the Santiago Declaration.

23. The minutes of the Lima Conference leave little doubt as to the relationship between these two instruments. The Minutes of the First Session of Commission I of the Lima Conference dated 2 December 1954, which were adopted only two days before the 1954 Agreement was concluded, contained a statement by the Ecuadorean delegate who agreed, instead of including it in the Agreement itself, to record in the said minutes the understanding that "the three countries deemed the matter on the dividing line of

the jurisdictional waters settled and that said line was the parallel starting at the point at which the land frontier between both countries reaches the sea". Considering the contextual coherence between the Lima and Santiago Conferences, the 1954 Agreement could not have possibly led to the conclusion that Peru and Chile had *tacitly agreed* on a maritime boundary that is much shorter than that agreed among the parties to the Santiago Declaration. Ecuador's clarification of "the dividing line of the jurisdictional waters" as the parallel identified in the Santiago Declaration may be taken as a further confirmation that the maritime boundary would run up to 200 nautical miles along that parallel.

24. The 1954 Agreement has a rather limited purpose, only targeting innocent and inadvertent incidents caused by small vessels. It does not provide where, and with regard to what kind of fishing activities, larger vessels of each State party should operate. Logically, ships other than small boats referred to above could fish well beyond the special zone, but within the limits of the maritime frontier between the adjacent States. Moreover, the parties' enforcement activities were not in any way confined by the tolerance zone. In the context of the Santiago Declaration, by no means could the parties to the 1954 Agreement have intended to use the fishing activities of small vessels as a pertinent factor for the determination of the extent of their maritime boundary. Should that have been the case, it would have seriously restrained the potential catching capacity of the parties to the detriment of their efforts to preserve fishing resources within 200 nautical miles, thus contradicting the very object and purpose of the Santiago Declaration. The fact that the seaward end of the special zone is not specifically mentioned in the 1954 Agreement and the fact that, while the parties' fishing activities greatly expanded in the ensuing years, the 1954 Agreement is still in force support the above interpretation.

25. There is a distinct difference between the maritime zone that each party claims under the Santiago Declaration and the special zone under the 1954 Agreement. The latter is drawn by the parties to serve a particular purpose, which has nothing to do with the scope of the former. The only element that applies to both zones is the parallel that serves as the maritime boundary of the parties: the parallel that divides the general maritime zones and serves as a reference line for the special zone. Given the object and purpose of the 1954 Agreement, it is rather questionable to construe this limited-purpose agreement as limiting the maritime boundary to the extent of the inshore fishing activities as of 1954. This construction of the Agreement is neither consistent with the object and purpose of the Agreement, nor with the context in which it was adopted.

26. The purpose of the 1954 Agreement is to maintain the maritime order in the frontier area. This indicates that the parties had not only delimited the lateral boundary of their maritime zones, but also intended to maintain it. Notwithstanding the tolerance shown towards the small ships of each other, the Agreement clearly states that the parties do not recognize any right arising from such infringing acts caused by small ships in their respective maritime waters, which means that the rights of each party in the general maritime zone are limited by the maritime boundary. In establishing the special zone, each party committed itself to observe the lateral boundary, which was only confirmed rather than determined by the parties in the 1954 Agreement.

The 1955 Protocol of Accession to the Declaration on "Maritime Zone"

27. In addition to the 1954 Agreement, the adoption of the Protocol of Accession to the Declaration on "Maritime Zone" of Santiago done at Quito on 6 October 1955 by the three parties (hereafter "the 1955 Protocol", or "the Protocol") is also significant. Even if it did not enter into force, the Protocol offers evidence of the nature and extent of the maritime boundaries between the parties to the Santiago Declaration.

28. When the Santiago Declaration was opened to other Latin-American States for accession, the parties reiterated in the Protocol the basic principles of the Santiago Declaration. In this regard, it is worth noting that on the terms of accession the Protocol omitted paragraph IV of the Santiago Declaration and explicitly excluded its paragraph VI from the scope of the Protocol. The Protocol underscored that, at the moment of accession,

> "every State shall be able to determine the extension and form of delimitation of its respective zone whether opposite to one part or to the entirety of its coastline, according to the peculiar geographic conditions, the extension of each sea and the geological and biological factors that condition the existence, conservation and development of the maritime fauna and flora in its waters".

29. This passage from the Protocol shows that at the time of the conclusion of the Santiago Declaration, notwithstanding their primary concern with their 200-nautical-mile maritime claims, the parties did have the issue of maritime delimitation in mind, albeit as a less significant question. It also illustrates that the parties did not envisage any general rule applicable to delimitation and that paragraph IV was a context-specific clause, applicable only to the parties to the Santiago Declaration.

30. The Protocol reaffirmed the parties' claims to their exclusive jurisdiction and sovereignty over maritime zones extending to 200 nautical miles, including the sea-bed and subsoil thereof. As a legal instrument adopted by the parties subsequent to the 1954 Agreement, this Protocol offers an important piece of evidence that disproves any tacit agreement between Peru and Chile that their maritime boundary would run only up to 80 rather than 200 nautical miles along the parallel passing through the point where the land frontier meets the sea.

The 1968 agreement on the installation of lighthouses

31. In 1968, Peru and Chile agreed to install, and subsequently indeed installed, two leading marks (or lighthouses) at the seashore near the first land marker, Boundary Marker number one (No. 1) (see the Document of 26 April 1968 adopted by the Parties, hereafter "the 1968 agreement"). One lighthouse was to be built with daylight and night signaling near Boundary Marker No. 1 on Peruvian territory, while the other, 1,800 meters away behind the first mark in the direction of the parallel of the maritime frontier, was located on Chilean territory. As was stated in the 1968 agreement, the object of the installation was to make the lighthouses visible from the sea so as "to materialise the parallel of the maritime frontier originating at Boundary Marker number one (No. 1)".

32. Apparently, the installation of the two lighthouses was designed to enforce the maritime delimitation between the Parties. From the correspondence between the Parties on this matter and the text of the 1968 agreement, it is clear that the Parties intended to ensure that with the facilities of the lighthouses, ships would observe the maritime boundary between the two countries.

33. More importantly, by locating the exact positions of the lighthouses the Parties clarified their understanding of the phrase in paragraph IV of the Santiago Declaration: "the parallel at the point at which the land frontier of the States concerned reaches the sea".

34. Even if done for a limited purpose, the installation of the two lighthouses further confirms that this parallel constitutes the lateral boundary between Peru and Chile. Consistent with their position taken at Santiago, the boundary along the parallel that is materialized by the lighthouses on the territories of Peru and Chile runs for 200 rather than 80 nautical miles.

Conclusion

35. The text of paragraph IV of the 1952 Santiago Declaration implies that the parallel that passes through the point where the land frontier reaches the sea represents the lateral boundary of the general maritime zones of the Parties, which, on the basis of the Parties' maritime claims as pronounced in the Santiago Declaration, extends for 200 nautical miles. Some subsequent agreements concluded between the Parties confirm this interpretation of the Declaration, in particular the 1954 Agreement, the 1955 Protocol and the 1968 agreement. These instruments provide a solid legal basis for the existence of a maritime boundary that extends along the parallel for 200 nautical miles from the continental coasts of Peru and Chile. It may also be noted that consequently Peru is entitled to sovereign rights and jurisdiction, as accepted under the modern international law of the sea, in the "outer triangle" that lies beyond the general maritime zone of Chile so delimited.

(Signed) Xue Hanqin.

(Signed) Giorgio Gaja.

(Signed) Dalveer Bhandari.

(Signed) Francisco Orrego Vicuña.

Declaration of Judge Donoghue

This is a case in which neither Party's pleaded case convinced the Court. The Judgment concludes that the 1952 Santiago Declaration on the Maritime Zone did not establish a maritime boundary. However, the 1954 Agreement relating to a Special Maritime Frontier Zone, when considered together with the 1968-1969 lighthouse arrangements, provides "compelling evidence" of the existence of a maritime boundary running along the parallel that crosses Boundary Marker No. 1, meeting the standard that the Court has previously articulated (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 735, para. 253).

What, then, is the extent of this tacitly-agreed maritime boundary? To answer this question, the Court, in effect, reaches conclusions about the substance of an informal and unwritten agreement. However, because the Parties did not address the existence or terms of such an agreement, they did not present evidence focused specifically on the extent of a tacitly-agreed maritime boundary.

In addition, neither Party put forward the possibility that the initial segment of the maritime boundary had been settled by agreement of the Parties, but that delimitation seaward of that segment would proceed in accordance with customary international law. Other maritime boundary cases have involved such scenarios (see, e.g., case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, pp. 431-432, paras. 268-269 and pp. 456-457, para. 325 (points IV (B) and (C)). As the Court notes, however, in the present case, the agreed maritime boundary extends for a significant distance (80 nautical miles). This raises novel questions about how to assess proportionality in respect of the area delimited on the basis of equidistance. As with the extent of the agreed maritime boundary, the Court did not have the benefit of the Parties' views on this issue.

I voted in favour of this Judgment in all respects, because I believe it reflects a sound outcome in light of the applicable law and the evidence before the Court. I submit this declaration because the circumstances of this case serve as a reminder of procedural approaches that may offer advantages when issues that are important to the Court's conclusions have not been squarely addressed by the parties. For example, a court or tribunal has the option of asking the parties for additional legal briefing or evidence. Alternatively, by rendering an interim or partial decision, a court or tribunal can decide part of a case while seeking more focused input from the parties on remaining issues.

In recent judgments, the Court has shown increased openness to drawing on insights from other international courts and tribunals. By making use of procedural approaches such as those noted here, the Court could further enrich its practice and jurisprudence.

(Signed) Joan E. Donoghue.

Declaration of Judge Gaja

1. The present declaration refers to the issue decided by the Court in the first operative paragraph of the Judgment.

With regard to the maritime delimitation between the maritime zones generated by islands and those generated by the continental coasts, the Santiago Declaration refers to the parallel running through the point where the land frontier reaches the sea (punto en que llega al mar la frontera terrestre). For the reasons given in the joint dissenting opinion, the same parallel is relevant, according to the Santiago Declaration, also when the delimitation concerns the maritime zones generated by the continental coasts of adjacent States. This implies the need to identify the precise point where the land frontier between Chile and Peru reaches the sea.

2. Chile contends that the Court does not have jurisdiction under the Pact of Bogotá to settle a dispute on the interpretation or application of the 1929 Treaty of Lima which established the land boundary between the Parties. This would preclude a decision by the Court which would have the object of determining where the land frontier runs. However, it does not prevent the Court from referring to that Treaty for the purpose of defining the starting-point of the maritime boundary.

3. According to Article 2 of the 1929 Treaty of Lima, "the frontier between the territories of Chile and Peru shall start from a point on the coast to be named 'Concordia', ten kilometres to the north of the bridge over the river Lluta" (un punto de la costa que se denominará "Concordia", distante diez kilómetros al Norte del puente del Rio Lluta). In 1930, the members of the bilateral Mixed Commission competent for demarcation were given identical instructions by their respective Governments. The delegates had to trace "an arc with a radius of ten kilometres . . . its centre being the aforementioned bridge, running to intercept the seashore", the starting-point of the land frontier being the "intersection point of the traced arc with the seashore" (punto de intersección del arco trazado, con la orilla del mar). A marker had to be erected "as close to the sea as allows preventing it from being destroyed by the ocean waters" (lo más próximo al mar posible, donde quede a cubierto de ser destruido por las aguas del océano).

It seems clear from these texts that the starting-point of the land frontier was regarded to be the intersection of the arc with the seashore, not the marker.

4. The question that arises in the present case is whether the starting-point of the maritime boundary is the intersection of the arc with the seashore or the point where the parallel running through the marker closest to the sea ("Hito No. 1") reaches the low-water line. The Parties hold opposite views on this question, Chile arguing in favour of the latter solution and Peru of the former. The submissions of each Party reflect these diverging opinions.

As we have seen, the point where the land frontier reaches the sea, to which the Santiago Declaration refers for identifying the relevant parallel, is the starting-point of the land boundary, hence the intersection of the arc with the seashore. The Chilean view

would prevail only if it could be shown that, for the purpose of defining the maritime boundary, the Parties had reached an agreement to use the parallel running through the marker ("Hito No. 1"). There is evidence that this marker has been used for the purpose of identifying the maritime boundary, especially in the context of the building of two lighthouses in the years after 1968, when the Parties agreed, upon the proposal of a bilateral commission, to "materialize" the parallel that runs through "Hito No. 1". However, this choice may be explained by practical reasons, also in view of the very short distance between the points involved. There is no evidence that the Parties reached an agreement by which they would have adopted, for the purpose of their maritime delimitation, a starting-point other than the one that they had agreed in the Santiago Declaration: namely, the starting-point of the land boundary according to the Treaty of Lima.

Moreover, the coincidence between the starting-point of the land boundary and the starting-point of the maritime boundary avoids creating a situation in which, albeit for a limited stretch of the coast, the adjacent territorial sea would be under the sovereignty of a State other than the one to which the coast belongs. This type of situation is not inconceivable but is seldom resorted to in State practice.

(Signed) Giorgio Gaja.

Dissenting Opinion of Judge Sebutinde

The Court should have determined the maritime boundary between the Parties de novo *— There is no agreement between the Parties, tacit or otherwise, establishing a permanent all-purpose maritime boundary — Neither Party invokes the 1954 Agreement as a basis for a pre-existing maritime boundary — The Parties' practice does not reflect the existence of an agreement concerning an all-purpose maritime boundary along the parallel of latitude up to 80 nautical miles — The stringent standard of proof required for the inference of a tacit agreement is not met.*

Introduction

1. I agree with the Court's finding in point 1 of the operative paragraph of the Judgment that "the starting-point of the single maritime boundary delimiting the respective maritime areas between the Republic of Peru and the Republic of Chile is the intersection of the parallel of latitude passing through Boundary Marker No. 1 with the low-water line". However, I have voted against points 2 and 3 of the operative paragraph in which the Court decides, respectively, that "the initial segment of the single maritime boundary follows the parallel of latitude passing through Boundary Marker No. 1 westward" and that "this initial segment runs up to a point (Point A) situated at a distance of 80 nautical miles from the starting-point of the single maritime boundary". Consequently, I also voted against point 4 of the operative paragraph of the Judgment in which the Court determines the course of the second segment of the single maritime boundary, starting from Point A.

2. For the reasons set out in this opinion, I do not concur with the view of the majority of the Court that an agreed all-purpose maritime boundary already exists between the Parties along the parallel of latitude passing through the Boundary Marker No. 1 up to a distance of 80 nautical miles. In my view no agreement of the Parties to this effect (tacit or otherwise) can be inferred from the evidence submitted to the Court. Accordingly, the Court should have determined the entirety of the single maritime boundary line between the Parties, by applying its well-established three-step delimitation method in order to achieve an equitable result. The following reasons underpin my opinion.

(i) Neither Party invokes the 1954 Agreement as a basis for a pre-existing maritime boundary

3. Chile consistently maintains that it is the 1952 Santiago Declaration concluded between Chile, Ecuador and Peru (and not the 1954 Agreement) that effected an all-purpose maritime delimitation between Chile and Peru and accordingly requests the Court to confirm this delimitation. According to Chile, the 1954 Agreement merely demonstrates the practice of the Parties confirming and implementing the pre-existing maritime boundary. Acknowledging that the Santiago Declaration contains no clear and unequivocal delimitation provision, Chile asserts that Article IV thereof should be interpreted as establishing an international maritime boundary between Chile and Peru

along the parallel of latitude passing through the starting-point of their land boundary and extending to a minimum of 200 nautical miles seaward. Peru, on the other hand, consistently denies that it has ever concluded with Chile, any agreement establishing an international maritime boundary, nor has it given up, expressly or tacitly, the maritime zones to which it is entitled under international law. Peru accordingly asks the Court to plot a boundary line applying the equidistance method in order to achieve an equitable result. Applying the established principles of treaty interpretation to the 1952 Santiago Declaration and in particular to Article IV thereof, the Court rightly rejects the very foundation of Chile's claim and concludes that the Parties "did not, by adopting the 1952 Santiago Declaration, agree to the establishment of a lateral maritime boundary between them along the line of latitude running into the Pacific Ocean from the seaward terminus of their land boundary" (Judgment, paragraph 70).

While the Court is not bound by the Parties' submission, the fact that neither Party asserts the existence of a tacit agreement either in 1952 or in 1954 regarding the establishment of a permanent maritime boundary, is, in my view, a strong indication that there was no meeting of the minds between the Parties on this important issue, and that the Court should have taken this factor into account before presuming the existence of one.

(ii) The stringent standard required for the inference of a tacit agreement is not met

4. In the absence of a formal maritime delimitation agreement between Chile and Peru, a legally binding maritime boundary between them could only be based on a tacit agreement or upon acquiescence. Peru discounts the existence of an all-purpose maritime boundary with Chile based on either of these notions, while Chile deliberately and expressly refrained from basing its claim upon a tacit agreement or upon acquiescence, even on a subsidiary basis. Nevertheless, the Court holds that it is precisely on the basis of "a tacit agreement" that an all-purpose maritime boundary already exists between the Parties along the parallel of latitude passing through the Boundary Marker No. 1 up to a distance of 80 nautical miles.

5. The Court finds evidence of such tacit agreement in the 1954 Special Maritime Frontier Zone Agreement (hereinafter the "1954 Agreement") concluded between the three Parties to the Santiago Declaration (Chile, Ecuador and Peru), specifically, in a reference, contained in Article 1 thereof, to "the parallel which constitutes the maritime boundary between the two countries". The Court, while acknowledging that "the operative terms and purpose of the 1954 Special Maritime Frontier Zone Agreement are indeed narrow and specific", concludes, nevertheless, that Article 1 of that Agreement read together with the preamble, "acknowledge[s] in a binding international agreement that a maritime boundary already exists" (Judgment, paragraph 90). Noting that the 1954 Agreement "gives no indication of the nature or extent of the maritime boundary . . . [n]or does it indicate its extent" (Judgment, paragraph 92) and that it "does not indicate when and by what means that boundary was agreed upon", the Court nevertheless considers that "[t]he Parties' express acknowledgment of its existence can only reflect a tacit agreement which they had reached earlier" (Judgment, paragraph 91). The Court then refers back to the 1952 Santiago Declaration, pointing out that certain elements of that Declaration,

together with the 1947 Proclamations of the Parties, "suggested an evolving understanding between the Parties concerning their maritime boundary" (Judgment, paragraphs 43, 69 and 91); and that the 1954 Agreement "cements the tacit agreement" which has somehow "evolved" in the two intervening years (Judgment, paragraph 91).

6. In my view, the above analysis of the evidence before the Court and conclusion thereon, fall short of the stringent and well-established standard of proof which the Court itself has set for establishing a permanent maritime boundary in international law on the basis of a tacit agreement. In *Nicaragua* v. *Honduras*, the Court set out that standard as follows:

> "Evidence of a tacit legal agreement must be compelling. The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed. A *de facto* line might in certain circumstances correspond to the existence of an agreed legal boundary or might be more in the nature of a provisional line or of a line for a specific, limited purpose, such as sharing a scarce resource. Even if there had been a provisional line found convenient for a period of time, this is to be distinguished from an international boundary." (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 735, para. 253.)

7. Respectfully, I am not at all convinced that the evidence on which the Court has based its finding regarding the existence of a tacit agreement establishing a permanent maritime boundary is "compelling"; nor am I convinced that it was the intention of the Parties under the 1952 Santiago Declaration or the 1954 Agreement to establish such a boundary.

8. While the 1954 Agreement is an important element to be taken into account in determining whether Peru and Chile agreed to delimit their respective maritime zones, taken on its own, that Agreement does not sufficiently prove the existence of an agreement in respect of an all-purpose maritime boundary. The existence or otherwise of such an agreed boundary has to be determined by reference to a thorough examination of the practice of the Parties to the dispute, of which the 1954 Agreement is just one example. Contrary to what the Court asserts in the Judgment, the language of the 1954 Agreement cannot be said to have clearly acknowledged the existence of an all-purpose maritime boundary along the parallel of latitude beyond a distance of 12 nautical miles from the coast (Judgment, paragraphs 90 and 102). In my view, the provisions of the 1954 Agreement must be carefully construed not only in light of the object and purpose of that treaty, but also as "an integral and supplementary part of . . . the resolutions and agreements adopted at the Conference on the Exploitation and Conservation of the Maritime Resources of the South Pacific, held in Santiago de Chile in August 1952" (see Article 4 of the 1954 Agreement).

9. It will be recalled that the object and purpose of the 1952 Santiago Declaration (of which the 1954 Agreement is an integral part), was to establish a process of tripartite maritime co-operation (between Chile/Peru/Ecuador) with a view to protecting the adjacent sea from the predatory activities of foreign fleets, thereby jointly protecting and conserving the marine resources of their peoples. This joint action was preceded

by the unilateral claims made by Chile and Peru in 1947 in relation to their new maritime areas (the 1947 Proclamations). The object of the 1952 Declaration was not to establish permanent maritime boundaries between the three States. Accordingly, the object and purpose of the 1954 Agreement which must be understood in the overall context of the Santiago resolutions and agreements of 1952, is "narrow and specific" as correctly observed by the Court, and was to create a special zone of tolerance aimed at averting disputes involving accidental transgressions of "the maritime frontier *[la frontera marítima]* between adjacent States" by small fishing vessels manned by crews with insufficient knowledge of navigation or not equipped with the necessary instruments to determine accurately their position on the high seas, with a view to fostering the spirit of co-operation and unity amongst the States parties to the Santiago instruments. It is noteworthy that this agreement was between Ecuador, Peru and Chile, and not just between the Parties to the present case. To this end, Article 1 of the 1954 Agreement established in relation to each pair of adjacent countries (Ecuador/Peru and Peru/Chile), a "special zone . . . at a distance of 12 nautical miles from the coast, extending to a breadth of 10 nautical miles on either side of the parallel which constitutes the maritime boundary *[el límite marítimo]* between the two countries". Article 2 provides that the "accidental presence" of small fishing vessels of either of the adjacent countries within the special zone "shall not be considered to be a violation of the waters of the maritime zone". While the wording of Articles 1 to 3 indicates the existence of some sort of a maritime boundary between the adjacent States along an undetermined parallel running beyond a distance of 12 nautical miles from the coast, this is, in my view, a reference to "provisional lines" for a specific purpose (namely, the sharing of fishing resources) and is not determinative of a permanent, all-purpose maritime boundary as understood in international law. Those provisions (which, as the Court notes, contain no indication of the nature or extent of a maritime boundary) were aimed at dealing with small fishing boats accidentally straying into waters on either side of those provisional lines, and cannot easily be construed as clearly confirming the existence of a tacit agreement in respect of a permanent, all-purpose international maritime boundary along a parallel of latitude beyond a distance of 12 nautical miles from the coast. It is my considered opinion that it is this narrow and strict interpretation of the 1954 Agreement that accords with the resolutions and agreements adopted at the tripartite Conference on the Exploitation and Conservation of the Maritime Resources of the South Pacific, held in Santiago de Chile in August 1952, and reflected in the Santiago Declaration of 1952.

10. This interpretation is further confirmed by the historical context in which the 1954 Agreement was concluded, particularly by the fact that back in 1954, the concepts of an exclusive economic zone or of a 12-nautical-mile territorial sea entitlement were alien to international customary law. Accordingly, to the extent that the special tolerance zone established by the 1954 Agreement started at a distance of 12 nautical miles from the coast of Peru and Chile along the "parallel which constitutes the maritime boundary", it concerned what at the time were considered high seas and could not be presumed to have concerned maritime zones over which the Parties had exclusive sovereign rights under international law. Furthermore, the most important instances of State practice pointing to the existence of a "maritime boundary" between the Parties invariably concern the water column (not the subsoil).

(iii) The Parties' practice does not reflect the existence of an agreement concerning an all-purpose maritime boundary along the parallel of latitude that extends up to 80 nautical miles out to sea

11. In the Judgment, the Court rightly finds that the unilateral 1947 Proclamations cannot be interpreted as "reflecting a shared understanding of the Parties concerning maritime delimitation" (Judgment, paragraph 43) and that the 1952 Santiago Declaration cannot be said to reflect an agreement of the Parties regarding "the establishment of a lateral maritime boundary between them along the line of latitude" (Judgment, paragraph 70). These two findings make it all the more imperative to interpret the 1954 Agreement with caution and not to read into it inferences that are far from obvious.

12. The Parties' practice (contemporaneous and subsequent), viewed in the light of the object and purpose of the 1952/1954 arrangements, confirms the above view. That practice, in my opinion, indicates that the Parties' intention was to regulate the sharing of a common resource and to protect that resource vis-à-vis third or non-States parties, rather than to effect a maritime delimitation. While certain documents and/or events that were considered by the Court may be said to reflect some degree of the Parties' shared understanding that there was a "maritime boundary" in place between them along the parallel of latitude passing through the coastal terminus of their land boundary, there are others that could equally be said to demonstrate the absence of such an agreement. Besides, even those potentially "confirmatory" examples do not unambiguously prove that the Parties were acting (or failing to act) on an assumption that this line constituted an all-purpose and definitive maritime boundary delimiting all possible maritime entitlements of the Parties. Furthermore, all these ambiguities and uncertainties are set against the backdrop of a complete absence of any international or domestic legal instrument dating from the post-1954 period, which would unequivocally stipulate that an agreed international maritime boundary exists between Peru and Chile along the parallel of latitude passing through the coastal terminus of the land boundary.

13. It is on the basis of these same considerations that I also find highly problematic the basis upon which the Court has arrived at its conclusion that the "agreed maritime boundary running along the parallel of latitude" extends up to a distance of 80 nautical miles out to sea. By the Court's own admission, all the practice involving incidents between the two Parties, including enforcement activities, was within about 60 nautical miles of their coasts and usually much closer.

It was only starting in 1996 that arrests frequently occurred beyond 60 nautical miles (Judgment, paragraphs 128, 146 and 147). Yet notwithstanding the above findings, the Court draws the conclusion that

> "the evidence at its disposal does not allow it to conclude that the maritime boundary, the existence of which the Parties acknowledged at that time, extended beyond 80 nautical miles along the parallel from its starting-point. The later practice which it has reviewed does not lead the Court to change that position. The Court has also had regard to the consideration that the acknowledgment, without more, in 1954 that a 'maritime boundary' exists is too weak a basis for holding that it extended far beyond the Parties' extractive and enforcement capacity at that time." (Judgment, paragraph 149.)

14. It is unclear to me how the Court's conclusion that the Parties could not be said to have tacitly agreed on a maritime boundary beyond 80 nautical miles can simply be turned into a legal finding that they have agreed on a boundary up to 80 nautical miles (or on any other distance beyond 12 nautical miles for that matter). In my view, this finding of the Court rests on dangerously weak and speculative grounds.

Conclusion

15. The legal bar set by the Court for establishing a permanent, all-purpose maritime boundary on the basis of a tacit agreement is very high, and for good reason. All elements considered, I remain of the view that the strict standard laid down in *Nicaragua* v. *Honduras* has not been met in the present case.

(Signed) Julia Sebutinde.

Declaration of Judge *ad hoc* Guillaume

[Translation]

Maritime boundary deriving from tacit agreement between Peru and Chile extending up to 80 nautical miles along parallel of latitude — Remaining boundary to be determined in accordance with customary international law — Starting-points of maritime and land boundaries not coinciding — Consequences.

1. Peru filed an Application with the Court against Chile which had a dual objective: *(a)* determination of the line delimiting the Parties' maritime zones; *(b)* recognition of its exclusive sovereign rights over a "maritime area lying out to a distance of 200 nautical miles from its baselines" (the "outer triangle"). Chile requested the Court to dismiss the Application and to adjudge and declare that: *(a)* the respective maritime zone entitlements of Chile and Peru have been fully delimited by agreement; *(b)* Peru has no entitlement to the maritime area which it claims within the outer triangle.

2. Thus the first question to be decided by the Court was whether there was an agreed maritime boundary between the Parties. Several texts were cited to the Court in this regard.

3. First, Chile relied on the 1947 Proclamations under which both States had unilaterally claimed certain maritime rights extending 200 nautical miles from their respective coasts. The Court rightly found that these declarations had not established any maritime boundary between the Parties.

4. Chile relied secondly on the 1952 Santiago Declaration, whereby Ecuador, Chile and Peru "proclaim[ed] as a norm of their international maritime policy that they each possess exclusive sovereignty and jurisdiction over the sea along the coasts of their respective countries to a minimum distance of 200 nautical miles from these coasts" (Judgment, paragraph 49). The Court recognizes that this Declaration has the character of a treaty, but concludes, "contrary to Chile's submissions, that Chile and Peru did not, by adopting the 1952 Santiago Declaration, agree to the establishment of a lateral maritime boundary between them along the line of latitude running into the Pacific Ocean from the seaward terminus of their land boundary", (Judgment, paragraph 70). I agree also with that finding.

5. Thirdly, the three signatory States to the Santiago Declaration had in 1954 adopted various agreements aimed at reinforcing their solidarity in the face of opposition from third States to the 200-nautical-mile claim. Those agreements included a Special Maritime Frontier Zone Agreement, whose Preamble reads as follows:

> "Experience has shown that innocent and inadvertent violations of the maritime frontier . . . between adjacent States occur frequently because small vessels manned by crews with insufficient knowledge of navigation or not equipped with the necessary instruments have difficulty in determining accurately their position on the high seas" (Judgment, paragraph 80).

Furthermore, continues the Preamble, "[t]he application of penalties in such cases always produces ill-feeling in the fishermen and friction between the countries concerned" (*ibid.*).

As a result, the Agreement provided in its first articles:

"1. A special zone is hereby established, at a distance of ['a partir de'] 12 nautical miles from the coast, extending to a breadth of 10 nautical miles on either side of the parallel which constitutes the maritime boundary ['el límite marítimo'] between the two countries.

2. The accidental presence in the said zone of a vessel of either of the adjacent countries, which is a vessel of the nature described in the paragraph beginning with the words 'Experience has shown' in the preamble hereto, shall not be considered to be a violation of the waters of the maritime zone, though this provision shall not be construed as recognizing any right to engage, with deliberate intent, in hunting or fishing in the said special zone.

3. Fishing or hunting within the zone of 12 nautical miles from the coast shall be reserved exclusively to the nationals of each country." (Judgment, paragraph 81.)

6. Moreover, in 1968-1969 Chile and Peru entered into arrangements to build two lighthouses close to their land border, in order to "materialise the parallel of the maritime frontier originating at Boundary Marker number one (No. 1)" (see the document signed by the representatives of the two Parties on 26 April 1968, quoted in the Judgment at paragraph 96). These lighthouses had a range of some 15 nautical miles, and were intended to enable the ships of each Party to determine their location in relation to the maritime boundary in areas close to the coasts.

7. The 1954 Agreement and the arrangements of 1968-1969 are not easy to interpret. It is clear, as the Court noted, that the 1954 Agreement had a "narrow and specific" purpose (Judgment, paragraph 103). The same applies to the arrangements of 1968-1969. But it is equally clear that they were referring to a "boundary". They were not establishing such a boundary, but noted its existence running along the line of latitude.

8. That boundary had not, moreover, been established either by the unilateral proclamations of 1947, or by the Santiago Declaration, or by any other treaty text. It could thus only derive from a tacit agreement reached between the Parties before 1954.

9. The Court has always recognized the possibility that States may enter into such agreements, but this is an area where the very greatest caution is required. Indeed, as the Court has stated: "[t]he establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 735, para. 253). "Evidence of a tacit legal agreement must be compelling." (*Ibid.*)

10. In the present case, the existence of a tacit agreement prior to 1954 is evidenced by the 1954 Agreement itself, and by the arrangements of 1968-1969. The boundary recognized in those texts follows the parallel of latitude passing through boundary marker No. 1. On the other hand, the texts give no indication as to how far that boundary extends out to sea, and the Parties disagree on this.

11. The 1954 Agreement and the 1968-1969 arrangements essentially concerned fishing by small vessels close to the coast, and Chile has failed to show that the boundary whose existence was recognized by the Parties in those texts extended along the parallel of latitude beyond the area in which those vessels operated. It was within that area that a boundary was recognized.

12. The Parties have provided few indications as to the extent of the area in question. However, it is apparent that "the principal maritime activity in the early 1950s was fishing undertaken by small vessels, such as those specifically mentioned in the 1954 Special Maritime Frontier Zone Agreement and which were also to benefit from the 1968-1969 arrangements relating to the lighthouses" (Judgment, paragraph 109). Such activities were limited, and concentrated within the areas close to the coast (Judgment, paragraphs 107 and 108). It is also clear from the case file that "[u]ntil the mid-1980s, all the practice involving incidents between the two Parties was within about 60 nautical miles of the coasts and usually much closer" (Judgment, paragraph 128).

13. In these circumstances, it seems to me that Chile has failed to show that the boundary deriving from the tacit agreement between the Parties, as confirmed by the 1954 Agreement and the 1968-1969 arrangements, extended beyond 60 to 80 nautical miles from the coasts. This latter figure marks the furthest limit of the boundary deriving from the tacit agreement of the Parties, and it is in light of that fact that I have been able to agree with the solution adopted in paragraph 3 of the Judgment's operative part.

14. Beyond that point as thus determined by the Court, it was for the latter to determine the maritime boundary between the two States in accordance with the customary law of the sea as identified in its jurisprudence. In that regard, I agree fully with the method followed. I likewise agree with the Court's reasoning and with the result as regards the outer triangle, over which Peru is entitled to exercise sovereign rights under the conditions laid down by international law.

15. Finally, I agree with the solution reached by the Court as regards the starting-point of the maritime boundary. This solution followed necessarily from the language of the arrangements of 1968-1969. However, it in no way prejudges "the location of the starting-point of the land boundary identified as 'Concordia' in Article 2 of the 1929 Treaty of Lima", which it was not for the Court to determine (Judgment, paragraph 163). The Parties disagree as to the location of that point, and for my part I tend to believe that it is located not at boundary marker No. 1, which is situated inland, but at "the point of intersection between the Pacific Ocean and an arc with a radius of 10 km having its centre on the bridge over the river Lluta" (see the Parties' "Joint Instructions" of April 1930, Judgment, paragraph 154). Accordingly, the coast between the starting-point of the maritime boundary and Point Concordia falls under the sovereignty of Peru, whilst the sea belongs to Chile. However, that situation is not unprecedented, as Chile pointed out at the hearings (CR 2012/31, pp. 35-38); it concerns just a few tens of metres of shoreline, and it may be hoped that it will not give rise to any difficulties.

(Signed) Gilbert Guillaume.

Separate, Partly Concurring and Partly Dissenting, Opinion of Judge *ad hoc* Orrego Vicuña

Starting-point of maritime delimitation — Recognition of the parallel — Single maritime boundary — "Maritime domain" governed by the 1982 United Nations Convention on the Law of the Sea — Freedom of navigation beyond 12 nautical miles — Misgivings about the maritime boundary following the parallel for only 80 nautical miles — Extensive practice of the Parties — Disproportionate effects of equidistance and the "outer triangle" — Negotiated access to fisheries — Role of equity in international law

1. Judges Xue, Gaja, Bhandari and this judge *ad hoc* have submitted a joint dissenting opinion concerning some legal aspects that are central to the Judgment of the Court in this case, with particular reference to the proper interpretation of the 1947 Presidential Proclamations (Memorial of Peru, Ann. 6 and Ann. 27), the 1952 Santiago Declaration (Memorial of Peru, Ann. 47) and the 1954 Special Maritime Frontier Zone Agreement (Memorial of Peru, Ann. 50), and to how these instruments lead to the conclusion that the Parties agreed that their maritime boundary delimitation follows the parallel of latitude up to a distance of 200 nautical miles from its starting-point.

2. In addition to that joint dissent, this judge believes that it is his duty to address some other questions relevant for the resolution of the dispute submitted to the Court. In respect of some of these questions, this judge agrees with the reasoning and conclusions of the Judgment, as will be noted below. In respect of some other questions, however, this judge has an opinion different from that of the majority of the Court. This opinion is submitted with the greatest respect for the Members of the Court and its President, all of whom have made a significant effort to reach a common position on many difficult issues, although regrettably, not always with success.

3. The first point on which this judge concurs with the Judgment is that concerning the starting-point of the maritime delimitation effected. The Court has rightly decided that this point is the intersection of the parallel of latitude passing through Boundary Marker No. 1 with the low-water line. As identified since 1930 in the Final Act concerning the demarcation and marking of the land boundary agreed in the 1929 Treaty between Chile and Peru (Memorial of Peru, Ann. 55), the parallel corresponding to Marker No. 1 is at 18° 21' 03" S. In its submissions, as in its legislation concerning baselines, Peru had identified the starting-point of the maritime boundary at 18° 21' 08" S, 70° 22' 39" W. It follows from the Judgment of the Court that the endpoint of these baselines cannot now be located south of the intersection of the parallel of Boundary Marker No. 1 with the low-water line.

4. It is also important to note that the Court has concluded that because it is concerned only with the starting-point of the maritime delimitation, it is not called upon to take a position on the starting-point of the land boundary (Judgment, paragraph 175).

5. The Court has also rightly concluded that the maritime boundary follows the parallel of latitude passing through Boundary Marker No. 1 westward. This is an important consequence of the Court having decided that the 1954 Special Maritime

Frontier Zone Agreement embodies the recognition of this parallel. This in turn relates to the acknowledgment of the legal significance of the 1952 Santiago Declaration as a treaty in force in the light of the Parties' common understanding in this respect. The Court also recognizes that the 1968-1969 lighthouse arrangements confirmed the prior existence of a maritime boundary following that parallel (Judgment, paragraph 130). As the Joint Dissent appropriately notes, the same holds true of the 1955 Protocol of Accession to the Santiago Declaration (Memorial of Peru, Ann. 52), although the Judgment takes a different view on this point.

6. This finding of the Court, however, is based on the understanding that the acceptance of the parallel by the Parties is the outcome of a tacit agreement. Rather, as also noted in the joint dissent, this is the outcome of the specific treaty commitments undertaken by the Parties in 1952 and 1954, which in turn are related to the meaning and extent of the 1947 Proclamations. As treaty provisions, their interpretation is governed by the 1969 Vienna Convention on the Law of Treaties, in the light of which the parallel reaching the 200-nautical-mile distance is the appropriate conclusion.

7. The Court has also reached the right conclusion in respect of the nature of the maritime boundary, deciding that it is a single all-purpose maritime boundary. Such a boundary shall thus be applicable not only to some limited fishing activities taking place in the superjacent waters but also to any activity related to the régime of the exclusive economic zone and the continental shelf and its subsoil.

8. The question of the nature of the maritime boundary also has important implications in respect of the kind of jurisdiction that Peru is entitled to exercise over its maritime areas. For a long time, Peru had been internally debating whether the "maritime domain" it claims over the adjacent seas was in the nature of a territorial sea or of a functional jurisdictional area concerning its resources. Distinguished jurists and statesmen had a divided opinion in this respect. Legislation, including the Secret Law No. 13508 enacted on 6 February 1961 (Law No. 13508, "Secret Law", promulgated on 6 February 1961, Navy, *Yearbook of Peruvian Legislation*, Vol. LII, Legislation of 1960, p. 89), and constitutional provisions were introduced in support of the territorial sea approach, but even then their interpretation was disputed in the light of the alternative jurisdictional approach. Due to these differing opinions, Peru did not become a signatory to the 1982 United Nations Convention on the Law of the Sea.

9. The International Court of Justice has now settled this Peruvian debate. The Judgment takes note of the formal declaration made on behalf of the Government of Peru by its Agent in this case to the effect that the term "maritime domain" used in its Constitution is "applied in a manner consistent with the maritime zones set out in the 1982 Convention" (CR 2012/27, p. 22, para. 26 (Wagner)). The Court, following a well-established jurisprudence, further notes that this declaration expresses a formal undertaking by Peru. It follows that Peru is entitled to exercise jurisdiction over its maritime areas up to 12 nautical miles for the territorial sea, 24 nautical miles for the contiguous zone and 200 nautical miles for the exclusive economic zone and the continental shelf.

10. The resolution of this question is not only important for the clarity of Peru's legislation and its corresponding amendments but also in terms of the proper

implementation of the law of the sea by the Court. Had the "maritime domain" been considered a territorial sea claim, the Court would have had no alternative but to declare Peru's application inadmissible, since it cannot proceed to delimitate maritime areas that are in breach of the contemporary law of the sea, as the delimitation of a 200-nautical-mile territorial sea clearly is.

11. A more important consequence of this finding is to the benefit of the international community as a whole. Vessels flying the flags of all nations, including Chile, whether merchant or military, can now have full freedom of navigation beyond the 12-nautical-mile territorial sea of Peru, just as submarines will be able to navigate submerged. Aircraft will also have the right of unrestricted overflight. Restrictions applied to such activities will now have to be lifted.

12. Notwithstanding this positive contribution of the Court to the law of the sea, there are, however, other aspects of the Judgment with which this judge regrettably cannot agree. As appropriately noted in the Joint Dissent, there is no support for the Judgment's conclusion that the boundary is composed of two segments, one running along the parallel up to Point A situated at the distance of 80 nautical miles from the starting-point, and the other following a line of equidistance from Point A until meeting Point B and thereon to Point C.

13. It is apparent from the case record that the Parties did not plead for such a distance or, in fact, any other distance short of 200 nautical miles. More importantly, nothing in the record shows that any shorter distance was ever considered throughout the long process of establishing the 200-nautical-mile offshore zones. In fact, it would be surprising if the Parties had chosen such a restricted boundary in the context of their respective individual and collective endeavours to establish a 200-nautical-mile zone and to ensure its international recognition. Had this been the case, they would have made an express statement to that effect, which they did not.

14. The recognition of the parallel in the 1954 Special Maritime Frontier Zone Agreement was not so restricted and, although no endpoint is expressly established, its context clearly shows that it was envisaged to extend to the full 200-nautical-mile area that was subject to the Parties' claims. Distinguished jurists, including the former President of the Court, Judge Eduardo Jiménez de Aréchaga, as well as eminent geographers, have all so concluded, as the record indicates.

15. The conclusion of the Judgment is mainly related to the view that the 1954 Special Maritime Frontier Zone Agreement refers to its application to small fishing boats lacking sophisticated navigational equipment, and is premised upon the assumption that such boats could not operate beyond a rather limited distance. While this could well be true for some fishing vessels, it is not so for larger industrial vessels that have been operating in the area for some time. It is appropriate to recall that fishing activities in this area are inextricably related to the biological and nutritional characteristics of the Humboldt Current, which extends far beyond the 200-nautical-mile limit.

16. It must also be noted that, even if the Special Maritime Frontier Zone had been understood as extending to a limited distance, which was not the case, the maritime

boundary would still have extended to 200 nautical miles as it was established independently of any special zone that could later be attached to it. Any interpretation to the contrary would have to rely on an express understanding between the Parties, which does not exist.

17. It is also appropriate to note that the Judgment has correctly explained that even smaller fishing boats departing from Ilo, the main Peruvian port in the area, in search of fishing grounds located some 60 nautical miles to the south-west would have crossed the parallel of the agreed boundary at a distance of approximately 100 nautical miles from its starting-point (Judgment, paragraph 108). If such fishing grounds were located at 80 nautical miles from Ilo, the crossing would take place at about 120 nautical miles from the parallel starting-point. While it is also explained that the situation relating to Arica is different, this does not detract from the fact that fishing grounds are located where they are and the claimed fisheries interests of Ilo would have been equally protected at distances greater than 80 nautical miles.

18. Because the Judgment follows the reasoning that the maritime boundary was the outcome of a tacit agreement, the role of the various instruments in the genesis and materialization of a treaty commitment concerning the maritime boundary is somewhat lost. The relevance of the 1947 Presidential Proclamations is greater than that which the Judgment appears to acknowledge. While these Proclamations lacked in some respects the precise legal language of contemporary developments, they nonetheless evidence that a 200-nautical-mile maritime boundary between the two countries was not absent from their respective texts, as discussed in the Joint Dissent.

19. The 1952 Santiago Declaration was still more explicit on the establishment of the boundary. The Joint Dissent explains this aspect in detail. The reference in Article IV to a general maritime zone delimited by the parallel of latitude can be no other than the expression of an understanding that the boundary line separating the Parties' respective jurisdictions followed this parallel irrespective of the insular delimitation. Even if such a general maritime zone would have been of relevance only for islands, which was not the case, the use of the parallel in determining the boundary around the islands in the vicinity of the Chile-Peru maritime boundary would have been applicable, as it is around the Ecuadorean islands. The Declaration does not make a distinction between islands under the jurisdiction of Ecuador, Peru or Chile, or between smaller and bigger islands, and there is therefore no reason to exclude the relevance of some islands in connection with the role of the general maritime zone following the parallel.

20. The extensive legal practice and diplomatic exchanges that followed the 1954 Special Maritime Frontier Zone Agreement offer clear evidence of the Parties' understanding of the 1952 and 1954 instruments. Particularly relevant in this context is the Resolution of the President of Peru in 1955 (Supreme Resolution No. 23 of 12 January 1955, The Peruvian 200-Mile Maritime Zone, Memorial of Peru, Ann. 9), which provided the technical criteria for drawing the maritime boundary with the express statement that it was not to "extend beyond that of the corresponding parallel at the point where the frontier of Peru reaches the sea", and which relied on both the Santiago Declaration and the 1954 Special Maritime Frontier Zone Agreement.

21. The abundant practice of the Parties also extends to enforcement activities in relation to the boundary, including fisheries, navigation, overflying, the laying of submarine cables and many other aspects that are well recorded. Such practice is enough to show that, even if the Court has considered a limited role for the agreements as the source of the boundary parallel, there is, at the very least, acquiescence by the Parties as to the existence and acceptance of such a parallel throughout its full extent.

22. Notwithstanding the significance of this practice, which extends for over six decades, the Judgment tends not to assign great importance to it, and to dismiss it altogether. This limited role accorded to the law and the practice of the Parties is the consequence of the fact that the Court started from the premise that the 1947 Proclamations and their aftermath through to 1954 were not in accordance with the law of the sea as understood at the time, and hence, that a maritime boundary could not then be drawn in relation to extended claims.

23. This judge regrets not to share such a limited understanding and, as the joint dissent indicates, the early instruments were in any event capable of agreeing on a maritime delimitation of the three States with regard to their potential entitlements. In fact, the Proclamations and the instruments that followed, like some that preceded them, were the triggering acts of a development that, after a systematic evolution, led to the concept of the exclusive economic zone and other key concepts of the present-day law of the sea as embodied in the 1982 United Nations Convention on the Law of the Sea, and recognized by the Court as a part of customary international law. The Third United Nations Conference on the Law of the Sea recognized as much in rendering, in plenary session, tribute to the memory of President González Videla on his passing in 1982 (Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Vol. XIV, United Nations doc. A/CONF.62/SR.137, 137th Plenary Meeting (Thursday, 26 August 1980, at 3.25 p.m.), at para. 67).

24. It is to be noted that the Judgment attaches particular significance to what came to be known as the Bákula Memorandum (Judgment, paragraphs 136-142). This judge had the privilege of working for many years with Ambassador Juan Miguel Bákula, a distinguished Peruvian diplomat and jurist, during the negotiations leading to the Convention on the Law of the Sea. In its origins, the Bákula Memorandum was not a diplomatic initiative of the Government of Peru. Rather, it was a proposal advanced on a personal basis by Ambassador Bákula to sound out the feasibility of certain thoughts on maritime delimitation.

25. This character is reflected in the Note accompanying the text of this Memorandum and sent by the Peruvian Embassy in Santiago de Chile to the Chilean Ministry of Foreign Affairs on 23 May 1986, which refers to the summary of the statements that the Ambassador "allowed himself to make" during the audience with the Minister (Memorial of Peru, Ann. 76). While it is true that the official communiqué issued by the Chilean Foreign Ministry on 13 June 1986 mistakenly considers that the initiative conveyed the "interest of the Peruvian Government" (Memorial of Peru, Ann. 109) in starting negotiations on maritime delimitation (Judgment, paragraph 138), the fact remains that if this had been its meaning, the Peruvian Ministry of Foreign Affairs would not have

taken 15 years to follow up on this initiative. The importance of the practice following this Memorandum is further minimized by the Judgment, as if its text were capable of establishing some kind of critical date for the purposes of this case.

26. The boundary thus drawn until Point A follows in its second segment the equidistance line as measured from that point until reaching Point B, where the equidistance line ends, and then to Point C where it meets the Peruvian "outer triangle" claim that will be discussed below.

27. The Judgment has adopted an unprecedented solution for effecting maritime delimitation in the context of the complex circumstances of this case. It appears to give satisfaction to one Party in following the parallel to the distance noted and to the other Party in continuing along an equidistance line, which were of course the two main approaches to this dispute, albeit with a different meaning and extent.

28. While the Court concludes that no significant disproportion is evident in this approach, such as would call into question the equitable nature of the provisional equidistance line (Judgment, paragraph 194), the real situation seems to be different. In point of fact, considering the relevant area to be delimited as determined by a parallel extending to a distance of 80 nautical miles, Peru is assigned a significant number of square kilometres south of the 200-nautical-mile parallel, which are diminished from Chile's entitlement. True, this is less than what would have been the case with the pure equidistance line claimed by Peru, but still the number of square kilometres lost by Chile is sizeable. If this situation casts some doubt on the meaning of proportionality, it cannot be fully assessed without taking into account the effect of the "outer triangle" in the distribution of maritime areas, as will be discussed below.

29. In spite of the shortcomings noted above, the Judgment has appropriately held that in assessing the extent of the lateral maritime boundary, the Court "is aware of the importance that fishing has had for the coastal populations of both Parties" (Judgment, paragraph 109), thereby evidencing a social and economic concern as to the effects the approach followed might have on those communities. A manifestation of this concern is that the maritime front of the port of Arica, while curtailed as a consequence of the equidistance line drawn, is nonetheless not enclosed and has access to the high seas. It is possible to find that this conclusion of the Court plays a role somewhat similar to that of the consideration of "special circumstances" in the correction of a maritime boundary, only that it is not explicitly stated as such.

30. More important still is that, in this light, the Parties are now entitled to negotiate access by the affected fishermen to the fishing areas brought under the jurisdiction of Peru in accordance with Article 62, paragraph 2, of the United Nations Convention on the Law of the Sea, which provides that the coastal State shall give other States access to the surplus of the allowable catch. The legal régime of the exclusive economic zone now applicable in Peru would thus be fully complied with. This compliance extends to the area of the "outer triangle" as its fishing resources have also been recognized of interest in the context of the South Pacific Regional Fisheries Management Organisation in which both Chile and Peru participate, the former as a State Party and the latter as a signatory.

31. The discussion concerning the extent of claims and their effects is inseparable from the consideration of Peru's second claim concerning the "outer triangle", in which it requests the Court to adjudge and declare that Peru is entitled to exercise exclusive sovereign rights over the whole of the maritime area up to a 200-nautical-mile distance from its baselines. It is an accepted fact that Chile lays no jurisdictional claim to this area under the concept of a "Presential Sea" or otherwise, but it has fishing rights in an area which, until now, was part of the high seas. It must be pointed out that, as a matter of principle, States are entitled to claim all maritime areas as measured from their baselines up to the extent permissible under international law. Because the Judgment uses an equidistance line in its second segment, it concludes that it does not need to rule on Peru's second final submission concerning the "outer triangle".

32. This judge is unable to share the Judgment's conclusion in this respect because of the following two reasons. The first is that the "outer triangle" is the consequence of Peru having adopted the "arcs-of-circle" method of delimitation in conjunction with the Law on Maritime Domain Baselines of 3 November 2005 (Memorial of Peru, Ann. 23), which stands in contrast to the method of *"tracé parallèle"* used in the 1950s. Although it has been argued that the arcs-of-circle had been introduced earlier, this assertion is not clearly supported by the evidence in the record, as the Joint Dissent has noted. In fact, the Joint Dissent shows that the enactments on which this argument is based prove rather the opposite, namely, that *tracé parallèle* was the method chosen at earlier periods.

33. The resort to the arcs-of-circle in 2005 is well beyond the critical date of 2000 and two decades after the Bákula Memorandum of 1986, following which the Judgment diminishes the influence of practice in the final outcome of the dispute. It would have been appropriate to apply the same criterion to the 2005 law and to the related implementation mechanisms on which the new method is based, and thus the influence of these factors in the maritime delimitation would have been equally diminished.

34. The second reason why this judge cannot support the Judgment's conclusion in this matter is that the area of the "outer triangle" needs to be considered in conjunction with the claim to an equidistance line. The addition of both sectors allocates to one Party a far greater proportion of the claimed maritime areas than that accorded to the other Party and therefore does not seem to adequately meet the test of not being disproportionate. There is no reason to consider the two claims as separate. They are simply two legs of the same maritime domain claim extending jurisdiction far into the Pacific Ocean and hence they should be considered as a whole for the purpose of deciding on the role of equity. In fact, the proportionality existing between the full parallel and the "outer triangle" would have allowed for a more reasonable role of equity, consistent with the governing law.

35. This leads to an additional concern in the light of this Judgment which relates to the overall role of equity under international law. While equity is generally accepted as a source of law under the Statute of the Court, the Court has always considered that the role of equity is bound by the law as a type of equity *infra legem*, that is, under the law and in accordance with it, as opposed to equity *preter legem* or equity *contra legem*.

36. Distinguished writers of international law have noted that, in its first attempts to use equity in the context of maritime delimitation, the Court did not clearly rely on

this source in keeping within the bounds of the law, which was largely left undetermined. Following the evolution of its jurisprudence, the Court then turned to a more precisely bound form of equity. This is the very understanding of Article 74, paragraph 1 of the 1982 United Nations Convention on the Law of the Sea in considering equitable results of maritime delimitation, not in isolation from, but in conjunction with agreements between the parties, all of it effected on the basis of international law. This judge had the honour of proposing the final text of the above-mentioned Article when acting as the delegate for Chile at the Third Conference, and can attest that this meaning was the fundamental basis of the consensus that was finally reached on its content.

37. This judge is certainly in favour of solutions that might result in the accommodation of the essential interests of the parties to a case, and thus be met with greater acceptance, on the understanding that such exercise is strictly bound by the governing law, which in this case is embodied in treaties and other legal instruments. In the context of this Judgment, however, this limitation placed on the role of equity appears blurred, as if it were called to influence the outcome on its own standing. Consistency with the meaning of the United Nations Convention on the Law of the Sea could thus be compromised.

38. None of these considerations in any way detract from the respect that this judge has for the role of the Court in ensuring effective dispute settlement and its outstanding contribution to the prevalence of the rule of law in the international community, a task that can always be perfected.

(Signed) Francisco Orrego Vicuña.