

THE ICJ JUDGMENT IN THE CASE OF A MARITIME DISPUTE BETWEEN PERU AND CHILE – SOME OBSERVATIONS ON THE IMPORTANCE OF THE CONDUCT OF STATES

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1. Introduction

On 16.1.2008, the Republic of Peru filed in the Registry of the International Court of Justice in the Hague (hereinafter “the ICJ”, “the Court”) an application instituting proceedings against the Republic of 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” 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”.

The dispute is one of a long line of controversies arising from the Pacific War (*La Guerra del Pacífico*, 1879-1883), a conflict over control of the nitrate industry in the Atacama desert, which has marred the two States’ relations since the late 19th century. The Pacific War is still remembered painfully in the societies of both States, so the public response to the ICJ’s judgment has been loud and often rather emotional. Apart from public

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outcry, in the weeks leading up to the Court's decision, both parties publicly stated that they would comply with the Court's judgment whatever it might have been. Such declarations are always to be welcomed, nevertheless almost two years after the verdict was given its implementation is still pending, because the geographical coordinates of the new maritime border have yet to be bilaterally determined.

2. Historic and geographical context

As in every case of maritime delimitation, geography is of utmost significance to the Court's reasoning in this case. Both Parties to the dispute are situated on the western coast of South America, at the shores of the Pacific Ocean. Peru shares a land boundary with Ecuador to its north and with Chile to its south. In the area concerned, Peru's coast runs in a north-westerly direction from the starting-point of the land boundary between the Parties on the Pacific coast; Chile's coast generally follows a north-southerly orientation. The coasts of both Peru and Chile in that area are mostly uncomplicated and relatively smooth, with no distinct features which may influence the delimitation of their respective maritime zones.

The dispute goes back to the War of the Pacific (1879-1883), in which Chile defeated Peru and Bolivia, annexing Bolivia's coastal province of Antofagasta and the Peruvian provinces of Tarapacá, Tacna and Arica. Under the provisions of the Treaty of Ancón (1883) the province of Tarapacá was ceded to Chile permanently but in the case of two other provinces Chile was supposed to organise a plebiscite within ten years in which the populations of Tacna and Arica would decide to which country they wanted to belong. It failed to do so and finally after the mediation of American President Hoover in 1929 the Treaty Rada y Gamio-Figueroa Larraín was signed in Lima (hereinafter the 'Treaty of Lima'), awarding Tacna to Peru and Arica to Chile and fixing 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 its 1930 Final Act, the 1929-1930 Mixed Commission recorded the precise locations of the 80 markers that it placed on the ground to demarcate the land boundary. What is crucial to the proceedings, the Treaty of Lima remained silent as to the maritime boundary between Chile and Peru.

3. Facts of the case

In 1947 both Parties unilaterally proclaimed certain maritime rights extending 200 nautical miles from their coasts. 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, six others were adopted in Lima in December 1954, and the final two agreements were signed in Quito in May 1967.

Peru and Chile adopted fundamentally different positions in the case. Peru argued that no agreed maritime boundary ever existed between the two States and asked the Court to draw a boundary line using the equi-distance method in order to achieve an equitable result. Chile contended 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 relied on several agreements and subsequent practice as evidence of that boundary. Chile asked the Court to confirm the boundary line accordingly. Chile submitted that the principle of *pacta sunt servanda* and the principle of the stability of boundaries prevented any attempt to invite the Court to redraw a boundary that had already been agreed.

Peru also argued that, beyond the point where the common maritime boundary ended, it was entitled to exercise exclusive sovereign rights over a maritime area lying out to a distance of 200 nautical miles from its baselines. Chile responded that Peru had no entitlement to any maritime zone extending to the south of the parallel of latitude along which, as Chile maintained, the international maritime boundary ran.

4. Judgment

It was clear to the Court that, in order to settle the dispute before it, the Court had to first ascertain whether an agreed maritime boundary existed between Parties. The Court noted that the Parties agreed that the 1947 Proclamations did not themselves establish an international maritime boundary. The Court therefore considered 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 was concerned. In the Court's view the language of the 1947 Proclamations, as well as their provisional nature, precluded an interpretation of them as reflecting a shared understanding of the Parties concerning maritime delimitation. The Court also observed that the Parties' 1947 Proclamations contained 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.

The ICJ then turned to establishing the juridical nature of the subsequent bilateral agreements between Peru and Chile. Starting with the 1952 Santiago Declaration the Court observed that it was no longer contested that the 1952 Santiago Declaration was an international treaty and – clearly – it was concluded before the 1969 Vienna Convention on the Law of Treaties (hereinafter: VCLT) was created. In the light of these findings, the Court concluded that it needed to apply to the 1952 Santiago Declaration customary rules of treaty interpretation as enshrined in the Articles 31 and 32 of the VLCT. The Court noted that the 1952 Santiago Declaration did not make express reference to the delimitation of maritime boundaries of the zones generated by the continental coasts of its States parties and therefore it concluded that the ordinary meaning of paragraph IV, read in its context, went 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. As to the object and purpose of the 1952 Santiago Declaration, the Court observed that the Preamble of the 1952 Santiago Declaration focused 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. Under these circumstances the Court concluded 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.

The ICJ then analysed the subsequent international instruments adopted by the Parties to the 1952 Santiago Declaration, as well as bilateral, Peruvian-Chilean agreements concerning their respective maritime zones. It attributed a special significance to the 1954 Special Maritime Frontier Zone Agreement. In the view of the Court, the operative terms and purpose of the 1954 Special Maritime Frontier Zone Agreement were crucial for the existence of a maritime boundary, as the Parties acknowledged in a binding international agreement that a maritime boundary already existed between

them. It must be stressed that the 1954 Special Maritime Frontier Zone Agreement did not indicate when and by what means that boundary was agreed upon. The Parties' express acknowledgment of its existence only reflected a tacit agreement which they had reached earlier (paras 90-91).

The same effect might be attributed to the 1968-1969 Peruvian-Chilean arrangements for lighthouses. The main purpose of these arrangements was to address the practical problems arising from the coastal fishing incidents in the 1960s. Nevertheless, in the Court's view, the arrangements proceed on the basis that a maritime boundary extending along the parallel beyond 12 nautical miles already existed. Along with the 1954 Special Maritime Frontier Zone Agreement, the Lighthouse Arrangements acknowledged that fact, yet without indicating the extent and nature of that maritime boundary. In the light of the subsequent practice of the Parties, the ICJ concluded that the existing maritime boundary is an all-purpose single maritime boundary.

The Court further analysed the practice of both Parties after 1954 in order to determine the extent of that tacit single maritime boundary. Like in every case of maritime delimitation, the ICJ assessed several important elements of relevant States' practice, *inter alia*, the activities of fisheries, whale hunting and whale hunting licensing, the legislative acts of both Parties and exchange of diplomatic instruments between them. The Court attributed the special significance to the enforcement practice relevant to the maritime boundary especially in the early 1950s and 1960s, when the Parties acknowledged the existence of their maritime boundary. The collected evidence brought the Court to the conclusion that the agreed maritime boundary did not extend beyond 80 nautical miles along the parallel from its starting-point, that is only as far as there was a 'real' practice of enforcement of said boundary and not beyond. As the ICJ observed, the tacit agreement of 1954 is "too weak a basis for holding that the boundary extended far beyond the Parties' extractive and enforcement capacity at that time" (para. 149).

Having concluded that an agreed single maritime boundary existed between the Parties, and that that boundary started at the intersection of the parallel of latitude passing through Boundary Marker No. 1 with the low-water line, and continued for 80 nautical miles along that parallel, the Court concluded that beyond that point the maritime zones of the Parties were still not delimited and consequently turned to determine the course of the maritime boundary beyond 80 nautical miles. The Court proceeded on the basis of the provisions of Articles 74, paragraph 1, and 83, paragraph

1, of UNCLOS which, as the ICJ had recognised in several earlier cases, reflect customary international law¹.

The methodology used by the Court in this case is the same it usually employs in seeking an equitable solution and consists of three stages. In the first stage, it constructs a provisional equidistance line unless there are compelling reasons preventing it. At the second stage, it considers whether there are relevant circumstances which may call for an adjustment of a particular 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 coasts².

In the present case, the Court observed that the 'not-delimited' area could have been divided in two parts – one, to which Peruvian and Chilean claims overlapped, and the other, situated beyond 200 nautical miles from the coasts of Chile, to which only Peru claimed its rights. This observation led to the construction of a provisional equidistance line, starting from the endpoint of the existing maritime boundary (Point A) and running in the general south-west direction until it reaches the 200-nautical-mile limit measured from the Chilean baselines (Point B). Due to the fact that seaward from that point the Parties' claims no longer overlapped, the final segment of the maritime boundary was therefore drawn from Point B to Point C, where the 200-nautical-mile limits of the Parties' maritime entitlements intersect. The Court did not find any relevant circumstances calling for an adjustment of the provisional equidistance line, and concluded that no significant disproportion is evident, such as would call into question the equitable nature of the provisional equidistance line. Therefore the provisional equidistance line was adopted – by ten votes to six – as the final single maritime boundary between the Parties' respective maritime zones. It is worth mentioning that the Court defined the course of the maritime boundary between the Parties without determining the precise

¹ See *inter alia*, Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, ICJ Reports 2001, p. 91, para. 167; Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, ICJ Reports 2012 (II), p. 674, para. 139.

² See *inter alia*, Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, ICJ Reports 2009, pp. 101-103, paras 115-122; Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, ICJ Reports 2012 (II), pp. 695-696, paras. 190-193.

geographical co-ordinates. The ICJ called both States to determine these co-ordinates in accordance with the given Judgment and in the spirit of good neighbourliness.

5. Conclusion

The ICJ's judgment in Maritime Dispute Case (Peru v. Chile) is – in my humble opinion – notable for two reasons. Firstly, as another ruling in a long and settled line of judgments concerning maritime delimitations, it follows the Court's own three-step methodology; in this respect not a great deal of novelty appears in this case. More importantly, the judgment firmly states that the delimitation of maritime boundaries must represent a just and "equitable solution". The ICJ's decision is largely a compromise between Chilean and Peruvian arguments: it awarded Peru control of some 50,000 sq km of ocean but confirmed Chile's sovereignty over inshore waters rich in fish. The decision was somewhat arbitrary (see remarks below) but fair – less than Peru had hoped for, but not as bad than Chile had feared. Thus, both Parties were able to claim "victory" to a degree and in this way it offers both States a chance to move on from a turbulent past.

Secondly, this judgment is also important for general international law, as the Court explicitly stated that a tacit legal agreement between States may constitute a foundation of an international boundary. Obviously it was not the first case where one of the Parties to a dispute tried to persuade the judges that such a conclusion was possible, but in earlier cases the Court was somehow reluctant in recognising the establishment of a permanent maritime boundary on the basis of tacit legal agreement emphasising that evidence of a such a tacit legal agreement must be compelling³. Admitting that this was the case in dispute, the Court showed a degree of 'compellingness' which must be achieved by the evidence of a States' practice as to the existence of a tacit legal agreement. It also demonstrated the importance of the conduct of States in the early days of co-operation between them.

³ *Inter alia*, the Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea case (Nicaragua v Honduras), Judgment of 8.10.2007, ICJ Reports 2007.

It must be noted, however, that the Court in reaching its judgment to some extent achieved an outcome that was pleaded by neither party. Neither party convinced the Court fully to their positions, so the Court's decision was a reasonable compromise. Some judges, *inter alia* Judge Donahue, argued that in these circumstances the ICJ should have considered 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, especially in the light of the fact that over previous years, the ICJ is perceived to have placed a greater weight on the fairness of divisions, even at the cost of undercutting the role of treaties and the historical possession of territory⁴. This procedural approach might allow the Court to further enrich its jurisprudence⁵.

In conclusion, the Court's Judgement in Maritime Dispute Case (Peru v. Chile) must be assessed as reflecting a sound and just outcome in light of the applicable law and the evidence before the Court. One may only hope that both Parties of the dispute will make the most of the judgment and this will herald a new beginning in bilateral relations between them.

⁴ See for example: Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment of 19.11.2012, ICJ Reports 2012.

⁵ See Declaration of Judge Donahue to the Judgment of 27.01.2014, p. 111.