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Low-Tide Elevations: Reassessing Their Impact on Maritime Delimitation

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LOW-TIDE ELEVATIONS: REASSESSING THEIR IMPACT ON MARITIME DELIMITATION

Hugo Ignacio Llanos*

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I. INTRODUCTION

The present article examines how low-tide elevations can currently influence the configuration of a line of maritime delimitation. For that purpose the relevant provisions of the Convention on the Territorial Sea and the Contiguous Zone of 1958 and the United Nations Convention on the Law of the Sea of 1982 are examined. Next, follows an examination of the international case law concerning the effect of low-tide elevations on maritime delimitation, starting with the Fisheries Case (United Kingdom v. Norway) and concluding with the judgment of the International Court of Justice in the Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain of March 16, 2001, which sheds light on a number of legal issues raised by these features and ultimately gives partial effect to a low-tide elevation in a sector of the delimitation.

II. RELEVANT PROVISIONS OF THE 1982 LAW OF THE SEA CONVENTION

A. *Definition*

According to the United Nations Convention on the Law of the Sea of 1982 (UNCLOS), “[a] low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide.”¹

B. *Maritime Areas Generated by Low-Tide Elevations*

Low-tide elevations can only generate territorial sea when they meet the distance criterion provided for in UNCLOS. According to Article 13, “[w]here a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.”² Thus, low-tide elevations do not have a contiguous zone, continental shelf or exclusive economic zone.³ However, if the

¹ United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 13, 1833 U.N.T.S., 397, 403 available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/part2.htm [hereinafter UNCLOS].

² *Id.* art. 13(2).

³ See generally UNCLOS, *supra* note 1, arts. 33, 48, 55-57, 76.

distance requirement is met, the low-water line of the low-tide elevation can be used as a baseline. As shall be seen, the distance criterion of UNCLOS between the low-tide elevation and a continent or an island considerably narrows the geographical scope in which low-tide elevations can constitute a “special circumstance” for delimitation purposes.⁴ As a consequence, the eventual presence of these features in the delimitation area shall not affect the delimitation of the continental shelf or that of the exclusive economic zone.⁵

C. *Low-Tide Elevations and Baselines*

There is a close relationship between maritime delimitation and baselines from which to measure the breadth of the territorial sea. Low-tide elevations can be used to draw baselines for measuring the breadth of the territorial sea in only one case. This occurs when the elevation is totally or partially at a distance from the continent or an island, not exceeding the breadth of the territorial sea.⁶ The situation described is an exception to the use of the normal baseline for measuring the breadth of the territorial sea. A normal baseline “is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.”⁷

The situation differs from the drawing of straight baselines. In fact, the general rule is that low-tide elevations cannot be used for the drawing of straight baselines.⁸ According to Article 7 of UNCLOS, “[s]traight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or except in instances where the drawing of baselines to and from such elevations has received general international recognition.”⁹

In turn, Article 47 of UNCLOS, “Archipelagic States,” forbids these States to draw archipelagic baselines to and from

⁴ See Lucius Caflisch, *The Delimitation of Marine Spaces Between States with Opposite or Adjacent Coasts*, in A HANDBOOK ON THE NEW LAW OF THE SEA 425, 487 (René-Jean Dupuy & Daniel Vignes eds., 1991).

⁵ See *id.* at 488.

⁶ See UNCLOS, *supra* note 1, art. 13(2).

⁷ *Id.* art. 5.

⁸ See *id.*

⁹ *Id.* art. 7(4).

low-tide elevations.¹⁰ However, there is an exception allowing the drawing of such lines where “lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.”¹¹ This exception is analogous to that contained in Article 7(4). No exception was foreseen in favor of baselines drawn to and from low-tide elevations that have received general international recognition.

D. *Low-Tide Elevations and Islands*

According to UNCLOS, “[a]n island is a naturally formed area of land, surrounded by water, which is above water at high tide.”¹² Islands generate all the maritime areas, i.e., territorial sea, contiguous zone, exclusive economic zone and continental shelf.¹³ Unlike the case of low-tide elevations, international law does not acknowledge a distinction between islands situated within a territorial sea and islands situated outside this space. Moreover, islands can always serve as basepoints for baselines, either straight or normal, if the conditions set forth by UNCLOS are met. A provision exists in UNCLOS concerning the regime of islands, which, it has been claimed, would be applicable *a fortiori* to low-tide elevations.¹⁴ Article 121 provides, “[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”¹⁵

III. BACKGROUND TO THE CONVENTIONAL REGIME

In the 19th century, Great Britain considered low-tide elevations as islands if they were located in the immediate vicinity of the coasts.¹⁶ This notion was applied irrespective of the ele-

¹⁰ See *id.* art. 47(4).

¹¹ *Id.*

¹² UNCLOS, *supra* note 1, art. 121(1).

¹³ See *id.* art. 121(2).

¹⁴ See Caflisch, *supra* note 4, at 488.

¹⁵ UNCLOS, *supra* note 1, art. 121(3).

¹⁶ See HARITINI DIPLA, LE REGIME JURIDIQUE DES ILES DANS LE DROIT INTERNATIONAL DE LA MER [THE LEGAL REGIME OF ISLANDS UNDER THE INTERNATIONAL LAW OF THE SEA] 23, 43 (1984).

vation's size, provided that it was linked to an island or mainland.¹⁷ Scandinavian countries also followed this notion.¹⁸

During the First Conference of Codification of International Law, convened by the League of Nations in 1930, a number of States wished to continue with the assimilation of low-tide elevations and islands.¹⁹ Meanwhile, a restrictive approach for the configuration of islands prevailed, which, as a consequence, excluded low-tide elevations.²⁰ Thereafter, for an island to be considered as such, it was necessary to meet the requirement of being permanently above high water. Reflecting this new approach, the final report of the sub-commission dealing with this matter gave a separate treatment to low-tide elevations.²¹ According to the report, "[e]levations of the sea-bed situated within the territorial sea, even if they only emerge at low-water tide, shall be taken into account for the drawing of the territorial sea."²² During that meeting, for the first time, a clear distinction between low-tide elevations situated within the territorial sea and those situated on the high seas was drawn.²³

Years later, the United Nations International Law Commission was entrusted with the task of preparing a draft Convention on the territorial sea and contiguous zone. Article 11 of the draft contained in the report of the Commission to the United Nations General Assembly indicated that "drying rocks and drying shoals which are wholly or partly within the territorial sea, as measured from the mainland or an island, may be taken as points of departure for measuring the extension of the territorial sea."²⁴ In turn, the draft provision relating to

¹⁷ *See id.* at 23.

¹⁸ *See id.* at 43.

¹⁹ *See id.*

²⁰ *See id.*

²¹ *See id.* at 44.

²² DIPLA, *supra* note 16, at 44 (citing Conference pour la Codification du Droit International, Rapport de la Deuxième Commission (mer territoriale) [Conference for the Codification of International Law, Report of the Second Commission (territorial sea)], May 2, 1930, Rapporteur J.P.A. François doc. C.230.M.117.1930.V, 131 (translation by the author)).

²³ *See* DIPLA, *supra* note 16, at 44.

²⁴ *Report of the International Law Commission to the General Assembly*, 11 U.N. GAOR Supp. (No. 9) U.N. Doc. A/3159 (1956), reprinted in [1957] 2 Y.B. Int'l L. Comm'n 270, U.N. Doc. A/CN.4/SER.A/1956/Add.1.

straight baselines (Article 5) provided that they might not be drawn to or from drying rocks and drying shoals.²⁵

The First United Nations Conference on the Law of the Sea took place in Geneva in 1958.²⁶ During the drafting of Article 5, the United Kingdom proposed adding a separate paragraph to provide, “[b]aselines shall not be drawn to and from drying rocks and drying shoals.”²⁷ Sweden and Iceland, countries that applied this method, opposed the proposal.²⁸ As a compromise formula, Mexico proposed the addition of the sentence “unless lighthouses or similar installations which are permanently above sea level have been built on them.”²⁹ In spite of an objection raised by Norway, the Mexican formula was finally adopted.³⁰

Article 11 of the Convention on the Territorial Sea and Contiguous Zone of 1958 also deals with low-tide elevations.³¹ The expression “low-tide elevation” used in the Convention came from a proposal made by the United States, which had objected to the use of the terms proposed by the International Law Commission for these features (“rocks” and “shoals”) as “irrelevant and vague.”³² The definition of a low-tide elevation contained in paragraph 1 closely follows the American proposal.

According to Article 11 of the 1958 Convention:

1. A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high-tide. Where a low-tide elevation is situated wholly or partly

²⁵ See *id.* at 267.

²⁶ See Geoffrey Marston, *Low-Tide Elevations and Straight Baselines*, in 46 THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 405, 417 (Sir Humphrey Waldock et al. eds., 1975).

²⁷ *Id.* (citing *Summary Records of Meetings and Annexes*, 3-4 Official Records of the United Nations Conference on the Law of the Sea 228, U.N. Doc. A/CONF.13/C.1/L.62/Corr.1 (1958)).

²⁸ See Marston, *supra* note 26, at 417.

²⁹ *Id.* (citing *Summary Records of Meetings and Annexes*, 3-4 Official Records of the United Nations Conference on the Law of the Sea 161, 239, U.N. Doc. A/CONF.13/C.1/L.99 (1958)).

³⁰ See Marston, *supra* note 26, at 417.

³¹ See Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205, available at <http://www.un.org/law/ilc/texts/terresa> [hereinafter The 1958 Convention].

³² *Summary Records of Meetings and Annexes*, 3-4 Official Records of the United Nations Conference on the Law of the Sea 243, U.N. Doc. A/CONF.13/c.1/L.115 (1958).

at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.³³

The UNCLOS followed this provision *verbatim* in Article 13, already mentioned. It was the delegation of Uruguay that proposed in 1973 in the Sea-Bed Committee to reiterate Article 11 of the 1958 Convention.³⁴ The *travaux préparatoires* of Article 13 show that a low-tide elevation may be a rock or a shoal, irrespective of its size.³⁵ The second provision of the 1958 Convention that alludes to low-tide elevations is Article 4(3), which states, "baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them."³⁶

The equivalent provision of UNCLOS, Article 7(4), is identical to the provision of the 1958 Convention, except that it contains a new phrase regarding the drawing of baselines to and from low-tide elevations, which has received general international recognition. This addition was introduced to reflect the situation of the Norwegian straight baselines, as recognized by the ICJ in the *Fisheries Case (U.K. v. Nor.)*,³⁷ where a baseline was drawn to and from a low-tide elevation without a lighthouse or analogous installation.³⁸ In this case, the ICJ used a method that Norway failed to obtain, during the negotiations of the 1958 Convention, as a provision of UNCLOS.³⁹

During the negotiations of the Third United Nations Conference on the Law of the Sea, several delegations criticized this provision as "too strict for those States which could not build

³³ The 1958 Convention, *supra* note 31, art. 11.

³⁴ See 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982, A COMMENTARY, 127 (Satya N. Nandan & Shabtai Rosenne eds., 1989)[hereinafter 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982].

³⁵ See *id.* at 128.

³⁶ The 1958 Convention, *supra* note 31, art. 4(3).

³⁷ 1951 I.C.J. 116 (order of Dec. 18).

³⁸ See *id.* at 116.

³⁹ See Marston, *supra* note 26, at 418.

such installations for technical reasons.”⁴⁰ These delegations proposed to delete this provision.⁴¹ It was also established that the provision’s requirement of lighthouses or similar installations was made for the benefit of navigation since low-tide elevations were not visible at all times. Installations that are similar to a lighthouse “could be towers or buildings which look like a lighthouse without serving any purpose specifically connected with navigation.”⁴² Installations that serve navigation purposes, such as beacons, foghorns and radar reflectors, could also qualify under the provision.⁴³ These installations “should be clearly visible at all states of the tides.”⁴⁴

It is also interesting to note that unlike the 1958 Convention, UNCLOS provided for straight baselines drawn in archipelagos to and from low-tide elevations in Part IV, “Archipelagic States.”

IV. SPECIFIC ISSUES POSED BY LOW-TIDE ELEVATIONS

A. *The Provisions of the 1982 Convention and Customary Law*

It has been submitted that the provisions of UNCLOS concerning low-tide elevations reflect international customary law.⁴⁵

B. *A Derived Title*

The legal title of low-tide elevations to the territorial sea is derived because it proceeds from the title of the landmass. Bowett suggests that what happens in this case is that the islands, rocks, reefs and low-tide elevations “‘represent’ the landmass”⁴⁶ and have no autonomous title to maritime areas.⁴⁷

⁴⁰ 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982, *supra* note 34, at 102.

⁴¹ *See id.*

⁴² *Id.*

⁴³ *See id.*

⁴⁴ *Id.*

⁴⁵ *See Case Concerning Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)*, 2001 I.C.J. para. 201, (Mar. 16), available at <http://www.icj-cij.org/ijwww/idoCKET/iqb/iqbframe.htm>.

⁴⁶ Derek Bowett, *Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations*, in 1 INTERNATIONAL MARITIME BOUNDARIES 130, 147-48 (Jonathan I. Charney & Lewis M. Alexander eds., 1993).

C. *The Doctrine of Minor Geographical Features*

The doctrine of minor geographical features has been elaborated by the ICJ and generally is linked to islands, but nevertheless has been applied to other features like low-tide elevations. If this doctrine is applied, it could lead to denying effect to low-tide elevations on maritime delimitation.

This doctrine responds to the concern of avoiding distortion effects, generating inequity in maritime delimitation. This concern was alluded to in a passage of a judgment by the Chamber of the ICJ in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*.⁴⁸ In that case, the Chamber, criticizing the delimitation method of drawing a lateral equidistance line as proposed by Canada, stated, "the likely end-result would be the adoption of a line all of whose basepoints would be located on a handful of isolated rocks, some very distant from the coast, or on a few low-tide elevations: these are the very type of minor geographical features which, as the Court and the Chamber have emphasized, should be discounted."⁴⁹

D. *The Issue of the Tidal Datum and Changes Thereto*

The election of the *datum* of sea level by the coastal State, as marked on large-scale charts, is an aspect that can have a bearing for determining whether a feature is legally an island, a low-tide elevation or simply part of the sea-bed.

An issue arises with regard to the definition of low-tide elevation contained in UNCLOS, which requires the naturally formed area of land surrounded by water to be above water "at low-tide."⁵⁰ Currently, there is no uniformity in State practice as to the criterion to be used to define the low-water line. Among the criteria used are the mean low-water, the mean low-water springs and the lowest astronomical tide.⁵¹ Dipla affirms

⁴⁷ See *id.*

⁴⁸ 1984 I.C.J. 246 (Oct. 12).

⁴⁹ *Id.* at 246, para. 210.

⁵⁰ UNCLOS, *supra* note 1, art. 13(1).

⁵¹ See generally Clive R. Symmons, *Some Problems Relating to the Definition of 'Insular Formations' in International Law: Islands and Low-Tide Elevations*, in 1 MARITIME BRIEFING (Clive R. Schofield & Peter Hocknell eds., 1995).

that the criterion to be applied in this case should be that of the lowest tide.⁵²

Shalowitz has stressed the importance of the date of establishment of the low-water line and, linked to this issue, the question of “what effect should be given to changes in the low-water line, both natural (accretion and erosion) and artificial, that have occurred since that date.”⁵³

Climate change also may have consequences on features used in maritime delimitation. Global warming is producing a sea-level rise and threatening low-lying coastal areas and small islands. It could also affect the current configuration of low-tide elevations, thus upsetting their impact on maritime delimitation. In fact, a UNEP study indicates that, “[t]he global mean sea level has already risen by 10-15 cm[s.] Global warming may well cause a further rise of 50 cm[s.] by the year 2100.”⁵⁴

E. *Freedom of Choice*

As States are free to choose the method or combination of methods for determining the delimitation line in a negotiation; States, in their search for an equitable solution, are free to consider, or not, low-tide elevations. Thus, parties can agree to disregard low-tide elevations. Such a decision might not necessarily involve an explicit pronouncement about the legal nature of a particular feature, but merely a consequence of the method of delimitation used.⁵⁵

In the presence of these features, parties can also choose a different method of delimitation or modify the method used so as to take these features into account. If these features are ignored, low-tide elevations are subject to the legal regime applicable to the sea-bed, without producing a change in the regime of the waters superjacent. If they are taken into account and

⁵² See *DIPLA*, *supra* note 16, at 45.

⁵³ AARON L. SHALOWITZ, U.S. DEPT OF COMMERCE, *SHORE AND SEA BOUNDARIES* 1, 101 (1962).

⁵⁴ UNEP Regional Seas Reports and Studies No. 140 (UNEP 1992), at <http://www.unep.ch/seas/main/hchange.html> (last visited Jan. 21, 2003).

⁵⁵ For instance, the method of the geographical parallel by definition disregards the presence of islands and features such as low-tide elevations. States that use the method of drawing a median line between the landmasses and whose coasts are opposite ignore the presence of any such feature.

used as basepoints for the drawing of straight baselines, waters on the landward side shall form part of internal waters.

V. INTERNATIONAL CASE LAW

A. *The Fisheries Case (United Kingdom v. Norway)*

By means of a Royal Decree of 1935, Norway claimed exclusive fishing rights in the waters surrounding its entire coastline, north to the parallel 66° 28' 48" North, north of the Arctic Circle.⁵⁶ The coastline, here, is broken and deeply indented by fjords and bays.⁵⁷ In consideration of the peculiar formation of the coast, the decree delimited the exclusive fisheries zone by means of straight baselines between 48 basepoints on headlands, islands and rocks, which constitute the *skjaergaard*.⁵⁸ The area of 4 miles adjacent to these baselines was proclaimed by Norway as a fishing zone.

In 1949 the United Kingdom filed an application against Norway before the ICJ contending that the delimitation contained in the decree of 1935 was contrary to international law because of the use of straight baselines and because of the length of some of these lines.⁵⁹ By a vote of 10 to 2, the ICJ rejected the British claims stating that the method and baselines used by Norway were not contrary to international law.⁶⁰ Although the *Fisheries Case* is not properly a dispute of delimitation, but one of limits, that is, regarding the separation to the high seas or with regard to what is known today as the international sea-bed area,⁶¹ it is relevant in the evolution of the case law concerning low-tide elevations because some of the segments of the straight baselines drawn by Norway were drawn on these features.

B. *The Delimitation of the Continental Shelf Case (United Kingdom / France)*

Whether a feature is an island or a low-tide elevation can be the object of dispute and have an impact on the delimitation

⁵⁶ See *Fisheries Case (U.K. v. Nor.)*, 1951 I.C.J. at 118.

⁵⁷ See *id.* at 127.

⁵⁸ See *id.*

⁵⁹ See *id.* at 119-21.

⁶⁰ See *id.* at 143.

⁶¹ See *Cafilisch, supra* note 4, at 426-27.

line. In the *Delimitation of the Continental Shelf Case (U.K. / France)*,⁶² the arbitral tribunal had to determine whether the *Eddystone Rocks*, an island or a low-tide elevation situated southwest of Plymouth, "were to be taken into account for the drawing of a median line in that part of the English Channel."⁶³ The feature in question is situated at 10 nautical miles from the continental coasts, that is, beyond the British territorial sea.⁶⁴ The United Kingdom contended that the *Eddystone Rocks* should be taken into consideration in the delimitation, whereas France argued that they should be ignored.⁶⁵ In its decision of June 30, 1977, the arbitral tribunal decided to take *Eddystone Rocks* into account based on the past conduct of the parties, which had given them validity as basepoints for the drawing of baselines.⁶⁶

C. *Continental Shelf Case (Tunisia / Libya)*

In the *Continental Shelf Case (Tunisia / Libya)*,⁶⁷ in the second sector of the delimitation, the ICJ had to decide on the weight to be given in the delimitation of the continental shelf to the Kerkennah Islands and their low-tide elevations in the Gulf of Gabes off the Tunisian coast.

Tunisia argued that the body of islands, islets and low-tide elevations were a constituent part of the Tunisian littoral.⁶⁸ It further contended that the island of Djerba and the Kerkennah Islands, with their low-tide elevations, represented a relevant circumstance that characterized the area of delimitation. Libya, for its part, advocated the omission of the island of Djerba and contended that the Kerkennah Islands should be excluded, without even mentioning their low-tide elevations. Although the ICJ held that the Kerkennah Islands, their islets and low-tide elevations constituted, by reason of their size and position, a circumstance relevant for the delimitation, they were not given full effect.⁶⁹ Finally, the ICJ decided to take the

⁶² 54 I.L.R. 6 (Anglo-French Ct. of Arb. 1977).

⁶³ *Id.* at 488.

⁶⁴ *See id.*

⁶⁵ *See id.*

⁶⁶ *See id.*

⁶⁷ 1982 I.C.J. 18 (Feb. 24).

⁶⁸ *See id.* para. 79.

⁶⁹ *See id.* para. 128.

Kerkennah Islands and their low-tide elevations into account, but gave them only “half-effect” without further explanation.

For the purpose of the present article, it is noteworthy to mention that the low-tide elevations of the Kerkennah Islands were not dissociated from the treatment given to these formations as islands. In the evolution of case law concerning low-tide elevations, it is to be pointed out that, in this case, these features qualified as a “relevant circumstance” in the delimitation of the continental shelf.

D. *Maritime Delimitation (Eritrea v. Yemen)*

In the second stage of the arbitration between Eritrea and Yemen on maritime delimitation, the tribunal was called to effect a delimitation through a single line of the maritime boundary of the two countries in the Red Sea.⁷⁰ In the northern stretch of the delimitation, the geographical situation was characterized by the presence of a multitude of mid-sea islands and islets between the mainland coasts of the parties.⁷¹ The median line, which Eritrea proposed to the arbitration tribunal, included in its straight baseline system a feature called “Negileh Rock.”⁷² Yemen objected to the use of this feature claiming that it was a reef. In support of its position, Yemen argued that on the chart used in the arbitral proceedings, this feature was shown to be a reef, which appeared not to be above water at any state of the tide.

In its judgment of December 17, 1999, the tribunal held that a reef that was not also a low-tide elevation could not serve as a basepoint. It added that the Eritrean claim of a straight baseline system “foreclose[d] any right to employ a reef that is not proud of the water at low-tide as a baseline of the territorial sea,”⁷³ ignoring it in the median line.⁷⁴

⁷⁰ See Award of the Arbitral Tribunal in the Second Stage (Maritime Delimitation), (*Eritrea v. Yemen*), 40 I.L.M. 900, para. 129 (Perm Ct. Arb. 1999), available at <http://pca-cpa.org/RPC/2ch5ER-YE.htm>.

⁷¹ See *id.* para. 114.

⁷² *Id.* para. 143.

⁷³ *Id.* para. 145

⁷⁴ See *id.*

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

In the case between Qatar and Bahrain, the ICJ had to effect a delimitation through a single line in an area of the Persian Gulf where numerous islands, islets and low-tide elevations exist.⁷⁵ In the southern sector of the delimitation area, the ICJ was called to effect the delimitation of the territorial sea. The parties disagreed as to whether Fasht al Azm should be deemed a part of the island of Sitrah, as asserted by Bahrain, or whether it was a low-tide elevation not naturally connected with the island, as contended by Qatar.⁷⁶ In support of its contention, Qatar argued that "Fasht al Azm is a low-tide elevation which has always been separated from the island of Sitrah by a natural channel (a "fisherman's channel") which was navigable even at low-tide."⁷⁷ The ICJ, being unable to establish the existence of this passage before 1982 (when an artificial channel was built), affirmed that it was nonetheless able to undertake the delimitation in this sector without determining the nature of Fasht al Azm.⁷⁸ The ICJ provisionally drew equidistance lines corresponding to the two hypotheses. Next, considering that both hypotheses presented certain "special circumstances," it drew a modified equidistant line between Fasht al Azm and Qit'at ash Shajarah.⁷⁹ The ICJ gave partial effect to a low-tide elevation, which had an impact on the delimitation line, making this the first precedent in international case law to give effect to this type of feature.

In the same southern sector, the ICJ faced a similar question. This time, it had to determine the legal nature of Qit'at Jaradah,⁸⁰ a small feature situated within the 12 nautical miles of the territorial sea of both States.⁸¹ Qatar claimed that this was a low-tide elevation,⁸² whereas Bahrain contended that it

⁷⁵ Note that because the two countries were not parties to the 1958 Convention, and only Bahrain is a party to UNCLOS, the ICJ applied only conventional law to the maritime delimitation.

⁷⁶ See (Qatar v. Bahrain), 2001 I.C.J. para. 188-189.

⁷⁷ *Id.* para. 189.

⁷⁸ See *id.* para. 190.

⁷⁹ See *id.* para. 218.

⁸⁰ See *id.* para. 219.

⁸¹ See (Qatar v. Bahrain), 2001 I.C.J. para. 197.

⁸² See *id.* para. 196.

was an island.⁸³ Based on the evidence submitted and expert reports of both countries, the ICJ concluded that this feature satisfied the criteria of Article 121, paragraph 1, of UNCLOS and that it should be considered as an island.⁸⁴ However, this finding did not have an impact on the delimitation line because the ICJ stated that, if the baseline of Qit'at Jaradah was to be used to determine a basepoint for the drawing of the delimitation line, "a disproportionate effect would be given to an insignificant maritime feature."⁸⁵

1. *Low-Tide Elevations as "Territory"*

The issue was raised in the same case (*Qatar v. Bahrain*) with regard to Fash ad Dibal, a feature that both parties qualified as a low-tide elevation, situated in the overlapping area of the territorial sea of both States. According to Bahrain, low-tide elevations, "whatever their location" were "always subject to the law which governs the acquisition and preservation of territorial sovereignty, with its subtle dialectic of title and [the so-called] *effectivités*."⁸⁶

At stake was a novel question in international law, "whether a State can acquire sovereignty by appropriation over a low-tide elevation situated within the breadth of its territorial sea when that same low-tide elevation lies also within the breadth of the territorial sea of another State."⁸⁷ Although this discussion goes beyond the scope of the present article (since it concerns a dispute of attribution of sovereignty rather than one of delimitation) it is noteworthy to point out that underlying this notion was a potential impact on the maritime delimitation to be effected: to recognize or not the parties' right to use the

⁸³ See *id.* para. 194

⁸⁴ See *id.* para. 195. On this point, see the declaration of Judge Vereshchetin who viewed this formation "as a low-tide elevation, whose appurtenance depended on its location in the territorial sea of one State or the other." He wrote he reached this conclusion based "on the opposing views of the experts, the absence of any evidence whatsoever to the effect that Qit'at Jaradah has ever been shown on nautical charts as an island" and the "alleged attempts of both States to artificially change the upper part of its surface." Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (*Qatar v. Bahrain*), 2001 I.C.J. para. 13 (Mar. 16)(Declaration of Judge Vereshchetin).

⁸⁵ (*Qatar v. Bahrain*), 2001 I.C.J. para. 219.

⁸⁶ *Id.* para. 200.

⁸⁷ *Id.* para. 204.

low-water line of a low-tide elevation for measuring the breadth of the territorial sea.

The ICJ, emphasizing the differences in international law between islands and low-tide elevations, rejected the contention that low-tide elevations are territory-like islands. Holding that, for delimitation purposes, the competing rights derived by both coastal States from the relevant provisions of the Law of the Sea would neutralize each other, the ICJ refused both States the right to use the low-water line of Fasht al Dibal for their baselines.⁸⁸

2. *Features Situated at a Remote Distance From the Coast*

In the northern sector of the delimitation area, which involved the delimitation by a single line of the continental shelf and the exclusive economic zone, lay Fasht al Jarim, a feature partially situated in the territorial sea of Bahrain, but relatively far from its coasts. The parties disagreed over its legal nature.⁸⁹ Whereas Qatar contended that Fasht al Jarim was a low-tide elevation, Bahrain, which qualified itself as being a *de facto* archipelago, included this feature as an island in its (alleged) archipelagic baselines. To effect the delimitation of this sector, the ICJ provisionally drew an equidistance line, which it did not subsequently modify in spite of the special or relevant circumstances invoked by both parties.

Subsequently, the ICJ authorized the use of the low-water line of Fasht al Jarim as the baseline for measuring the breadth of the territorial sea, continental shelf and exclusive economic zone,⁹⁰ a right that normally corresponds to islands. Notwithstanding, this had no practical effect because the ICJ finally decided not to give effect to Fasht al Jarim in the determination of the boundary line in the northern sector. In the ICJ's view this would have deviated the limit and produced a distortion not leading to an equitable solution.⁹¹ Among the reasons to deprive effect to Fasht al Jarim, the ICJ alluded to its remote

⁸⁸ See (Qatar v. Bahrain), 2001 I.C.J. paras. 202, 245, 248.

⁸⁹ See *id.* para. 245.

⁹⁰ See *id.*

⁹¹ See *id.* para. 248.

character, with respect to the coasts, and the fact that “at most a minute part of it is above water at high tide.”⁹²

3. *The Leap-Frogging Method Rejected*

In the same case, in the northern sector of the delimitation, Bahrain, basing itself on the low-water line of Qit’at Jaradah, situated in the territorial waters of Fasht al-Azm, claimed for a third feature, Dibal, a territorial sea for its own. Bahrain advocated the ability of Dibal to serve as a basepoint for the delimitation. Bahrain thus applied a method for determining the baseline of the territorial sea, which maximizes the effect of low-tide elevations on the delimitation line. This is known as the *leap-frogging* method. In its Counter-Memorial, Qatar rejected this contention.⁹³

The Court rejected the application of this method declaring that:

[W]hereas a low-tide elevation which is situated within the limits of the territorial sea may be used for the determination of its breadth, this does not hold for a low-tide elevation which is situated less than 12 nautical miles from that low-tide elevation but is beyond the limits of the territorial sea.⁹⁴

On this point, the ICJ added that, “it is irrelevant whether the coastal State has treated such a low-tide elevation as its property and carried out some governmental acts with regard to it.”⁹⁵ It is to be noted that this method was unsuccessfully invoked by Eritrea, with respect to certain islands in the first phase of the *Eritrea-Yemen Arbitration*.⁹⁶

VI. CONCLUSIONS

1. Low-tide elevations are subject to a specific regime provided for in UNCLOS, which essentially reproduced what was pro-

⁹² *Id.* para. 248.

⁹³ See Case Concerning Maritime Delimitation and Territorial Questions (Qatar v. Bahrain), 2001 I.C.J. paras. 8.52-8.55 (Counter Memorial submitted by the State of Qatar (Merits)).

⁹⁴ (Qatar v. Bahrain), 2001 I.C.J. para. 207.

⁹⁵ *Id.*

⁹⁶ See Eritrea-Yemen Arbitration. 40 I.L.M. 900, 971 para. 473 (Perm Ct. Arb. 1998), available at <http://www.pca.cpa.org/RPC/ch10ER-YE.htm>. See also Award of the Arbitral Tribunal in the Second Stage (Maritime Delimitation) (Eritrea v. Yemen), para. 156.

vided for in the 1958 Convention. The situation of straight baselines drawn in archipelagos to and from low-tide elevations represents an innovation of UNCLOS.

2. The regime described establishes the ambit in which low-tide elevations can play a role in maritime delimitation. The relevant provisions of UNCLOS have a customary status.

3. Once certain conditions are met, the low-water line of a low-tide elevation can be used as a baseline for measuring the breadth of the territorial sea.

4. Low-tide elevations can be a "relevant circumstance" in matters of maritime delimitation.

5. The case law of the ICJ continues to demonstrate concern for eliminating the disproportionate effect of small features to arrive at an equitable solution in maritime delimitation. In the *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* this predicament, which had been applied to islands in previous cases, was extended to low-tide elevations.

6. International case law, prior to 2001, shows a reluctance to give effect to low-tide elevations in maritime delimitation. Although in the *Continental Shelf Case* (Tunisia/Libya), these features qualified as a "relevant circumstance" in the delimitation of the continental shelf, the ICJ did not draw the consequences arising from this finding.

7. The *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* is the first precedent in a maritime delimitation in which an international tribunal gives effect (partial) to a low-tide elevation.