

**RECENT DEVELOPMENTS IN MARITIME BOUNDARY DELIMITATIONS:
BRIEF REFLECTIONS ON CERTAIN ASPECTS OF THE
TWO UNCLOS CASES
(ERITREA/YEMEN AND QATAR V. BAHRAIN)**

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BIO

Robert Volterra is a Canadian lawyer who is a partner at Herbert Smith, a leading international law firm. He practices in the firm's international law group, based in their London office. His practice focuses exclusively on public international law and was described in the 2001 edition of *The Legal 500* as “a renowned expert on public international law”. He has advised governments on every continent on issues of territorial sovereignty, land boundaries, maritime delimitation and the Law of the Sea. He is currently advising a number of governments and private entities on maritime delimitation issues. He also advises governments, international organisations and private entities on other aspects of public international law, including: transboundary resources and pipelines; expropriation and investor-State arbitrations; treaties; sanctions; State responsibility; human rights; sovereign immunity; and the law of international organisations. He acts as counsel and advocate in international arbitrations, including before the International Court of Justice, the Permanent Court of Arbitration, and *ad hoc* arbitration tribunals. He has been a member of the faculty of law at the universities of Cambridge and Paris. He currently teaches the international law of boundary disputes, as

well as the international law of natural resources, at the University of London (LSE-UCL and SOAS). He acted as counsel and advocate to the Governments of Eritrea and Bahrain in the two maritime delimitation cases that are examined in this paper.¹

ABSTRACT

There have been two maritime boundary arbitrations to date under the 1982 *Law of the Sea Convention (UNCLOS)*: the 1999 *Eritrea/Yemen Phase II* case and the 2001 *Bahrain v. Qatar* case. At issue in each case, *inter alia*, was the delimitation of a single maritime boundary. As the first two UNCLOS cases, they merit particular attention. The *ad hoc* Tribunal in the former and the ICJ in the latter case both delivered judgments that were generally consistent with the principles of international law, as they have been developed in the jurisprudence. Furthermore, both tribunals also took the opportunity afforded them to develop or clarify other legal principles of maritime delimitation of considerable significance. Both decisions represent strong jurisprudential contributions to the progressive development of the law of maritime delimitation. However, neither describes with clarity the bases for calculating the “equitable” modifications that were used by the tribunals.

INTRODUCTION

The international law of maritime delimitation has been the subject of considerable examination during the past half century. The history of the development of the law through the cases, starting from the 1969 *North Sea Continental Shelf* cases, has been well documented elsewhere. It is presumed that the participants at this conference are familiar with this history and so it shall not be discussed here. Instead, this paper will focus on the only two maritime boundary cases decided under UNCLOS: the 1999 *Eritrea/Yemen* arbitration (phase II)² and the 2001 *Qatar v. Bahrain* case.³

The *ad hoc* Tribunal in the former and the ICJ in the latter case both delivered judgments that were generally consistent with the principles of international law, as they have been developed in the jurisprudence. For example, they held that:

- the land dominates the sea, in terms of delimitation. That is to say, right to maritime territory, whether Exclusive Economic Zone (**EEZ**) or continental shelf, derives from sovereignty over its adjacent land territory.⁴
- areas of overlapping territorial sea are to be divided by the median or equidistance line method, unless variation is required by historic title or special circumstances;⁵

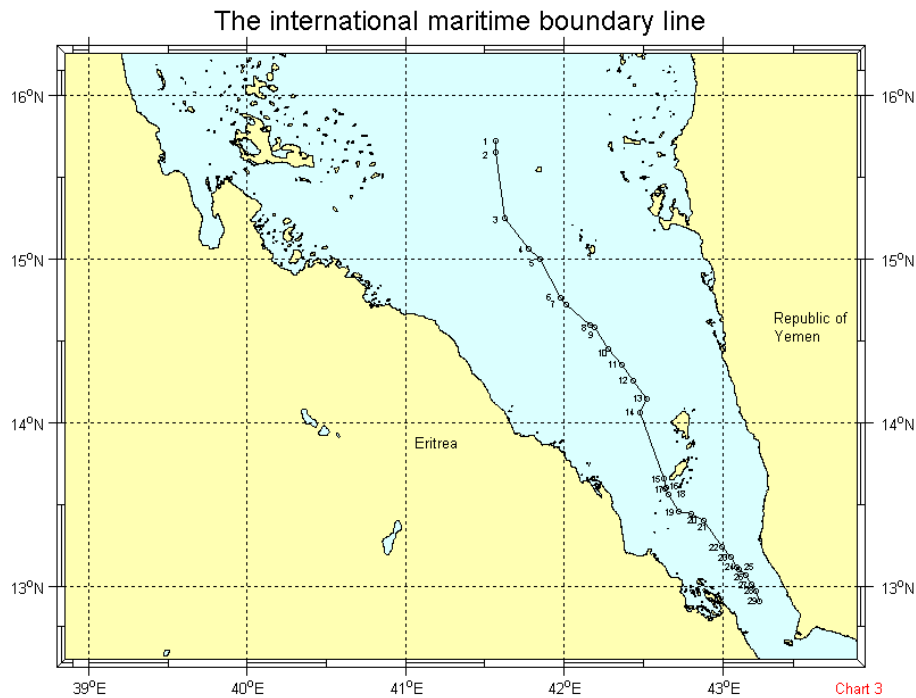
- the appropriate methodology for delimiting the EEZ and Continental Shelf is first to determine the median or equidistance line and then to consider whether there are any relevant factors required to be taken into account in order to achieve an equitable result;⁶ and
- all territory that remains above water at high tide was capable of generating territorial sea of up to 12 miles.⁷

Despite their consistency with the customary international law concerning maritime delimitation, as developed in the decided cases, both tribunals also took the opportunity afforded them by these cases to develop or clarify other legal principles of maritime delimitation. It is to certain of these developments that this paper will now turn.

ANALYSIS

Eritrea/Yemen phase II

The *Eritrea/Yemen* case involved a dispute between those two States about sovereignty over the Red Sea area between them. The second phase of *Eritrea/Yemen* – the maritime delimitation – took place after the Tribunal had already allocated between them sovereignty over the four sets of contested mid-sea islands.



The Tribunal stated at the outset that it would approach the delimitation using as a rebuttable presumption the proposition that a median line fits the requirements of UNCLOS Articles 15, 74 and 83.⁸ The Award recorded that:

... the Tribunal has taken as its starting point, as its fundamental point of departure, that, as between opposite coasts, a median line obtains.⁹

Both Parties in turn claimed that their proposed delimitation line was based on the median line. The Parties differed with respect to the effect that should be given to the mid-sea islands, whose sovereignty had been decided in the first phase.¹⁰ The Tribunal recognised that the provisions of UNCLOS required that an equitable result be achieved. Its role, *inter alia*, was to examine whether giving the mid-sea islands full or partial effect would achieve the desired result.¹¹ The Tribunal indicated in general terms that this

examination would consist of considering whether giving the islands a certain effect (full or partial) would produce a disproportionate effect on the maritime boundary, depending on their size, importance and like considerations in the general geographical context.

The Tribunal divided the maritime area between the Parties into three sectors – north, middle and south – for the purpose of the delimitation. In the north, it held that the delimitation was essentially a mainland-to-mainland delimitation between the Parties’ opposite coasts.

In the middle, it held that the delimitation became complicated by the presence and proximity of the mid-sea islands. The Tribunal concluded that the boundary would have to be moved to the west in order to take into account overlapping territorial seas and three sets of mid-sea islands. The Tribunal gave the mid-sea islands certain partial effects, but did not explain its methodology other than indicating that the line that it eventually described resulted in a “neater and more convenient international boundary”.¹²

Interestingly, the Tribunal rejected various arguments made by Yemen in relation to the middle sector that would have given it control over all the shipping lanes in the southern Red Sea, a result that Eritrea had noted to the Tribunal.

In the south, the Tribunal again used a coastal median line.

Perhaps the most interesting aspect of the *Eritrea/Yemen* Award was its treatment of the traditional fishing regime of the Parties – or perhaps more accurately of the Parties’

inhabitants – in the Red Sea. In both phases of the arbitration, the Parties put forward claims to the effect that their nationals relied significantly on the Red Sea fishing industry and fish consumption. In the first phase Award, the Tribunal had conferred the two principal sets of mid-sea islands on Yemen. However, it placed a novel and undefined limit on Yemen's sovereignty over those islands:

In the exercise of its sovereignty over these islands, Yemen shall ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihoods of this poor and industrious order of men.¹³

The dispositif of the first Award similarly decreed that:

the sovereignty found to lie within Yemen entails the perpetuation of the traditional fishing regime in the region, including free access and enjoyment for the fishermen of both Eritrea and Yemen.¹⁴

Despite this ruling in the first phase, it was not evident from the Award what this "lien" or limitation of Yemeni sovereignty entailed. Nor was it clear how this caution might modify the maritime delimitation to be effected in the second phase.

The Tribunal based its decision to recognise and give effect to the traditional fishing regime on what it referred to as local custom and Islamic law.¹⁵ The texts of the Awards, however, do not reflect a profound examination of either source of law. In any event, the Tribunal's treatment of Islamic law does not assist in determining the exact nature of the rights and obligations imposed by the Awards under the aegis of the protection of the traditional Red Sea artisanal fishing regime.

As a result of the uncertainty left over from the first Award, and because it was one of the few things that Eritrea perceived that it had gained from the first phase (having lost all of the principal islands in dispute to Yemen), Eritrea focused the attention of the Tribunal on the traditional fishing regime during the written and oral pleadings of the second phase. If quantity of text devoted to the issue in the second phase Award is a reflection of the attention given to it by the Tribunal, much of the Tribunal's work in the second phase was directed at clarifying the content and scope of this legally binding limitation on Yemen's sovereignty.

The Tribunal clarified that the obligation imposed on Yemen in relation to its sovereignty over the mid-sea islands extended to requiring Yemen to enable Eritrean fishermen to exercise their entitlement to fish around the islands and even use the islands freely for such traditional activities as drying fish, repairing boats and nets, establishing and using way stations, and taking shelter.¹⁶ The Tribunal took the view that the obligation also required Yemen to permit artisanal Eritrean fishermen to fish up to its mainland coasts and to permit them to land their catches in Yemeni ports.

Despite the attention given in the second Award to the clarifying the obligations imposed by the reference to the protection of the traditional fishing regime, the Parties appear to have remained uncertain of their exact scope. Shortly after the second Award was issued, the Parties met to discuss various aspects of their fishing activities in the Red Sea. It transpired that they had differing views of the Award on the issue of the traditional

fishing regime and Eritrea requested a clarification from the Tribunal. A decree issued by the Tribunal in response to this clarified that Yemeni fishermen did not enjoy a right to fish off Eritrea's continental coast inside the internal waters of the Dhalak Islands in the northern sector.

This ruling was particularly significant because the best fisheries in the Red Sea are around the mid-sea islands (awarded to Yemen in the first phase), off Yemen's mainland coast, and around Eritrea's Dhalak Islands. The effect of this clarification meant that, while Eritreans could fish around Yemen's fishing grounds in the Red Sea, Yemenis could not fish off Eritrea's fishing grounds. Thus the benefit of the protections afforded to the traditional artisanal Red Sea fishermen in effect fall substantially to Eritrea.

Ultimately, despite the Tribunal's post-Award attempt to clarify the scope of the traditional fishing regime, it appears that the issue might still be considered by some to be far from clear. It is open to question as to whether the subject was dealt with in sufficient clarity to remove the suspicion that the issue of the traditional fishing regime could possibly give rise to future problems at both a personal/individual as well as an inter-State level.¹⁷

Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)

Qatar v. Bahrain was one of the longest-running cases ever brought before the Court. It survived ten years on the Court's docket. The dispute between the two Arab States in the Gulf of Arabia was centred more closely, in the self-conceived interests of the Parties, on the issue of sovereignty over the Hawar Islands than on the delimitation of their maritime boundary. The maritime part of the case was certainly overshadowed by other well-known issues that arose during the life of the case. Nonetheless, the stakes at play in the maritime delimitation were perhaps of considerable long-term economic interest to the Parties.¹⁸

This paper will focus on several of the noteworthy aspects of the delimitation.

One of the most interesting findings of the Court in the case was that low tide elevations (*LTEs*) are territory that is capable of generating maritime rights in certain circumstances.¹⁹ This finding included not only *LTEs* located within a State's territorial sea, but also those found in its EEZ and Continental Shelf.²⁰ The Court observed that international treaty law was silent on the question of whether *LTEs* could be considered to be land territory.²¹ It went on to state that *LTEs* could not be "fully assimilated" with islands or other land territory, but it clearly viewed *LTEs* as a form of quasi-land territory.²² Finally, the Court ruled out the possibility of using *LTEs* to "leapfrog", noting that they could not be used as basepoints for straight baselines in normal circumstances.²³

There was an echo, in the *Qatar v. Bahrain* case, of the traditional Red Sea fishing regime that had been dealt with in the *Eritrea/Yemen* case. Bahrain claimed that its historical dominance over the pearling grounds in the Gulf of Arabia to the north of the Qatar peninsula constituted a special circumstance that warranted shifting the provisional equidistance boundary line further to the east. The Court rejected Bahrain's arguments on the facts²⁴, but it did not reject the possibility of such a claim constituting a special circumstance. This is particularly interesting, of course, given the fact that the maritime boundary at issue was a multi-purpose boundary, not just an EEZ boundary.

As noted above, the Court confirmed that an island was capable of generating full maritime rights, regardless of its size.²⁵ This was important in the context of a maritime feature called Qit'at Jaradah. Qit'at Jaradah is located in the Parties' overlapping territorial seas to the northeast of the main island of Bahrain and northwest of the Qatar peninsula. It had been referred to as an island in historical documents, but some more recent documents referred to it as a LTE. In 1986, Qatari armed forces took a Dutch construction crew working for Bahrain on a nearby maritime feature prisoner. Qatar then forced Qit'at Jaradah to be bulldozed into the sea. Bahrain claimed that in the years after 1986, Qit'at Jaradah had returned to its historical state (an island) through natural accretion. Before the Court, Bahrain established through satellite imagery and expert on-site examination that Qit'at Jaradah had become an island again: a very small portion of its surface remained above water at high tide.

The fact that Qit'at Jaradah was found to be an island meant that the international law relating to title to territory applied. Bahrain's historical acts of sovereignty over Qit'at Jaradah resulted in its being recognised as Bahraini land territory. This in turn pushed the maritime boundary in that part of the dispute well to the east. However, despite having stated earlier in the Judgment that even a small island is capable of generating full maritime rights, the Court held that the maritime boundary line should pass just to the east of Qit'at Jaradah, giving it no effect. The Court held that the disproportion that would result from giving the island any effect, let alone partial or full effect, constituted a special circumstance that warranted this decision.²⁶

One of the most perplexing parts of the Judgment was the Court's conclusion in relation to Bahrain's status as an archipelago. Bahrain is indisputably an archipelago, in geographical terms. Its land territory is made up of a collection of over 30 islands situated in the Gulf of Bahrain, off the Gulf of Arabia. Bahrain had never claimed archipelagic status under UNCLOS, but before the Court it claimed to be a *de facto* archipelago. The Court refused to recognise Bahrain's archipelagic status and held that Bahrain's coast was not one of straight or archipelagic baselines.²⁷ It almost appeared as if the Court desired to avoid the characterisation of Bahrain as an archipelago in order to avoid the result that Bahrain's coastline for delimitation purposes would be a line linking its outermost islands. If the Court had not, as it did, simultaneously ignored both its own jurisprudence and geography, it would have been left with very little room to engage in creative delimitation.

The Court drew attention to the fact that the process of delimitation found in Article 15 of UNCLOS was "closely interrelated" to the process of delimitation found in Articles 74 and 83.²⁸ This underscored the Court's endorsement of its previous view expressed in *Jan Mayen*²⁹ on the appropriate methodology of delimitation. The Court interpreted the development of the law in the relevant cases to have been that the appropriate methodology of delimitation was to:

... first provisionally draw an equidistance line and then consider whether there are circumstances which must lead to an adjustment of that line.³⁰

In the northern sector of the boundary, the Court equated the geographical situation of the Parties to adjacent coasts abutting on the same maritime areas extending seaward into the Gulf of Arabia. Nonetheless, it still took the same methodological approach to delimiting that maritime area as it did for the coastally opposite sector of the line.³¹

Also in the northern sector, the Court decided to give no effect to a large LTE that was partly in Bahrain's territorial sea that would have shifted the northern part of the line significantly to the east. In doing so, the Court gave no specific reasons for its decision other than that to do otherwise would be inequitable.³²

CONCLUSION

It is rare that an international tribunal will award total victory to one party in a boundary dispute. This appears to be almost inevitably so even in situations where a strict application of legal principles to the geography of the situation would seem to require that result. It is therefore perhaps not surprising that the practical conclusions reached by the tribunals in *Eritrea/Yemen* and *Qatar v. Bahrain*, in mapping out the relevant maritime boundaries, were not always entirely consistent with the legal principles that they enunciated.

For example, Yemen was awarded sovereignty over the mid-sea islands in the first phase of the *Eritrea/Yemen* case and yet this sovereignty was in some fashion curtailed by the requirement that it observe the traditional Eritrean fishing regime. Islands in both of the cases – no matter how small – were held to be capable of generating full maritime rights. Yet both tribunals declined to give certain small islands full maritime rights, providing no other explanation than a vague reference to “equity”. Bahrain – self-evidently an archipelago – was prohibited from ever even claiming archipelagic status.

Regrettably, the texts of the judgments do not provide details of the real reasons used by the tribunals in calculating their “equitable” modifications. In such circumstances, apart from the members of the tribunals, it remains to those closely involved in the particular cases at issue to evaluate, based on their first-hand knowledge of the dynamics of the processes (dynamics not easily conveyed to those not involved), what the real arguments

and issues were that motivated the tribunals. While this leaves a degree of uncertainty in the legal process for future delimitations, it seems to be a feature of most land and maritime boundary arbitrations.

Despite this observation, these first two UNCLOS awards are in many ways strong decisions and contribute to the further clarification and development of international law in this field. The academic debates as to their substance must be tempered by a consideration that boundary arbitration and delimitation are practical processes designed to provide long-term solutions to disputes between neighbours. The practical value of the two judgments being considered in this paper can be measured by the fact that the parties to the disputes quickly and unqualifiedly accepted them in both cases.

REFERENCES

¹ The views expressed in this paper are entirely those of the author and do not reflect those of the Governments of Eritrea or Bahrain.

² The arbitration was conducted before an *ad hoc* tribunal under the auspices of the Permanent Court of Arbitration. The text of the Award in both phases of this case can be found at the relevant pages of the web site of the Permanent Court of Arbitration:

<http://pca-cpa.org/RPC/#Eritrea> . The Awards of the two phases shall be distinguished as Award I and Award II.

³ *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)* ICJ Reps. 2001.

⁴ See generally Chapter V of Award II and also *Qatar v. Bahrain* ICJ Rep. 2001, para. 185.

⁵ See the Award II paras. 158 and 159 and also *Qatar v. Bahrain* ICJ Rep. 2001, paras. 174 to 177.

⁶ See the Award II paras. 131 and 132 and also *Qatar v. Bahrain* ICJ Rep. 2001, paras. 230 and 247.

⁷ See the Award II para. 155 and also *Qatar v. Bahrain* ICJ Rep. 2001, para. 185.

⁸ Award II para. 131.

⁹ Award II para. 83.

¹⁰ Award II para. 114.

¹¹ Award II para. 117.

¹² Award II para. 162.

¹³ Award I para. 526.

¹⁴ Award I para 526 sub vi.

¹⁵ For example, see Award II paras. 92 to 94. This, despite the fact that neither Party pleaded it nor argued that it was a relevant factor for the Tribunal to consider. Islamic law is a complex system of thought. The Tribunal's brief treatment of it is probably unsatisfactory for any Islamic law scholar.

¹⁶ Award II para. 103.

¹⁷ Although it is outside the scope of this paper, it is worth noting in this context the case of *Kasikili/Sedudu (Botswana/Namibia)* (ICJ Reps. 1999). At issue in that case was a land boundary (it ran through a river, but was not, of course, a maritime delimitation). In that case, the Court endorsed a series of agreements between and communications from the Parties that the Court interpreted as, *inter alia*, continuing the traditional fishing activities in the whole of the river by the people on either side of the boundary. See paras. 100 to 103 of the Judgment.

¹⁸ This, despite the fact that there were no known hydrocarbon reserves in any of the core maritime areas that were under dispute.

¹⁹ ICJ Reps. 2001 paras. 203 to 207. The rights derived from LTEs situated in the overlapping territorial seas of two States "neutralise" each other, as they would appertain to both States. See para. 202.

²⁰ ICJ Reps. 2001 para. 245.

²¹ ICJ Reps. 2001 para. 205.

²² ICJ Reps. 2001 para. 206

²³ ICJ Reps. 2001 paras. 207 and 208.

²⁴ The Court held that the pearling industry in the Gulf was long finished and that, in any event, local practice had never recognised that control over pearl fisheries gave rise to

territorial rights to the pearl grounds or the superadjacent waters. ICJ Reps. 2001 paras. 235 and 236.

²⁵ ICJ Reps. 2001 para. 185.

²⁶ ICJ Reps. 2001 para. 219.

²⁷ ICJ Reps. 2001 para 212 to 215.

²⁸ ICJ Reps. 2001 para. 231.

²⁹ ICJ Reps. 1993.

³⁰ ICJ Reps. 2001 para. 230.

³¹ ICJ Reps. 2001 para. 247.

³² ICJ Reps. 2001 paras. 247 to 249.