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Chile's Defense at the International Court of Justice in The Hague

In 2008, the Peruvian government introduced a claim in The Hague, generating a new post 1929 Treaty litigation, which had been overcome. The Chilean defense hopes that there are two issues that strengthen its position: the terms of the agreements and the consistent, sustained and recognized practice in different spheres since 1952. This attitude lies on solid juridical grounds, and therefore, it has been faced with state and continuity policies throughout different governments.

Although the maritime border with Peru was settled long ago, we currently face a new delimitation controversy, which Chile must defend before the International Court of Justice (ICJ), creating wide expectation in both countries. Thus, the Court shall resolve the validity of the ongoing agreements, which were signed over fifty years ago and which the Peruvian government now disowns.

Chile has maintained a clear continuity in its foreign affairs policy, especially with regard to the intangibility principle of the Treaties[i] signed with its neighbor countries. In this respect, there is full confidence that the Chilean titles and juridical argumentation will support its position, since they are based on ongoing treaties and many years' practice.

For a long time, Peru behaved in a way that confirmed the existence of an agreement, that is, that there is a maritime border in absolute juridical terms. As former Chilean ambassador Luis Winter states in its book "*La defensa de Chile en La Haya*", as one of the negotiators of the execution instrument for the 1929 delimitation treaty, he thought this was the last pending point and now we could look into the future with Peru.

Nevertheless, on January 16th 2008, the Peruvian government introduced a claim before the International Court of Justice in Le Hague, generating a new post 1929 Treaty litigation, which we thought had been overcome.

The appeal before the Court is under the terms of the American Treaty on Pacific Settlement, also known as the "Pact of Bogotá", being Peru and Chile parties thereof.ii

The final stage of the trial started this week with the oral proceedings; we have witnessed a broad deployment of arguments and resources from Peru and Chile in order to present their submissions.

The Peruvian Claim

On January 16th 2008, Peru presented a claim before the ICJ requesting to delimit the maritime border between both countries in the Pacific Ocean, and requested to make the delimitation in accordance with the International Law of the Sea.

According to the summary of the Peruvian claim, they request the Court to define the maritime border with Chile under the equidistance criterion in the disputed area, which is the overlapping area from the Chilean and Peruvian coasts (approximately 66,000km^2 in all), starting at "Point Concordia" (the final point of the land border by virtue of the 1929 Treaty and the Boundary Commission of 1929-1930, something they consider irrefutable, but questioned by Chile, which states that the border starts at the boundary marker *Hito Nr 1*, 230 meters inland from the sea shore).

The second part of the claim seeks the recognition of Peru's right within the limits of 200 nautical miles from its coast, that is, that the exclusive sovereign rights of Peru upon the so-called "external triangle" are recognized, which Chile considers high seas, and part of its patrolled waters ("*mar presencial"*), something which Peru claims as non existing in the International Law of the Sea.

The foregoing can be appreciated in Drawing 1, made by the Peruvian Embassy and published in the newspaper *La República* of Peru.

During its submissions in the first part of the oral proceedings concerning the maritime dispute, the lawyers of the Peruvian delegation reaffirmed the position that "since there is no maritime

border", they stress the principle stating that "the main purpose of the maritime delimitation is to seek a fair solution". That is why they insist upon an equidistant line being an equitable result in the coasts of both parties.

Moreover, they focused on what they believe is a lack of equity of the line defended by Chile, since it seeks to deprive Peru from the so-called external triangle, which should entail a gain of 30,000km^2 for the neighbor country.

Drawing 1

THE THREE DIFFERENCES OF THE MARITIME DISPUTE

1 DETERMINATION OF THE MARITIME BORDER Considering the issue, Peru sets out an equidistant line which divides the disputed zone, in accordance with the international law.	2 BEGINNING OF THE MARITIME BORDER A The maritime border begins at Marker Nr 1. B Instead, Peru states that the border extends from Point Concordia, fixed in the 1929 Treaty.	3 This triangle corresponds to the maritime domain of Peru. Chile disowns the sovereignty and jurisdiction of Peru.

Source, Peruvian Embassy, published in the newspaper *Diario La República*.

The Chilean Position

Once the War of the Pacific with Peru was over, through the signature of the Treaty of Ancón in 1883 and later on the signature of the Treaty of Lima in 1929 and its complementary Protocol, the boundary chapter with Chile was closed. Subsequently, the declaration of the 200 nautical miles of sovereignty and jurisdiction in 1947 and the respective treaties, duly ratified by both countries and Ecuador, called Declaration on the Maritime Zone in 1952[iii] and the Agreement on the Special Maritime Boundary Zone, in 1954iv, the Peruvian declaration of 1955 and the agreements of 1968 and 1969, closed the chapter concerning the maritime border.

Therefore, there should be no juridical dispute over the maritime borders as set forth by Peru, since they have been already set and respected.

Consequently, Chile requests that the Peruvian claim be dismissed in its entirety, and that the maritime zones be declared to be fully

delimited by agreement of the parties, in accordance with the Treaties of 1952 and 1954. This was made clear in the allegations of Chile's lawyer Pierre-Marie Dupuy, stressing that the Declaration of Santiago in 1952 has always been a treaty, and he named several examples of internationally recognized agreements, and also recognized by the ICJ, which do not hold the name of treaty.

The governments of both countries properly recognize and interpret the relationship between the land border and the maritime border, as can be derived from the records and acts of 1968 and 1969, international agreements adopted by Peru's own initiative, which materialized on site the parallel of Marker Nr 1. This is how the maritime border between Chile and Peru is indicated: 18º 21'03" parallel of South latitude.

Chile also requested the International Court of Justice to limit its jurisdiction and refrains from settling the Peruvian petition to fix the land border, since the 1929 Treaty only gives power to the United States to act as arbiter.

A series of maps include the Counter-Memorial and Reply of the Chilean defense among the key documents that seek to strengthen our country's position before the International Court of Justice in Le Hague. In Drawing 2 we can observe the existence of a border on the parallel between Chile and Peru, also recognized by other nations.v

Chile supports its position by invoking not only international agreements subscribed by the parties, but also the behavior of both countries regarding the enforcement of the border. Although over these years Lima started to prepare a case on maritime delimitation, reinterpreting the scope of the treaties, it has continued to respect the parallel as the actual border between both countries, and Chile has invariably performed its jurisdiction south of this parallel until now.

Drawing 2

BORDERS BETWEEN CHILE AND PERU RECOGNIZED BY OTHER NATIONS

- True maritime border (1947-1952-1954)
- Maritime border aspired to by Peru
- Chile's maritime area
- Peru's maritime area
- Chilean sea portion claimed by Peru
- Additional sea portion claimed by Peru

Source: *Corporación Defensa de la Soberanía* (Corporation for the Defense of Sovereignty) (2008). Historical, juridical and geographical arguments against the Peruvian claim of altering the maritime border with Chile.

As Luis Winter adequately summarizes, the Chilean position's solidity is based on telling the truth; what exists; how it has been applied; and how the maritime border is understood by us, by them and by third countries. Meanwhile, it accuses Peru of disowning the existence of a maritime border between both countries, by searching errors or making interpretations of the juridical acts –agreements, treaties or practices- where the border is present, in order to give them a different meaning, in spite of the fact that they have a 60 years' history.

Another issue to be considered is that in May 2011, Peru recognized the nautical chart setting the border line at the parallel –which recognizes the maritime borders between Ecuador, Chile and Peru according to the treaties subscribed in 1952 and 1954-, which Ecuador sent to the UN; this seems to contradict the Peruvian government's claim presented in Le Hague.

Conclusions

As it is demonstrated, for Peru this trial deals with maritime delimitation, while for Chile it deals with the Law of Treaties.

Chile, who has requested the ICJ to dismiss the Peruvian claim in its entirety in view of the existence of an agreed maritime border, shall have to wait the judgment until June-July 2013.

Given the recent history on bordering differences – such as the cases of Chile and Argentina in 1966, 1967 and 1991-, the results are not always reduced to entirely ratifying our rights. In this perspective, once a controversy is brought before a court, composed by competent arbiters or judges of different citizenships, we remain subordinated to their judgments. These may not be totally favorable to one state; they can determine a transactional or equitable solution or another unforeseen one, which is more in line with the new trends of the applicable International Law; or even according to the judges' personal private beliefs.

In this case, the ICJ is in charge of resolving disputes between states by means of judgments, with binding final verdicts, and no possibility of appeals.

In this perspective, the Chilean defense hopes that there are two issues which strengthen its position: the terms of the agreements and the consistent, sustained and recognized practice in different spheres (navigation, fishing, research, recognition and protection of borders, among others) since 1952.

The Chilean position lies on solid juridical grounds, and thus it has been faced with state and continuity policies throughout differently oriented governments, highlighting the respectful role towards the International Treaties, whose unconditional compliance has allowed the country to enjoy peace for more than a century.

In brief…

DEFENSE OF CHILE AT LE HAGUE

- On January 16th 2008, Peru introduced a claim before the ICJ requesting to delimit the maritime border between both countries.

- Chile's defense is based on the full validity and applicability of two treaties subscribed by both parties and Ecuador (1952 & 1954), where the maritime delimitation was accurately defined. Furthermore, there's abundant evidence concerning a total respect conduct towards this demarcation from both countries over 60 years.

- Peru cannot claim the Court's intervention for a land delimitation issue –such as trying to deny Marker Nr 1- since it is not competent.

- Finally, Peru's claim over the external triangle, which is a high seas zone for Chile, is out of order since it extends south of the parallel.

Sources:

- Statements of former Ministers for Foreign Affairs (2009): "*El límite marítimo Chile-Perú*"; Santiago de Chile, May 6th 2009.
- Fernández Illanes, Samuel. "*Reflexiones acerca del juicio limítrofe de Perú contra Chile, ante la Corte Internacional De Justicia*". *Revista Chilena de Derecho*, vol. 35 Nr 2, 2008, p. 371-398.
- Hernández, Claudia and Karin Ebensperger. "*Los temas limítrofes de Chile y sus vecinos*". Political Report Series. Libertad & Desarrollo, October 2010.
- Winter, Luis (2012): "*La Defensa de Chile en La Haya*". LyD Editions, Santiago de Chile, 2012.

[i] The intangibility principle of the international treaties, recognized by the public international law, based on the Vienna Convention on the Law of Treaties adopted in 1969, and ratified by Chile in April 1981, also relies on the recognition of our political Constitution, article 54 Nr 1, which states that "the provisions of a treaty shall only be annulled, amended or disqualified in the way envisaged in the treaties themselves or in accordance with the general regulations of international law". Thus, the purpose is to prevent the national legislator from modifying an international treaty in a unilateral way, and not following the rules of the Vienna Convention, and clearly establishing "the constituent's will to fully respect the principles and rules of international law, avoiding all sorts of juridical schizophrenia, a serious illness of the State which generates international responsibility." See for example, Humberto Nogueira, "*Aspectos fundamentales de la Reforma Constitucional de 2005 en materia de Tratados Internacionales*", in Francisco Zúñiga: *Reforma Constitucional de 2005*, LexisNexis, p. 536.

[ii] This treaty is a legal way to directly appeal to the Court, with no need of any special agreement, through the enforcement of its article XXXI. See Pact of Bogota in:

http://www.oas.org/juridico/spanish/tratados/a-42.html

[iii] In 1952, Chile, Ecuador and Peru subscribed the "Declaration on the Maritime Zone" in Santiago of Chile. This Declaration was an unequivocal expression of sovereignty rights in a maritime zone of 200 miles and has also become the cornerstone of the new Law of the Sea. Text available in: http://www.difrol.cl/index.php?option=com_content&task=view&id=34&Itemid=12

[iv] In 1954, Chile, Ecuador and Peru signed the "Agreement on the Special Maritime Boundary Zone", which "creates a special zone, starting 12 nautical miles from the coast, of 10 nautical miles' breadth on each side of the parallel forming the maritime border between the two countries". Text available in: http://www.difrol.cl/index.php?option=com_content&task=view&id=34&Itemid=12

[v] In the Pacific Ocean's Eastern coast, the maritime delimitation method which uses the geographical parallel has become the delimitation formula among four countries of the Eastern Pacific of South America (Panama/Colombia (partially); Colombia/Ecuador; Ecuador/Peru; Peru/Chile) to fix their maritime border, thus reflecting a general agreement on the matter.