

# The Maritime Dispute Between Peru and Chile

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DON ANTON, MAR 18 2014

On 27 January 2014, the International Court of Justice (ICJ) delivered its judgment on the maritime boundary dispute between Peru and Chile (Peru v. Chile, Judgment, General List No. 137). The Court had to determine first whether a maritime boundary existed between Peru and Chile. If so, then it also had to consider the nature and extent of the boundary.

Peru's application instituting proceedings in 2008 asserted that the limits of its southern maritime boundary and Chile's abutting northern maritime boundary were uncertain and requested the ICJ to delimit the respective maritime zones based on a line "equidistant from the baselines of both Parties, up to a point situated at a distance of 200 nautical miles (nm) from those baselines" (Peru v. Chile, para. 14). Chile disputed this uncertainty and maintained that the maritime boundary had been settled by a prior agreement. Chile maintained that the delimitation under the agreement was based on a "parallel of latitude passing through the most seaward boundary marker of the land boundary between Chile and Peru" and extending 200 nm (*id.*). The respective positions of both Chile and Peru are shown below in sketch-map No. 2 of the Court's judgment (Peru v. Chile, para 22). Peru also argued that if the parallel of latitude method of delimitation was adopted, then at the end of the common boundary it was entitled to exercise exclusive sovereign rights over a maritime area lying out to a distance of 200 nm from its baseline (and beyond 200 nm from the Chilean baseline). Peru referred to this area as the "outer triangle" (shown shaded in blue).

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Delimiting the boundary by the use of the parallel of latitude method urged by Chile (instead of based on the equidistance principle) would have greatly enlarged the ocean space subject to Chilean sovereign rights and jurisdiction, while significantly diminishing those of Peru. The significant economic impact for both states in where the boundary line is set is readily apparent. The water column seaward of the coasts of Peru and Chile, known as the Humbolt Current, is extremely rich in living marine resources. In 2008, it was said to be the most productive marine ecosystem in the world and approximately 18%-20% of world's total fish catch is harvested in the waters off Peru and Chile (Mark McGinley, Humboldt Current large marine ecosystem, Encyclopedia of Earth). Given this economic significance, since 1982 Peru had repeatedly sought to negotiate, presumably pursuant to Article 74 of the United Nations Convention for the Law of the Sea, an agreement finally establishing a maritime boundary with Chile. However, in Chile's view the boundary had been formally delimited by an agreement reflected in Paragraph IV of the 1952 Santiago Declaration and that this boundary was protected from challenge on the basis of *pacta sunt servanda* (agreements must be kept) and the need to ensure the stability of boundaries.

Ultimately, the Court fashioned a boundary that neither Peru nor Chile had pleaded. The Court delimited the starting point (Boundary Marker No. 1) and a parallel maritime boundary line that extended 80 nm (Point A) on the basis of a tacit agreement. Beyond that initial 80 nm segment, the Court called on customary international law in order to delimit the seaward boundary related to overlapping claims out to 200 nm (Point B) then dropping down to where the maritime entitlements of the parties end (Point C). The final boundary declared delimited by the Court is shown in sketch-map No. 4 of the judgment (Peru v. Chile, para 195).

## **The Treatment of the Dispute by the ICJ**

The Court starts by noting that its jurisdiction arises, according to Peru and unchallenged by Chile, by virtue of the compromissory clause in the 1948 American Treaty on Pacific Settlement (Art. XXXI). The judgment then briefly recounts the fascinating genesis of the maritime boundary dispute between Peru and Chile.

The dispute is traced back to the 19th Century and in the "War of the Pacific" (1879-1883) between Chile, Peru and Bolivia, which revolved around control over nitrate resources in the Atacama Desert. Chile ultimately proved victorious and annexed the Peruvian provinces of Tacna, Arica and Tarapacá. In 1883 Chile and Peru entered into a peace treaty known as the Treaty of Ancón and hostilities came to an end. Under the terms of the treaty, Chile was supposed to organise a plebiscite after ten years in which the populations of Tacna and Arica would decide which country they wanted to belong to. It failed to do this and following mediation by the President of the United States in 1929 the two countries entered into the Treaty of Lima whereby they agreed that Tacna would be returned to Peru and Chile would retain Arica. They also agreed to the establishment of a Mixed Commission of Limits to determine the land boundary between the two countries, which was accomplished by its 1930 Final Act (see sketch-map No. 2).

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While Peru and Chile agreed that their land boundary had been conclusively determined, Peru maintained that this was not the case with the party's common maritime boundary and requested the Court to delimit the maritime zones between the parties by means of a line equidistant from the baselines of both parties. Peru asserted that the start of the boundary should be at Punta Concordia, where the land border hits the sea. As noted, Peru also requested the ICJ to declare the "outer triangle" subject to its sovereign rights and jurisdiction as within 200 nm of its baselines, but more than 200 nm from Chile's baselines. Chile argued contra-wisely that a definitive boundary had been agreed in the 1952 Santiago Declaration, as supported by a reading of preceding and subsequent instruments and their *travaux préparatoires*. Chile maintained that the maritime boundary line followed the parallel of latitude passing through the most seaward boundary marker of the land boundary (250 meters north of Punta Concordia), Boundary Marker No. 1 (referred to as Hito No. 1 in the 1930 Final Act) and extending to 200 nm. Chile requested the Court to recognize and declare this pre-existing maritime boundary and dismiss Peru's claim in its entirety.

The Court began its analysis by considering a series of instruments and agreements between Peru and Chile, including the 1947 unilateral Proclamations (1947 Proclamations) by both states claiming a 200 nm exclusive maritime zone of each coast, the 1952 Santiago Declaration on the Maritime Zone (1952 Santiago Declaration), and related agreements concluded over the next two years, especially the 1954 Agreement Relating to a Special Maritime Frontier Zone (1954 Agreement), as well as relevant state practice. Of course, at this period of time customary international law was silent about the declaration of 200 nm exclusive maritime zones in relation to living marine resources, although the Truman Proclamation did serve to crystalize the customary international law over the delimitation of overlapping claims over the continental shelf.

In terms of the 1947 Proclamations, the ICJ ruled (as conceded by Chile) that they did not, of themselves, establish an international maritime boundary between the parties. However, the Court did find that the Proclamations were evidence of the necessity of an understanding of the need to establish the lateral limits of the claimed maritime zones in the future. The Court then examined the 1952 Santiago Declaration, in particular paragraph IV which 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.

For Chile, paragraph IV clearly indicated a general maritime delimitation between Peru and Chile extending to 200 nm had been intended. If this were not the case, then it would be impossible to know if an island was within 200 nm of the "general maritime zone" of the neighbouring State. The Court disagreed. Interestingly, the Court held that the 1952 Declaration, which presumably started life as a declarative political instrument, was transformed into a treaty (properly so called) by virtue of its ratification by each signatory and its registration with the U.N. under Article 102 of the U.N. Charter. Treaty though it became, the Court held that it did not constitute an agreement to establish a maritime boundary.

Interpreting the 1952 Declaration according to the ordinary meaning of its terms, the Court found that the Parties had only agreed on the limits of certain insular maritime zones and the zones generated by the continental coasts that abut these zones. The Court further considered the object and purpose of the 1952 Declaration and found the focus to be on conservation and protection of natural resources. It found it was not necessary to consider the situation of small islands located close to the coast near the Peru-Chile land boundary because the concerns about insular zones arose from a concern expressed by Ecuador. Finally the Court rejected Chile's claim that the Minutes of the 1952 conference leading to the Declaration constitute an "agreement relation to the treaty" under Article 31(2)(a) of the Vienna Convention on the Law of Treaties. The Court found they were not an agreement but more in the nature of *travaux*, which were not needed as supplementary means of interpretation in this case.

Yet, the Court accepted Chilean reliance on the provisions of various agreements from 1952 to 1954, within the context of the 1947 Proclamations and the 1952 Santiago Declaration, was sufficient to establish a tacit agreement for a general parallel maritime boundary starting at Boundary Marker No. 1. In reaching this conclusion the Court

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examined 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 also assessed the practice of the two Parties subsequent to 1954. The ICJ noted that the practice and agreements before 1954 “suggested an evolving understanding between the Parties concerning their maritime boundary” (Peru v. Chile, para. 91). The Court also considered the 1954 Agreement as it addressed violations of the maritime frontier by small fishing vessels. Article 1 of the 1954 Agreement established 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 between the two countries.” The ICJ found that the 1954 Agreement constituted an acknowledgement by the Parties that a maritime boundary was in existence (even though the Agreement gave no indication of the nature or extent of that boundary). Recognizing the heavy burden of the pre-existing implied agreement, the Court stated:

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.

The Court found that certain 1968-1969 lighthouse arrangements, while not constituting maritime boundary delimitation, proceeded on the basis that a maritime boundary already existed extending along the parallel of latitude from Boundary Marker No.1 (and not Punta Concordia).

The Court next examined the character of the maritime boundary that had been established by tacit agreement. Because the 1947 Proclamations and the 1952 Declaration referred to both the sea-bed and the waters above the sea-bed, making no distinction between these two different maritime aspects. The Court concluded that the tacitly agreed boundary was a single maritime boundary applicable to the water column, the sea-bed and its subsoil.

Turning to the extent of the existing maritime boundary established by tacit agreement, the Court focused on the purpose of the 1954 agreement and the practice of the parties. As the 1954 Agreement was specifically concluded to regulate fisheries and prevent innocent and inadvertent violations of the frontiers of each state, the Court concluded that the boundary must extend at least to the distance where such activity was taking place at the time. The Court noted that the fish species making up the bulk of the annual catch of the two states in the 1950s were mostly harvested within 60 nm of the coast. On the basis of 1950s fishing practices and the law of the sea existing at the time, the ICJ concluded that the agreed maritime boundary did not extend beyond 80 nm from its starting-point (Point A on sketch-map No. 4).

The Court then addressed the delimitation of the boundary beyond Point A following its three-step method it has established to help reach an equitable delimitation. At the first step – the application of the equidistance principle – the Court constructed a provisional equidistance line, drawing a circle with an 80 nm radius from Point A, in order to determine the relevant base points on the Peruvian coast. This equidistance line was extended out to 200 nm from the Chilean coast (to Point B). The Court did not find it necessary to address the submission of Peru regarding the “outer triangle” because it did not arise. The delimitation of the Parties’ overlapping maritime entitlements beyond Point A was by way of an equidistance line and it did not present an “outer triangle.” Thus, the Peruvian entitlement by virtue of the maritime boundary extends south of Point B to Point C for approximately 22 nm following the 200 nm limit of Chile.

At the second step – the consideration of other relevant circumstances that might alter the provisional equidistance line – the Court found that there were no relevant circumstances calling for adjustment of the provisional equidistance line.

At the third step – proportionality analysis – the Court examined whether the result achieved was significantly disproportionate in relation to the lengths of the relevant coasts. The Court noted that the object of delimitation was to achieve an equitable result, not an arithmetical equal apportionment of maritime areas. In this case, the existence of

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an agreed boundary running along a parallel for 80 nm made the calculation of the relevant coastal length and coastal areas “difficult, if not impossible” (Peru v. Chile, para. 193). The Court, accordingly, did not calculate any sort of precise ratios of entitlement, but instead broadly assessed the proportionality of the delimitation and concluded no significant disproportionality existed that militated against the equitable nature of the provisional equidistance line beyond Point A (Peru v. Chile, para. 194).

## Some Thoughts about the Judgment

The peaceful resolution of this maritime boundary dispute is to be welcomed, especially given that its origins began through hostilities and the use of force. It seems plain that the Court achieved (even if it was not striving for) a reasonable compromise between the absolutist positions that had been staked out by Peru and Chile. Chile has a lateral boundary out to 80 nm and the some of the richest fisheries in the area of overlapping claims. Peru has an equidistant boundary from that point out to 200 nm which gives it roughly 21,000 sq km of the disputed 38,000 sq km overlapping claims, including its “outer triangle”. Thus, both parties are able to claim “victory” to a degree.

Importantly, however, the judgment broadly adheres to the proposition that the delimitation of maritime boundaries represent a just and “equitable solution”. It is true that the Court in reaching its judgment has been proactive in achieving an outcome that was pleaded by neither party. In this regard, the Declaration of Judge Donoghue bears attention. Because neither party convinced the Court on the law, neither party fully briefed the Court on the delimitation actually made by the Court; either the initial 80 nm segment settled by agreement or the area beyond Point A delimited on the basis of equidistance. Judge Donoghue would have the Court in such circumstances consider the need to request additional briefing or evidence from the parties and/or render an interim decision while seeking additional submissions on the new or remaining issues. Just as importantly, Judge Donoghue is cognizant of opportunities for judicial cross-fertilization and calls on the Court to be open to making use of appropriate procedural approaches and practices of other tribunals.

Significantly, the Court took detailed, hands-on approach to the practice of the parties in the pre-exclusive economic zone era and to the assessment of the evidence in an attempt to identify what was the outer point of the tacitly agreed boundary. The Court relied on fisheries statistics cited by both Chile in its written statements in order to determine which species were fished in the 1950s. The Court also utilized statements made by Peru at the 1958 United Nations Conference on the Law of the Sea to determine the range of such species at the time. The evidence, thus, gives the 80 nm initial established by the Court a basis in fact, although an empirical scientific basis is absent and six members of the Court did not reach this conclusion.

In terms of the methodology of delimitation beyond Point A employed by the Court, not much new appears in the judgment. The delimitation follows the doctrinaire three-step methodology repeatedly approved by the Court in what is an unexceptional geographic setting.

Whether or not the judgment finally settles the nationalist competition that has surrounded the claims and litigation remains to be seen, with some press reports indicating continued jingoistic reaction (e.g. César Uco and Bill Van Auken, ‘World Court decision on Peru-Chile border fails to quell nationalist rivalries’, World Socialist Web Site, 4 Feb 2014) and others reporting cooperation on implementation between the parties (e.g. Ryan Dube, ‘Peru, Chile Agree to ‘Gradually’ Implement Sea-Border Ruling’, Wall Street Journal, 30 Jan 2014). Beyond the dispute between Peru and Chile, next on the next case on the radar is Bolivia’s request to the ICJ seeking an Order that Chile grant to Bolivia a corridor to access the Pacific Ocean; a claim that has a common genesis in the 19<sup>th</sup> Century War of the Pacific.

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