

CLIENT UPDATE

MARITIME DELIMITATION: ICJ RULES ON PERU-CHILE MARITIME BOUNDARY DISPUTE

NEW YORK

Catherine M. Amirfar
cmamirfar@debevoise.com

Donovan Francis Donovan
dfdonovan@debevoise.com

LONDON

Lord Goldsmith QC
phgoldsmith@debevoise.com

Sophie Lamb
sjlamb@debevoise.com

Jessica Gladstone
jgladstone@debevoise.com

Aimee-Jane Lee
ajlee@debevoise.com

On 27 January 2014, the International Court of Justice (“ICJ” or “Court”) delivered its judgment in the maritime boundary dispute between Peru and Chile. The Court held that the maritime boundary between the two States had been defined by a tacit agreement between the Parties in or before 1954 and that it extended to a distance of 80 nautical miles along a parallel of latitude. Since the agreed boundary covered only a portion of the relevant maritime area, the Court proceeded to delimit the remainder of the maritime boundary in accordance with the established equidistance method.

The finding that a tacit maritime boundary agreement was in existence - a thesis which had not been advanced by either Party - succeeded in reconciling the States’ competing claims and effectively divided the contested maritime area equally between the Parties. However, the solution provoked judicial discussion about whether the standard of evidence required to establish the existence of a tacit boundary agreement had been met in the present case.

* * *

On 16 January 2008, Peru initiated proceedings before the ICJ, requesting it to determine the course of the maritime boundary between Peru and Chile and to recognise its exclusive sovereign rights over a 200 nautical mile maritime area, including an area which wrapped around the western limit of Chile's maritime zone and which Chile considered to be the high sea, described as the "outer triangle".

In response, Chile submitted that the maritime boundary had already been fully delimited by agreement. Specifically, Chile argued that the 1952 Santiago Declaration, an international agreement on the conservation of maritime resources concluded by Chile, Peru and Ecuador, provided for an all-purpose international maritime boundary extending to a minimum of 200 nautical miles.

The Court, however, declined to follow the submissions of either Party. It rejected Chile's position that the maritime boundary was established by the 1952 Santiago Declaration on the basis that it made no express reference to maritime delimitation. Specifically, it held that a provision of the Santiago Declaration which provided for the delimitation of overlapping maritime zones between island territories could not be interpreted as effecting a general maritime delimitation.

Conversely, the Court also rejected Peru's contention that the maritime boundary had never been delimited. Rather, the Court found that, by 1954, the Parties had entered into a tacit agreement that a maritime boundary was in existence. The Court relied principally on terms of the 1954 Special Maritime Frontier Zone Agreement, an international instrument concluded by Chile, Peru and Ecuador, which served the "narrow and limited" purpose of creating a zone of tolerance for small fishing vessels. The reference in the 1954 Agreement to the "parallel which constitutes the maritime boundary" "cemented" a tacit agreement between the Parties that the maritime boundary had been defined. The existence of the tacit agreement was further affirmed by the conclusion of agreements in 1968-1969 to build lighthouses with a view to "materialis[ing] the parallel of the maritime frontier".

However, the 1954 Agreement gave no indication as to the nature or extent of the boundary. Consequently, the Court assessed contemporaneous State practice and developments in international law and inferred, by a majority of ten votes to six, that the Parties implicitly agreed to a boundary extending to 80 nautical miles. The Court arrived at this figure after reviewing diverse State and international practice, including *inter alia*, the geographic location of the Humboldt Current, a rich marine ecosystem; the scope of the fishing activities conducted at the time, which were largely confined within a 60 nautical mile radius from the main ports; the location of enforcement measures against maritime

infractions; diplomatic statements and the absence of any international consensus concerning rights extending to 200 nautical miles. This review led the Court to the conclusion that the boundary could not have extended beyond 80 nautical miles.

The Court also held that the boundary was an all-purpose boundary (*i.e.*, including the water column, the sea-bed and its subsoil).

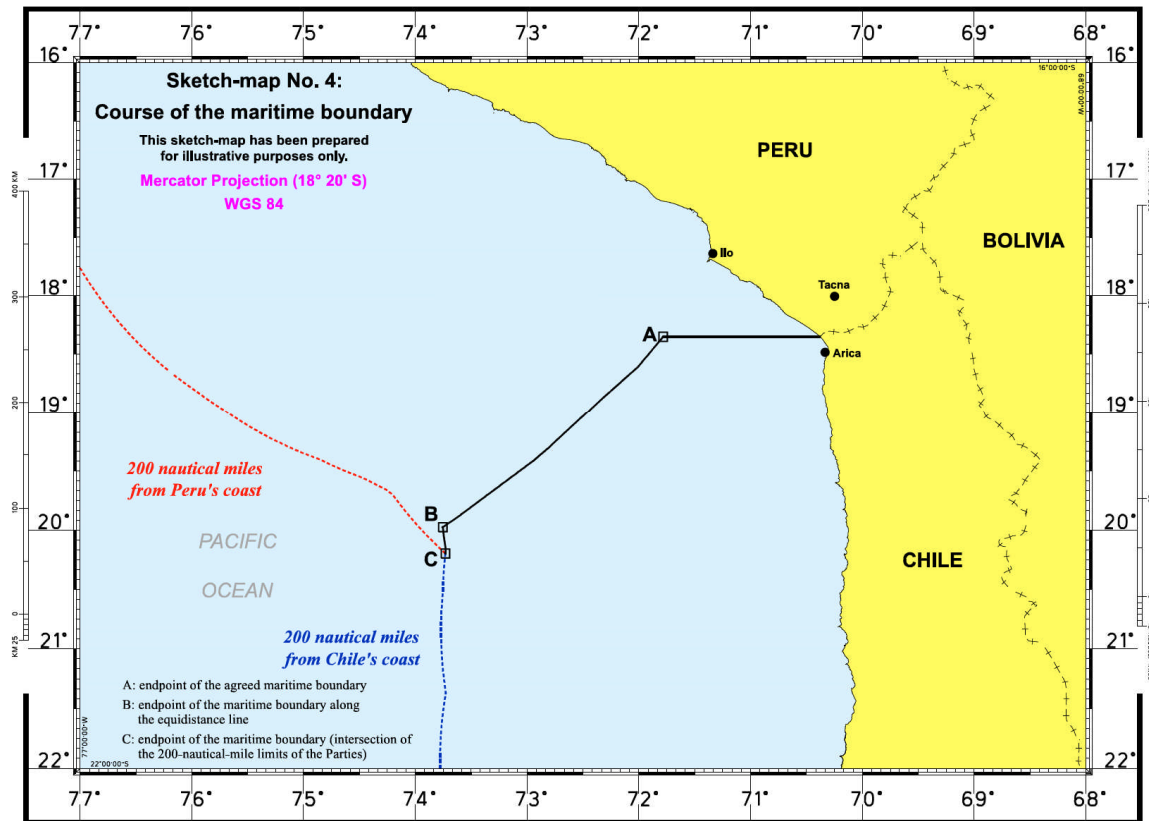
In a second phase, the Court was required to delimit the remainder of the relevant maritime area in accordance with the tripartite equidistance method. After plotting the provisional equidistance line, the Court proceeded to assess whether there were any relevant circumstances warranting an adjustment of the provisional line and whether the line was disproportionate to the lengths of the relevant coasts. In this regard, the Court's approach was affected by the "unusual" location of the starting point of the delimitation which (given the tacit agreement) was not on the coast but 80 nautical miles seaward. Notably, neither Party had made submissions to the Court on either issue, as Chile maintained that the boundary was already in existence while Peru's submissions were premised on the equidistance line beginning from the coast.

In the event, the Court engaged in a cursory review of both issues, finding that there were no relevant circumstances calling for the adjustment of the line and that, since the unusual starting point rendered the calculation of proportionality "difficult, if not impossible", it was sufficient that "no significant disproportion" was evident such as to undermine its equitable nature.

Of note, Judge Donoghue drew attention to this issue in her Declaration, opining that in a case such as this, in which "neither Party's pleaded case convinced the Court" and neither Party presented evidence directed specifically to the tacit agreement or to the delimitation from that point, the Court should consider availing of alternative procedural approaches which are deployed by other international courts and tribunals, such as requests for additional legal briefings or recourse to interim or partial decisions.

The Court concluded that the maritime boundary runs from the intersection of the parallel of latitude passing through a specified boundary marker and the low-water line and extends to a point 80 nautical miles seaward, at which point it deviates to the south-west along the equidistance line until the point where the 200 nautical mile zones no longer overlap. The final section of the boundary runs along the 200 nautical mile limit until the intersection of the 200 nautical mile limits of the Parties. The solution adopted by the Court rendered Peru's second request concerning rights over the "outer-triangle" moot. The

Court did not specify precise geographical coordinates, expressing its expectation that the Parties would determine the coordinates in the spirit of good neighbourliness.



The Court’s judgment can be seen as a rapprochement between both States’ positions: Peru celebrated the extension of its maritime zone and while Chile ceded approximately half of the contested area, it welcomed the fact that it retained control of its rich fishing grounds.

However, some members of the Court expressed doubt about the methodology through which this consensus was reached. A number of Judges considered that there was insufficient evidence of an implied agreement and that the record did not meet “the stringent and well established standard of proof” required for the establishment of an international maritime boundary by tacit agreement, articulated by the Court in *Nicaragua v Honduras* (I.C.J. Reports 2007, p. 659 at p.735, para.253). In that case, the Court ruled that, in light of its “grave importance”, the establishment of a maritime boundary is not to be easily presumed and the evidence of a tacit legal agreement must be “compelling”. Furthermore, some members of the bench found the 80 nautical mile limit “unpersuasive”, including four Judges who signed a joint-dissenting opinion which pointed to the fact that

both parties had, since 1947, publicly proclaimed maritime zones extending to 200 nautical miles.

* * *

Please do not hesitate to contact us with any questions.

March 17, 2014