

Muddy Diplomacy

By Alan Hootnick

Drowned out by the din of Iraq, terrorism, nuclear crises in Iran and North Korea, and the chronic humanitarian problems in Africa, Peru will bring an almost-forgotten maritime dispute with Chile to the International Court in The Hague.

What is the nature of this dispute? And why was it not resolved diplomatically?

On November 3 2005, the Peruvian Congress voted 98-0 to approve a unilateral proclamation of maritime limits asserting sovereignty over 65,000 sq.km. of waters which Chile claims is theirs (see diagrams). And then on August 12 of this year it was published in Peru's official gazette, and Peruvian President Alan García reasserted his intention to take this case to the International Court in The Hague.

Chile reacted sharply. Foreign Minister Alejandro Foxley characterized the Peruvian initiative as being "aggressive" and "unacceptable", and stated that the Peruvian claims are baseless under international law. Chile subsequently recalled its ambassador in Lima for "consultations" in Santiago. For Chile, there are US\$500 million in annual fisheries exports at stake.

There are many such geographical disputes in the world, and most of them arise out of technical problems and the ambiguities of the individual case. One side usually interprets the clauses in the existing treaties in one way in order to support its formula for geographical measurements, while the other side emphasizes another clause in its favour. These cases are generally resolved on the basis of a compromise with which both sides could live satisfactorily.

However, the strangest and most intractable aspect of the Chile-Peru dispute is not each side's technical interpretation of existing treaties, but whether a treaty exists or not.

Chile cites the Declaration of Santiago of 1952 and the Maritime Zones Convention of 1954 -- signed by Chile, Peru and Ecuador -- as being "final agreements" which resolved the issue by applying the principle of the territorial limit -- latitude 18°21'03" -- being the determining factor and therefore represents the maritime delimitation, thus avoiding an overlap.

Peru, on the other hand, claims that the 1952 Declaration applied the principle of the territorial limit only to the question of the two small islands situated between Peru and Ecuador and did not apply to the 200-mile adjacent maritime limit between Peru and Chile. Similarly, Peru insists that the 1954 Convention was a fishing rights agreement establishing an economic zone beyond a maritime limit which had not yet been established, since the 1952 Declaration established sovereign maritime limits only between Peru and Ecuador.

The origin of those declarations was that in those days, international law did not yet recognise those fishing zones as being universally enforceable, and five ships of the fleet of Aristotle Onassis had been seized by Peru, which prompted a reaffirmation of fishing rights by Peru, Chile and Ecuador.

According to Peru, this agreement did not try to settle the overall maritime limits with Chile, and it expressly omitted any reference to the continental shelf and to the first 12-mile limit, since that would have required a specific definition and thus a separate treaty. The Peruvian position measures 200 miles at right angles to their coast, but since Peru's coastline angles down toward Chile, the Peruvian maritime limit would overlap with Chile's zone.

Chile, on the other hand, claims that these agreements fixed the 18° 21'03" parallel as being the maritime limit, and that documents interchanged in 1968 between the governments of Peru and Chile upheld this line. Peru, however, claims that the 1968 document utilised "an ambiguous

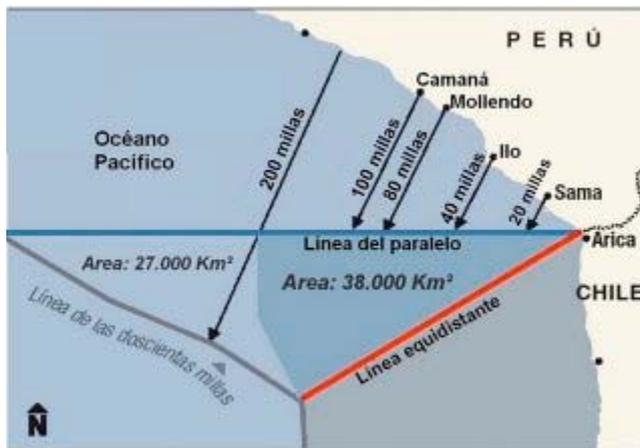
and erroneous interpretation of the 1952 and 1954 agreements" and that they did not serve to ratify any maritime limit at all. Nevertheless, Peru signed the document.

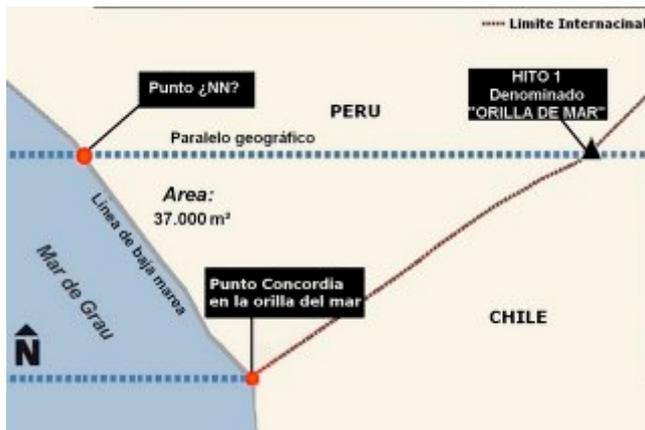
Peru informed the government of Chile on May 23, 1986, that they considered a new negotiation to be necessary to resolve the matter. They reaffirmed their demand on Oct. 20, 2000 in another note to the Chilean government. Peru, having not received any response, informed the United Nations on Jan. 9, 2001 that Chile and Peru had never established the 18°21'03" line as being a maritime limit; Peru insisted again on a negotiation, and that Peru does not recognise that line as being valid under international law.

But there is an additional complication which muddies the waters even further. In the Treaty of 1929, which ended Chile's occupation of southern Peru captured by Chile in the 1879 War, the territorial border between the two countries was defined by the "Punto de la Concordia", and the coastal limit of Peruvian and Chilean continental territory was to be marked by a physical marker called "Hito No. 1".

However, in 1930, when Chile placed the marker on the coastline in order to indicate where fishing rights were to be limited (as was contemplated in the 1929 Treaty), they had to move the marker 265 meters inland to the northeast because they found that tidal waves might destroy it. According to Peru, this meant that the latitude used by Chile to delimit maritime rights was also moved to the north, and its extension therefore cut across 36,000 sq.km. of Peruvian continental territory.

Furthermore, in December of 2006, Chile created a new Region in the north, and its charter defined its northern border as being the latitude corresponding to Hito No. 1 and not the Punto de la Concordia. The Chilean Tribunal Constitutional subsequently struck down that clause, but the Peruvians interpreted this whole episode as being yet another attempt to "annex" sovereign Peruvian territories and maritime rights. This prompted Peruvian President García to officially proclaim their map, as well as to inform the United Nations that there exists a "disputed zone" through which international ships should not pass until the matter is resolved by The Hague.





How will this case be resolved? First of all, an international court will have to determine whether a treaty between Chile and Peru exists or not. Therefore the "Declaration of Santiago" of 1952 is the crucial document. The Declaración de Santiago ("Declaración sobre Zona Marítima") was signed on Aug. 18 1952, between delegates from Chile, Peru and Ecuador. The Declaration led to the creation of the Permanent Commission of the South Pacific, and Colombia subscribed to the same document on Apr. 16, 1980.

The crux of the dispute is really all about whether the Declaration was "a final agreement" (the Chilean version), or whether it was only "an interim agreement", as Peru insists. The Declaración states: "1. - The governments have the obligation to assure its peoples the necessary conditions to subsist and to obtain for them the means to develop economically. 2. - Consequently, it is their duty to protect and to conserve their natural resources and to regulate their exploitation... 3. - Therefore it is also their duty to impede their exploitation outside of their jurisdiction, to put their existence in danger... For these reasons, the governments of Chile, Ecuador and Peru have decided to conserve and to ensure for their respective peoples the natural wealth of their coastlines..." (unofficial translation).

I think that in retrospect, the three parties should have first decided what they were negotiating, and then title the document accordingly so that there would be no doubt later as to what the purpose of the Declaration really was. If they wanted to establish final sovereign borders, it should have been titled this way. But if what they wanted was only to establish fishing rights, then the agreement should have been titled as an "interim agreement" and not a "final treaty".

The importance for the rest of the world will be how the Law of the Seas Convention is applied in this case, and whether such a determination would serve as a precedent for other disputes. Specifically, Peru will emphasize Articles 5 and 15.

Article 5 states: "Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State."

Article 15 states: "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith."

Peru will probably cite the 1980s Court rulings in the cases of Libya vs. Malta and Libya vs. Tunisia as being precedents which uphold their version of how limits should be measured. Chile will respond by stating that the geographical conditions in those cases are totally different and therefore irrelevant to the case of Chile and Peru.

It is possible that an international court will try to find an honourable formula for both sides. For example, it could recommend that both parties "update" the current status quo by taking into account changes in the system of international law since 1952, especially with regards to the continental shelf and environmental protection. Therefore Chile could save face by stating that the present agreements will not be "renegotiated" but only "updated" and modernized. Peru could save face by pointing to whatever minor technical modifications are achieved.

Furthermore, it must be stressed that Peru has always respected the "Chilean line" as if it were sovereign. It has never moved any warships into the disputed territory (at least not up to the date of this article), and its merchant vessels similarly respect the status quo. Chile will also stress the fact that fishing rights derive from sovereign rights. That is, if Peru was ready in 1952 to sit down and negotiate with Chile on the matter of fishing rights, it meant that Peru had already accepted Chile's sovereign rights.

Many Chilean congressmen believe that Peru's unilateral declaration was proclaimed so suddenly because the Peruvians want to obstruct an imminent agreement between Chile and Bolivia which may give the Bolivians an outlet to the sea. Such a corridor would separate Chile from Peru and hence create complications for Chile-Peru trade and travel.