Article: “Maritime boundaries and legal imagination”

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It is difficult to relate the concepts that encompass the title of this article. In effect, what is the relation between an ordinarily practical subject matter of a tangible nature and linked to international territorial agreements –as is the case of the “maritime boundaries”- with that other one, sounding so diverse and unequal, with a certain philosophical, poetic or even emotional tinge to it, such as “imagination”, furthermore qualified as “legal”?

As it may be inferred from the statements of Peru’s own representatives, the so-called “legal imagination” has become the central tenet of Peru’s thesis in its claim against Chile before the International Court of Justice at The Hague, filed in the year 2008, petitioning that the maritime boundaries between the two countries be established by that Court.

We have recently heard press accounts to the effect that The Hague Court would have announced that its judges would have already concluded their study period toward reaching a sentence, which is expected to be communicated to the parties toward the end of the month of January 2014.

It seems fitting, consequently, to abridge the main issues submitted by each country in their allegations before the Court. The more so, if one is to take into account certain statements proffered by Peruvian representatives exulting an air of anticipated optimism as they face the announcement of such sentence, whereby they even suggest the creation of a bilateral commission to implement it.

MARITIME BOUNDARY AGREEMENTS

In my previous article regarding this dispute (See, "The Hague Sentence and the Pacific Alliance". MICROJURIS, October 7, 2013), I refer to the various instruments issued both by Chile as well as by Peru, in which, as of the year 1947, the two countries proclaimed their respective national sovereignties over the continental plaque and seas adjacent to their coastlines, which is to be exercised considering "a mathematical parallel projected over the sea up to a distance of 200 miles from the continental shelf". Chile's Official Declaration was issued in June of the year 1947, followed by that of Peru in August of that same year; whereby the latter country's Executive Decree stated that such distance of 200 nautical miles shall be determined "following the measure of the geographical parallels".

Subsequently, in the year 1952, Chile, Peru and Ecuador participated in a Conference about the Conservation and Development of Marine Species in the South Pacific held in Chile. Upon concluding the Conference, the representatives of each of these three countries executed a document denominated the "Santiago Declaration", ratifying that the maritime boundary is located on "the parallel of the point at which the land boundary of the respective countries reaches the sea".

In 1954, another Agreement was executed between the three countries with the purpose of avoiding eventual conflicts in the fishing area, where "often violations of the maritime boundary between the neighboring states occur in an innocent and accidental manner". Clause N°1 of this Agreement established a zone of special tolerance of "10 nautical miles wide at each side of the parallel that constitutes the maritime boundary between the two countries".

Finally -it is worth mentioning in this brief recapitulation- Peru's Executive Resolution of January 12, 1955, issued with the objective of introducing certain clarifications to ongoing map-making and geodesic works undertaken toward establishing Peru's 200-mile maritime zone; Resolution that takes into account the Santiago Declaration executed on August 18, 1952 by Peru, Chile and Ecuador. Point N°2 of such Executive Resolution literally states: "Pursuant to section IV of the Santiago Declaration, such line may not surpass that of the corresponding parallel at the point in which the Peruvian boundary reaches the sea".

Thus, a straightforward interpretation of these official documents of both countries, leads us to conclude that the expression of the sovereign will of each of them, as of the year 1947, as stated in different periods and by diverse political regimes, coincides fully in that their maritime boundary was indeed to be found in the corresponding parallel at the point in which the boundary between them reaches the sea.

The Declarations, Resolutions and Agreements executed in due course by Peru and Chile have been fully abided and respected by each of these countries; which, in turn, have exercised their respective sovereignties, jurisdiction and national power to the North and to the South, reciprocally, of the parallel that constitutes the maritime boundary between them.

PERÚ CONSTRUCTS A CASE: EQUIDISTANCE AND LEGAL IMAGINATION

Insofar as this peculiar concept of "legal imagination", in December or 2012, Peru's Chancellor at the time, Rafael Roncagliolo, explained his country's petition before the International Court, stating: "We are petitioning the Court to set the boundary. The consequence of our diagnosis is that no boundary has ever been established and that there is indeed an international way of establishing it; namely, equidistance". The Peruvian Chancellor went on to say that: "On certain occasions The Hague's Court issues sentences amenable to represent legal imagination exercises".

Additionally, Peru's co-agent before such Court, José Antonio García Belaunde, stated in a recent interview in Lima, that "The Court must decide whether or not there is a lawful boundary agreement; which Peru considers there is not, reason why it submitted a request for arbitration against Chile in 2008".

García Belaunde goes on to say the following: "Now, upon drawing a boundary line, the Court may take into consideration what it calls relevant circumstances and there, a certain kind of adjustment may take place".

When thus confronted to such novel and peculiar concepts in the application of the law and its rationality -which nonetheless comprise the essential foundation of our northern neighbors- it behooves us to attempt to understand where does such rationale and argumentation come from.

As stated in our previous MICROJURIS article, as of the year 1977 a new geopolitical theory began to take hold in Peru, which propounds and advocates the inconvenience of measuring the 200 miles over the geographic parallels. Such interpretation channels a proposal once submitted by a retired Peruvian Admiral purporting to "modify" the boundary situation existing at the time. This proposal was elaborated over the principle of "equidistance" with the purpose of ratifying their 200-mile sovereignty from their coastline measured over a "continuous distance", for whose purpose it suggested applying a so-called "Arch of Circles" formula.

Unquestionably, this presentation offers an ingenious approach by offering a measuring scheme called "constant distance". This is a concept of ulterior creation that is not found in any text or even in the spirit of the Declarations issued either by Peru or Chile or mentioned in their respective Agreements.

The verb "to modify" used by said Admiral in his proposal is to be understood in its natural and obvious meaning; that is, to change or alter the existing reality. In other words, the proposal itself assumes the existence of an earlier agreement between the two countries with respect to their maritime boundaries.

This new proposal to "modify" the maritime boundaries begs the question: How is it possible to argue the need to change the maritime boundary in evidence of the great quantity and variety of sovereign instruments issued by both countries throughout a period of over 60 years, during which they have acknowledged the mutual sovereignty exercised by each of them?

The answer cannot be other than –and so we now understand- by requiring the compelling assistance brought about by laborious argumentation supported on their innovative "legal imagination" tenet.

In sum, Peru asserts that there is no boundary agreement between the two countries and, consequently, that it is appropriate to apply new theories based on the principle of "equidistance" proposed by certain Law-of-the-Sea scholars; in which case, they necessarily must apply concepts such as those delivered by the so-called "legal imagination" concept.

For a due understanding of these newly proposed criteria, and it being a traditional interpretative practice of universally applied legal norms, it is appropriate to; firstly, define the "imagination" concept. To that effect, The Royal Academy Dictionary defines it as a "false appreciation or judgment and discourse of something that does not exist in reality or that is groundless". Thus, from such definition it may be concluded that Peru's is attempting to create a new norm based on something that is non-existent or groundless.

In sum, the combination of these two ideas leads us to conclude that we are indeed confronted to proposals of new legal norms or of new forms of interpreting a given situation, in want of circumstances to govern such event.

In another perspective –from a strictly academic perspective- insofar as the theory of knowledge or the philosophy of law is concerned, one may observe the emergence of certain recent philosophical undercurrents constructed on the premise of the "legal imagination" definition. Such legal doctrines propose to establish and actually define new ways for creating legal norms, in opposition to what is denominated as Hobbes' contractualism and legal monism. This path leads to philosophical disquisitions that go beyond the reality of applying the current law to the parties.

THE HAGUE COURT MUST ISSUE A SENTENCE ACCORDING TO LAW

Undoubtedly, from the perspective of a philosophical research project about the origin and source of legal norms, the discussion and analysis of these "legal imagination" theories and their relationship to "equidistance" regarding undefined maritime boundaries may sound attractive or even thrilling.

The point is, however, that appearances and procedures undertaken before The International Court of Justice are neither academic nor philosophical exercises.

The Hague Court, according to its bylaws, is the United Nations' main judicial organ and its function is "to decide according to international law", in whose pursuit it shall firstly consider the application of "the International Conventions, whether of a general or a particular nature, that establish rules that are expressly acknowledged by the litigating States", and, likewise, by way of strengthening the latter point, it shall apply "international mores as proof of a practice that is generally accepted as law".

Even if we were to admit that the documents written by the parties do not qualify as Treaties and, instead, that they refer specifically to regulations related to fishing activities and marine resources, there is no doubt that in order to abide by such purposes, such instruments establish certain rules that have been acknowledged by the States with respect to their respective maritime boundaries. It is appropriate to apply here the traditional legal precept stating that "things are what they are and not what it is said that they are". Unquestionably, we are here confronted to International Conventions, of a particular nature, executed by three States; i.e. Ecuador, Peru and Chile, that have been formally acknowledged by each of such States. In such Conventions all three countries agree and accept the principle of defining their maritime boundaries by the parallel line; on the other hand, none of such Conventions ever mentions this novel "equidistance" concept.

For the sake of even overstating this point, there is a Peruvian Executive Decree issued in January of 1955 that defines exactly the same concept, considering the parallel line in order to establish its boundaries and, consequently, to define Peru's 200-mile maritime zone to be applied to its own map-making and geodesic activities.

Lastly, the pacific and customary practice of Peru and Chile since 1947 is also a clear manifestation of their respective sovereign wills, fully acknowledging all of Chile's economic and territorial rights, as well as the exercise of its national sovereignty in its own maritime territory, in strict adherence to the parallel line, established at the point in which its land boundary with Peru reaches the sea.

In conclusion, as stated by nine Chilean Chancellors in their Declaration of May, 2009, we are indeed confronted to a legally groundless case solely constructed by Peru.

The International Court of Justice, upon rendering its sentence in accordance to International Law must expressly dismiss the Peruvian claim.

(1) "Maritime boundaries and legal imagination" (english version), Translated by, Hernán Reitze (E-mail: hernan@reitze.cl: Mobile: (56-9) 9334-4646.

(2) Original article "Sentencia de la Haya y Alianza del Pacífico". MICROJURIS. 7 Octubre 2013, ver documento

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