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Lights and Shadows in the Final Decision of the International Court of Justice

Although the verdict of the International Court of Justice confirms the Boundary Marker Nº 1 (*Hito 1*) as the maritime boundary between Peru and Chile, the latter has expressed his rejection to the decision of limiting its extension to 80 nautical miles. Not only for losing part of the Exclusive Economic Zone, but for the lack of arguments supporting this determination, which sets a precedent for other nations regarding the institution's performance.

After two postponements, almost a year waiting, and more than five years of trial proceedings, on last January 27th, the International Court of Justice (ICJ) in Le Hague read the verdict concerning the maritime boundary claim presented by Peru against Chile.

In the claim, Peru denied the existence of the maritime boundary agreement between both countries, contested Boundary Marker Nº 1 as reference of the parallel that establishes the boundary, requested the Court to stipulate the maritime delimitation based on the equidistance principle for a controversy zone of approximately 36 thousand square kilometers, which was an Exclusive Economic Zone of Chile, and claimed sovereign rights over an external triangle of 28 thousand square kilometers south of the parallel that passes through Boundary Marker Nº 1 (see Map 1).

Peru considered that none of the treaties subscribed with our country had fixed the boundaries of the maritime zones. Instead, Chile maintained that the maritime boundary had been agreed by maritime declarations of 200 nautical miles of national sovereignty and jurisdiction, stated in the 1952 Declaration of Santiago related to the Maritime Zone; by the Treaty of Lima of 1954 on Special Maritime Boundary Zone, by records of the mixed commission on boundaries of Chile and Peru in 1930, 1968 and 1969; and by Chilean actions and Peruvian acknowledgements concerning the practical adherence to that boundary.

Although the ICJ confirmed almost unanimously that the maritime boundary between the two countries is the parallel passing through Boundary Marker Nº 1, its extension was fixed at 80 nautical miles with ten votes against six; thereby drawing a line from that point to the meeting point of the Exclusive Economic Zones of Chile and Peru. Furthermore, it recognizes the neighbor country economical rights over 28,595 square kilometers in high seas, the so-called "external triangle". This decision has been controversial both among different experts and the Chilean public opinion.

Historical Disagreements Concerning Maritime Boundaries and Disregard of the Treaties

The identification of the maritime boundary between Chile and Peru has been going on for a long time. Once the War of the Pacific was over, through the signature of the Treaty of Ancón in 1883, the Treaty of Lima of 1929 was subscribed together with its Complementary Protocol. The latter, in its first article agreed that (the division of Tacna and Arica) "the only pending issue between the subscribing governments…" was definitely settled. Subsequently, the declaration of 200 nautical miles of sovereignty and jurisdiction in 1947 and the corresponding treaties, duly ratified by both countries and Ecuador, called the Declaration on the Maritime Zone in 1952i and Agreement on the Special Maritime Boundary Zone, in 1954ii, the chapter regarding the maritime boundary was deemed closed.

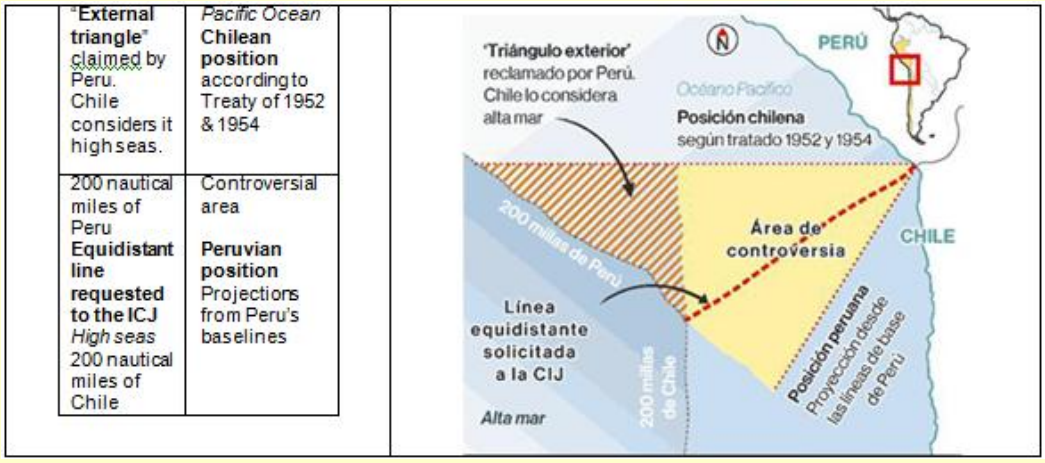
Later on, the governments of both countries properly recognized and interpreted their maritime delimitation, as can be derived from the records and acts of 1968 and 1969 regarding the construction of lineup towers at the sides of Boundary Marker Nº 1.

Although in the mid-eighties some academicians started to prepare on their own this case on maritime delimitation, ignoring the scope of the treaties, in practice the parallel was invariably respected as the actual boundary between both countries.

Moreover, when the protocol to execute the pending clauses of the 1929 Treaty was signed in 1999, accepting to build a mooring wharf, customs and the train station of Arica and monument in the Cape of Arica (Morro), the Peruvian President and Minister of Foreign Affairs declared once again that this put an end to all controversies on border boundaries between Chile and Peru.

Map 1

PROJECTION OF THE EXISTING MARITIME BOUNDARY AND THE ONE PRETENDED BY PERU



Source: AFP/El Comercio.

Decision of the ICJ

The controversial verdict informed by Peter Tomka, President of the ICJ, confirmed –through the vote of 15 of 16 judges- the existence of the agreement between Chile and Peru to fix the parallel passing through Boundary Marker Nº 1 as the division of the border between both countries. However, by a majority of 10 judges against 6, it limited its extension to only 80 nautical miles, and beyond this point, it established the equidistance principle on the zone of controversy with our country, in accordance with the Convention on the Law of the Sea, which also means to extend its projection to the external triangle mentioned above, which Chile considered high seas.

In the first place, we can highlight the existence of a maritime boundary agreement between the parties consisting in the parallel of Boundary Marker Nº 1. This is a relevant fact, since the Court embodies hereby the Chilean position and discards two times the Peruvian claim that ignored the existence of treaties and an agreed boundary. It also dismisses the claim of using point 266, denominated Concordia, as starting point of the maritime boundary.

Instead, it confirms Boundary Marker Nº 1 as reference of the parallel that divides the maritime boundary between both countries, thus leaving the border between Marker Nº 1 and point 266 as a "dry coast" area. Nevertheless, as the defense indicated in the trial, the Court had to limit its

jurisdiction and refrain from dealing with the Peruvian request of fixing the land boundary, since the 1929 Treaty only gives power to the United States to act as the arbiter.iii

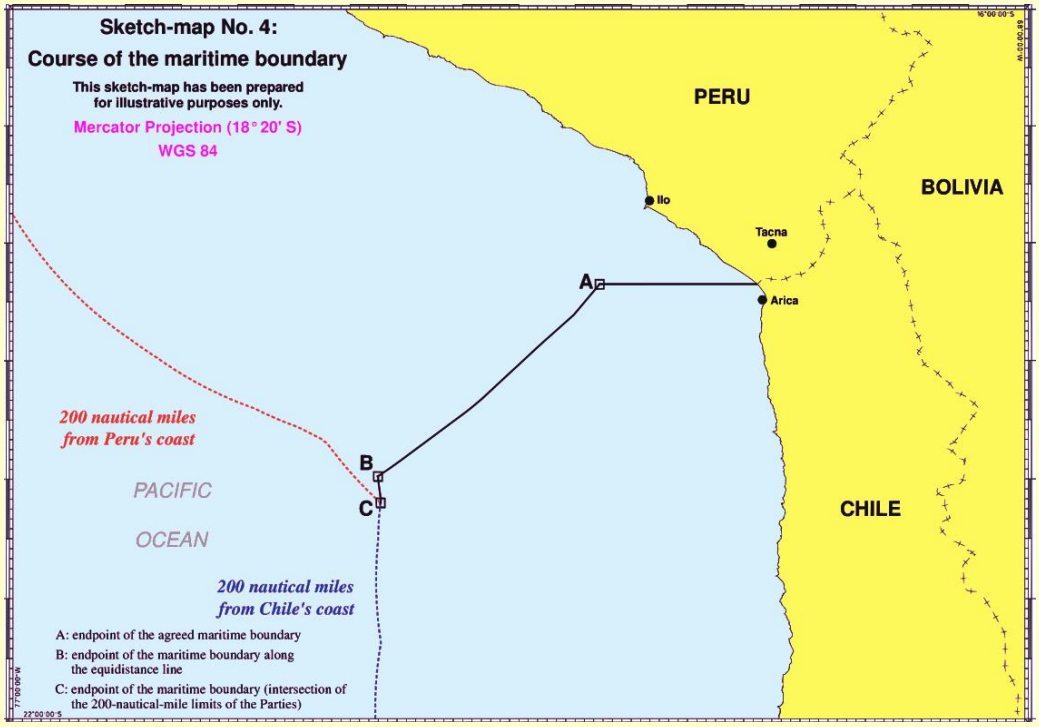
Second, it recognizes the mentioned parallel as dividing only up to 80 nautical miles (point A in Map 2); considering this point, a line was drawn running southwest from an equidistant point from the baselines of both countries. Therefore, the Court denied in its decision the delimitating nature of the 1952 Declaration on the Maritime Zone and the agreements contained in the Reports of the Juridical Commission which prepared this declaration, estimating that they delimitated islands only; and it did not consider the backgrounds contained in the 1947 unilateral Acts, all of which refer to the extension of 200 nautical miles from the border.iv On the other hand, the Court recognized as boundary treaties the 1954 Declaration of Lima establishing the parallel, but only up to 80 nautical miles, and then applied the equidistance of the controversial zone. Thus, it recognizes exclusive economic rights for Peru over approximately 22 thousand square kilometers, which Chile had used until now. Although in this area there is not much fishing, the seabed is very deep and Chile is still fully free to practice maritime and air navigation; this transfer is an unfortunate loss of maritime area for the country. Additionally, Peru was recognized economic rights over 28,595 square kilometers on high seas, that is, over the so-called “external triangle”.

All in all, and as the Chilean government has pointed out, it must be considered that this verdict has: (a) protected the maritime connectivity and projection of the cities of Arica and Iquique and ports southwards; (b) guaranteed and kept unchanged the sovereign jurisdiction upon all the Chilean territorial sea (by acknowledging the 12 miles integrally) and on two thirds of the Chilean controversial Exclusive Economic Zone of 68,819km2, over which Chile keeps its full and absolute rights; and (c) protects the greatest wealth of the maritime spaces being utilized, all relevant fisheries and the potential wealth of the first 60 nautical miles and the Exclusive Economic Zones that the Court recognizes to Chile.

It is also worth mentioning that the verdict gives full freedom to navigate and overfly beyond the 12 miles.

Map 2

MAP FOLLOWING THE ICJ VERDICT CONCERNING THE MARITIME BOUNDARY DISPUTE BETWEEN PERU AND CHILE



Source: International Court of Justice. United Nations 2014.

The Controversial 80-Nautical Mile Boundary

The fact that the extension of the parallel starting in Marker Nº 1 has been set at 80 nautical miles is not only the most controversial aspect of the verdict, but one that had been anticipated. In fact, some members of the Chilean juridical team and eminent persons linked to the process had foretold, days before the final decision, that there would be an intense scrutiny of the grounds, arguments and juridical logic used by the Court to justify a "breakdown" in the parallel's extension (inferior to 200 nautical miles). And they were not mistaken.

The arbitrary nature of the parallel's breakdown and the chosen extension, endorsed by 10 judges, differs from the minority's position. For example, the special dissenting vote of Francisco Orregov, Chilean ad hoc judge, who participated together with Judges Xue, Gaja and Bhandari in a joint dissenting opinion, is very enlightening in this context. They maintained that the interpretation of the analyzed relevant declarations and agreements allow drawing the diverging conclusion that the parties agreed that the

delimitation of their maritime boundary follows the latitude parallel until the distance of 200 nautical miles from its starting point.

In his own particular vote, Judge Orrego affirms that the decision of the Court stating that the maritime boundary is composed of two segments, has no foundation: “It is clear in this case file that the parties did not argue about this distance or, in the event, any distance lesser than 200 nautical miles. Still more important, nothing in the case file shows that any smaller distance was ever considered during the long process of establishing the jurisdictional zones of 200 nautical miles.” Actually, this judge would find “surprising” that “the parties would chose a reduced border in the context of their respective individual and collective efforts to establish a zone of 200 nautical miles and ensure its international acknowledgement. If it had been the case, they would have formulated an express declaration to this effect, which did not occur.” Consequently, the parallel’s recognition by the 1954 Agreement on Special Maritime Boundary Zone “was not made with that restriction, and although its ending point was not expressly foreseen, the context clearly indicates that it was envisaged to extend it until the full distance of 200 nautical miles referred to in the claims of the parties.”

In addition to the foregoing, for Judge Orrego the verdict’s conclusion is mainly related to the point of view stating that the implementation of the 1954 Agreement was meant for small fishing boats that lacked the necessary instruments to exactly determine their position at high seas. Orrego’s argument is based on the presumption that these vessels could not operate beyond a limited distance. Although this might be true for some vessels, it is not so for larger industrial ships, which have been operating in the zone for some time”.

Finally, the Judge stresses that the verdict has not only “adopted a solution without precedent to implement the maritime delimitation in the context of the complex circumstances of this case”, but “despite the Court concluding that this approach does not evidence a significant disproportion, in such a way that it might question the equitable nature of the provisional equidistance line…the real situation seems to be a different one”.

Orrego’s argument is relevant, since it makes clear that many of the assumptions and justifications indicated in the majority verdict concerning this specific point (parallel breakdown at mile 80), find no support in previous precedents of the Court or factual elements presented before the Court, without even resorting to the explicit text of the controversial Agreements or the practice of the countries for several decades.

Therefore, it is necessary and important that, despite being a verdict with lights and shadows for Chile –and it would seem to give high degrees of juridical certainty and peace for both countries in order to forge a closer

relationship in the future-, the Chilean government has been emphatic in rejecting the parallel's extension to 80 nautical miles. Thus, Chile reaffirms the solidity of its juridical position, both by signaling the unfairness of the decision, and showing that we are dealing with a negative precedent from the perspective of the ICJ itself, which may have future consequences, either in relation to the controversies between other nations and those that our country might face later on. The fact that some sectors maintain that Chile should evaluate withdrawing from the American Treaty on Pacific Settlement (Pact of Bogota) –or that the next Ministry of Foreign Affairs, Heraldo Muñoz, has recently expressed, regarding this alternative, that it is a legitimate discussion- admits, in our opinion, the reading that a signal is being sent to the international community that should be attentively read.

Conclusion

After six years of litigation, the ICJ has pronounced its assumingly "Solomonic" decision, although erroneous, thereby avoiding the true sense and scope of the subscribed treaties, resorting instead to equity opposed to the law.

In the verdict, which is binding from the moment of its reading –and the countries having to define the way of executing it- the Court has ratified the Chilean position and great deal of its argumentation. The maritime demarcation leaves the rich coastal fishing zone to Chile. Obviously, limiting the extension of the parallel starting at Boundary Marker Nº 1 to only 80 nautical miles (from the current 200), regrettably and unjustly cuts part of our Exclusive Economic Zone. However, this has a symbolic importance to Peru, and it could help improving the good relationship between the two countries, which have come closer in the last years. All this assuming that the execution of the verdict does not originate new controversies.

Chile and Peru have currently a broad relationship. In fact, a proof of integration and cooperation are the 100 thousand Peruvians living in our country (main migratory force in Chile), or that both are members of the strategic Pacific Alliance, together with Colombia and Mexico, (regional free trade platform that seeks to join efforts allowing them to act as a bloc in trade and investment issues, and with unsuspected projection in different scopes of cooperation and culture, among others). In turn, the neighbor cities of Arica and Tacna lead an integrated economic and social life, which should be further fostered in the future.

Finally, it should be highlighted that rather than dealing with a verdict that evidently has lights and shadows for Chile, we stand before a litigation that was conducted as a State affair in our country, above contingent politics and government, keeping the same strategy and juridical team of the

defense during two governments of different political sign. This policy should be maintained when facing the implementation of the judgment.

In brief…

- The International Court of Justice confirmed in its final decision that the maritime boundary between the two countries is the parallel passing through Boundary Marker Nº 1. However, it established its extension at 80 nautical miles, drawing a line from Marker Nº 1 to the junction of the Chilean Exclusive Economic Zone; this point generated controversy both among different experts and the public opinion.
- Therefore, we speak of a verdict with lights and shadows, because beyond the fact that the Chilean government has promised to respect the decision, it has been emphatic in rejecting the extension of the parallel to 80 nautical miles, demonstrating that it is a negative precedent of the ICJ.
- It should be noted that the case of Peru against Chile in the ICJ was dealt as a State affair, a fact that should be maintained when facing the implementation of the judgment.

[i] In 1952, Chile, Ecuador and Peru subscribed the "Declaration on the Maritime Zone" in Santiago of Chile. Text available in: http://www.difrol.cl/index.php?option=com_content&task=view&id=34&Itemid=12

[ii] In 1954, Chile, Ecuador and Peru signed the "Agreement on the Special Maritime Boundary Zone", Text available in: http://www.difrol.cl/index.php?option=com_content&task=view&id=34&Itemid=12

[iii] None of the parties questioned the 1929 Treaty. The Pact of Bogota of 1946 stipulates that disputes cannot be resolved with treaties subscribed before its signature. In turn, if it compromises lands delimitated in the Treaty of 1929, the United Stated is responsible for arbitrating in case of differences in the land border.

[iv] On the contrary, it considered as implicit Treaty the 1954 Agreement on Special Maritime Boundary Zone which, while expressly mentioning the "parallel constituting the maritime boundary between the parties", does not expressly refer to its extension.

[v] Vote that was integrally published in Spanish by the newspaper *El Mercurio*, on Tuesday January 28th, p.C7.