

The Effects of Islands on the definition of the International Maritime Boundaries: the Kuwaiti Sui Generis Case^(*)

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Abstract:

The effects of the three islands: Garu, Umm al-Maradim and Failaka, on the marine boundary delimitations between the Kingdom of Saudi Arabia and Kuwait have been reiterated several times, most recently upon the conclusion and implementation of the 2000 Agreement defining the marine boundaries between the Kingdom of Saudi Arabia and Kuwait. The prevailing evidence found in the literature, the existing agreements, the practice of the disputant states, and principles of international law have been conclusive in verifying the relevance of these islands to the disputed offshore boundaries between the two states.

However, notwithstanding the established relevance of the three islands under international law to the disputed marine boundaries, upon the conclusion of the agreement between the Kingdom of Saudi Arabia and Kuwait to define marine boundaries between them, the disputant states have treated the islands differently. This divergent approach has not been based completely on the general principles of international law governing the effects of islands on maritime boundary delimitations but on other factors, mostly for the benefit of one party at the expense of the other. Moreover, this approach may constitute an encroachment on the territorial sovereignty of one party by the other and may negatively influence the former's future maritime boundary delimitations with a third state.

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Introduction

The effects of the islands located in the marine area between the Kingdom of Saudi Arabia and Kuwait have been raised several occasions not only in theoretical debates but also in the practice of the two states. Most recently, this issue was brought to the forefront during the drafting and implementation of the one and only short Annex (I) of the 2000 Agreement defining the offshore boundaries between the Kingdom of Saudi Arabia and Kuwait.⁽¹⁾

In reference to Garu and Umm al-Maradim Islands (the two islands), the Annex⁽²⁾ and Articles 1⁽³⁾, 2⁽⁴⁾, 3⁽⁵⁾, and 4⁽⁶⁾ of the Agreement ignore the issue of the effects of these two islands. In contrast, Article 3⁽⁷⁾ of the agreement plainly embodies a different treatment of the Failaka Island. These provisions, however, underline that the islands of Garu, Umm al-Maradim and Failaka (the three islands) are factually and legally relevant to the disputed marine boundaries between the two states, that were demarcated by the 2000 Agreement. It is, therefore, legitimate to ask whether the geographical features of the islands and the islands' position have had any, or should have had, effects on the delimitation process employed by the 2000 Agreement (the agreement) and/or to evaluate the method utilized by the agreement under contemporary international law, as the ultimate goals of the present study. For convenience, the question can be divided into two

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- (1) See the 2000 Agreement available at:
< http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/SAU_KWT2000SA.PDF > (visited Apr 28, 2012).
 - (2) Id.
 - (3) It refers clearly at its end to the effects of Annex I, which mentions Garu and Umm al-Maradim Islands by name, Id.
 - (4) It refers explicitly at its end to certain effects of islands in general on the demarcation of northern marine boundaries between Kuwait and the Neutral Zone (NZ), where the two islands of Garu and Umm al-Maradim are located, Id.
 - (5) It refers also explicitly at its end to the effects of Annex I, which mentions Garu and Umm al-Maradim Islands by name, Id.
 - (6) It demarcates the southern marine boundaries between the Kingdom of Saudi Arabia and the NZ without any reference to the islands, which are located near there, Id.
 - (7) Id.

components, which can be addressed in successive manner as follows: first, the geographical features of the islands must be defined and second, the effects of the islands on the entire delimitation process must be evaluated as embodied in the 2000 Agreement.

II. The Features of the Islands and the raising of the Issues: The three islands possess different geographical features and diverse legal positions: Garu Island⁽⁸⁾ is the smallest of these islands. It is surrounded by shallow water, whereas Umm al-Maradim Island⁽⁹⁾ is surrounded by deep water, which enables ships to land directly at its shores. The natural life of both islands is limited. Unlike these islands, Failaka⁽¹⁰⁾ undisputedly belongs to Kuwait and has been inhabited by Kuwaitis since the 17th century. **According to Wikipedia, Garu is 0.035 square km in area, Umm al-Maradim 0.65 square km and Failaka 20.0 square km. They are composed of naturally formed land and above water at high tide,** as required by Article 121 of the U.N. Convention on the Law of the Sea⁽¹¹⁾.

Upon the emergence of the Kuwait and the Kingdom of Saudi Arabia, these islands and their locations have led to marine boundary disputes between Kuwait and the Kingdom of Saudi Arabia (the disputant states). The nexus of this dispute is that Kuwait claims that the two islands have been under its uninterrupted de facto exclusive sovereignty even before the emergence of the Kingdom of Saudi Arabia. However, the Kingdom of Saudi Arabia has considered that, following its establishment and after assuming its formal name⁽¹²⁾, the two islands

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- (8) See Garuh Island, available at:
< <http://www.crsk.edu.kw/Photo.asp?img=KNEW083.jpg&AlbumID=247> > (visited Apr 28, 2012).
- (9) See Umm al-Maradim island, available at:
< http://en.wikipedia.org/wiki/Umm_al_Maradim_Island > (visited Apr 28, 2012).
- (10) J. G. Lorimer, *Gazetteer of the Persian Gulf, Oman and Central Arabia*, Geographical and Statistical (1908), vol. II, p.512; see the historical background of Failaka at the following website:
< <http://www.globalsecurity.org/military/facility/failaka.htm> > (visited Apr 28, 2012).
- (11) Cf., R. R.Churchil, and others, *The Law of the Sea*, (2nd ed. Manchester University Press 1992), p. 41 ff.
- (12) On September 18, 1932, Ibn Saud issued a Royal Decree unifying all of the territories that he had occupied under his authority under the name of “the Kingdom of Saudi Arabia”. See
< <http://www.state.gov/r/pa/ci/bgn/3584.htm> > (visited Apr 28, 2012).

were to be subject to the same legal status as that of the NZ⁽¹³⁾. Therefore, the second component of the central question of the present study, outlined above (concerning the effects of the islands on the entire delimitation process as embodied in the 2000 Agreement.), can be restated in a detailed manner as follows: do the islands (Garu, Umm al-Maradim, and Failaka) constitute relevant circumstances (RCS) that affected, or should have affected, under international law, the marine boundary delimitations between the two states as defined in the 2000 Agreement? These questions will be addressed in light of the existing literature, the practice of the two states, and the rules embodied in the 2000 Agreement inasmuch as these rules conform to contemporary international law.

III. The Effects of the Three Islands: The two islands belong to Kuwait by law and in fact, the previous question can now be restated: did the three islands (Garu, Umm al-Maradim, and Failaka) constitute RCS that should have affected under international law, the marine boundary delimitation process brought about by the 2000 Agreement to the advantage of Kuwait as the owner of these islands? Moreover, which factors (economic or geographical) were employed to give these islands full, partial or no effects in demarcating marine boundaries between the Kingdom of Saudi Arabia and the NZ, between the NZ and Kuwait and the dividing line of the submerged area adjacent to the NZ as defined in the 2000 Agreement?

1. The effects of the three islands on the demarcation of the Southern Offshore Boundaries between the Kingdom of Saudi Arabia and the NZ: In demarcating these marine boundaries, Article 4 of the 2000 Agreement refers to geographical coordinates by stating that “The southernmost limit of the Submerged Zone adjacent to the divided zone shall be the line

(13) The 1922 Uqair Convention defining the land boundaries between the Kingdom of Saudi Arabia and Kuwait established what is now known as “the Neutral Zone (ZN)”, which is located between the two states. The Convention did not give the NZ this name; it acquired it later on. See R. H. Sanger, *The Arabian Peninsula*, (Cornell University Press, 1954), p. 152; H.R. Dickson, *Kuwait and Her Neighbors*, (London 1956), p. 279; E. H. Brown, *The Saudi Arabia-Kuwait Neutral Zone* (Beirut, 1963).

between the two countries currently in use...". This line implies many injustices to Kuwait related to its foundation. In that, the parties chose, through this article, to observe their pre-existing practice ("...currently in use...") as far as the demarcating line is concerned, despite the fact that this "... line between the two countries.." had never been defined in its fullest extent, because the area is very rich of oil deposits and constitutes an area of competition among oil companies of the two states.

Although the article impliedly refer to the starting point of the boundaries to begin from the low-water mark; i, e, the low-tide⁽¹⁴⁾, it does not recognize the two islands as RCS in favor of Kuwait, which are located between the territorial waters of the two states and are outside the NZ's sixth nautical miles territorial waters. It appears that the parties have preferred, in this article, to give economic factors more weight than any other factors, not on the basis of the equal sharing of natural resources, as will be seen in the other articles, but only for the benefit of the Kingdom of Saudi Arabia. Furthermore, the legal basis of the definition of "The southernmost limit", as stated in Article 4, is contrary to the principle of equal rights⁽¹⁵⁾ that had been established in the practice of the two states before the conclusion of the Agreement. Finally, as far as the effects of the three islands on the marine boundary delimitation brought about by the Agreement are concerned, Article 4 contradicts the principle of the definition of the northern marine boundaries between the NZ and Kuwait, as stated in Article 2 of this Agreement, which may raise questions regarding the equity of the marine delimitations as brought about by this Agreement.

(14) Cf., Article 13 of the 1982 UN Convention on the Law of the Sea; Churchill. *The Law of the Sea*, op. cit. n. 11, p.40; the 1965 Agreement Partitioning the NZ between the Kingdom of Saudi Arabia and Kuwait, 4 I.L.M. pp. 1134-7 (1965).

(15) Cf., The 1922 Uqair Convention, op. cit. n. 13; the 1965 Agreement Partitioning the NZ between the Kingdom of Saudi Arabia and Kuwait, 4 I.L.M. pp. 1134-7 (1965).; the 1969 Partition Agreement, Middle East Economic Survey (hereafter referred to as: M.E.E.S). Supplement to No. 32, (5 June 1970), all these instruments observe the principle of the equal sharing of natural resources.

2. *The effects of the three islands on The Demarcation of the Marine Boundaries between the NZ and Kuwait:* The evaluation of this demarcation starts with reading of Article 2 of the 2000 Agreement, which states: "The northernmost point of the submerged zone adjacent to the divided zone, beginning on the coast at Point No.1, at geographical coordinates 28 49 58.7 north and 48 17 00.188 east, shall be determined on the basis of the principle of equal distances from the low-water mark. With due regard for the provisions of article 8 of the Agreement on the partition of the neutral zone, the islands, shoals and reefs shall have no effect on this point."

Article 2 implies many injustices to Kuwait; it does not reveal the pre-existing practice of the parties with respect to the demarcating line of the northern marine boundaries between Kuwait and the NZ or Kuwait's mainland. This practice has always recognized that the coast of Kuwait's mainland has certain geographical configurations and islands, i, e, RCS in the meaning of international law of the sea, as will be clearfield soon.

In that, economic factors played a substantial role in the drafting of Article 2 on the expense of Kuwait. This article applies "... the principle of equal distances from the low-water mark..." to share equally the natural resources deposited in this Kuwaiti marine area. Thus, it defines these marine boundaries by demarcating them "... from the low-water mark..." of the mainland of Kuwait; the article further adds that "... the islands, shoals and reefs [such as Garu and Umm al-Maradim islands] shall have no effect on this point", not because these islands are incompatible with the concept of island in international law but, it was viewed, on the basis of the timing of the conclusion of the 2000 Agreement after Kuwait's liberation⁽¹⁶⁾ from Iraq's occupation in 1991. Contrary to what was embodied in Article 2, Article 3 of the agreement

(16) The 2000 Agreement was concluded after the 1990 War, in which the Kingdom of Saudi Arabia, together with the International Community, played a substantial role in liberating Kuwait from Iraq's occupation, therefore, it was, in the view of some Kuwaitis, the price of that liberation, see: the view of Ali jabber ALali, one of Alsabih governing family of Kuwait, Alwatn (Kuwaiti newspapers) of 1 Feb 2001 No: 8969/ 3415 Year 40.

gives full effects to Failaka Island, which is far from the NZ and does nothing to mitigate this inequitable result.

These provisions emphasize that the three islands (Garu, Umm al-Maradim and Failaka) are factually and legally relevant to the disputed marine boundaries between the two states and constitute relevant circumstances, which substantiate the deviation from the application of the principle of equal distance upon the demarcation of the northern marine boundaries between Kuwait and the NZ for the benefit of Kuwait. It is, therefore, legitimate to ask; why have these islands been treated differently? It has been contended, in answering such question, that "The essence of the settlement embodied in the 2 July 2000 Agreement is that Saudi Arabia deferred to Kuwait's position concerning the status of the islands of Qaru and Umm al-Maradim and the position of the northern limit, but Kuwait agreed that these Saudi concessions were without coast to Saudi Arabia's economic interest. Thus, Kuwait agreed that the principle of common resources ownership would nonetheless still apply to Qaru and Umm al-Maradim and to a northern area defined, basically, by two lines reflecting past positions of both countries concerning the placement of the northern limit."⁽¹⁷⁾

This view was inconsistent with the fact and law: the two islands, according to the recorded history, have been under the full sovereignty of Kuwait since 1905⁽¹⁸⁾, and upon the emergence of the Kingdom of Saudi Arabia in 1932, this *status quo* has continued to the present. Thus, titles to these islands may have been possessed by Kuwait by recognized means of the acquisition of territories under international law, such as prescription and recognition⁽¹⁹⁾.

(17) D. A. Colson. International Marine Boundaries, in: IV, The American Society of International Law (2002), p.2828.

(18) Lorimer, op.cit, n. 10, p.1061.

(19) Cf. R.Y. Jennings, The Acquisition of Territory in International Law, 21(1963); Brownlie, - Principles of Public International Law, at 156 ff, (3rd ed. Clarendon Press, Oxford 1983).; Cf., M. Shaw, Title to Territory in Africa, International Legal Issues, (Clarendon Press, Oxford 1986), p.16 ff.

However, the silence of the 2000 Agreement on the legal status of the two islands and the absence of their effects on the demarcation process can be justified on the grounds that the method of delimitation adopted in Article 2 of the 2000 Agreement implies the resolution of the Kingdom of Saudi Arabia's counter-claim of sovereignty over Garuh and Umm al-Maradim Islands. In this respect, the Kingdom of Saudi Arabia explicitly relinquished its counter-claim of shared sovereignty over these islands and its ownership of the islands, which had been owned by Kuwait. This was performed in return for not only the sharing of natural resources (oil, gas, etc.) between the two states on these islands and in the surrounding waters⁽²⁰⁾ but also for the redefinition of the northern offshore boundaries and the method used for the demarcation of the dividing line of the submerged area adjacent to the NZ.

Additionally, it has been claimed that the use of Failaka as a base point demonstrates the fact that the parties did not want to influence any future delimitations of marine boundaries between Kuwait and Iran. In this regard, Colson has stated that: "... While Kharg Island [an Iranian island] obviously has no effect on any lateral delimitation pertaining to Saudi Arabia and Kuwait regarding the Neutral Zone, it is safe to assume that Iran would argue that Kharg Island should have at least as much effect on a delimitation between Iran and the Offshore Neutral Zone, or Iran and Kuwait, as has been given to Failaka in Kuwait's practice with Saudi Arabia "⁽²¹⁾. The merit or demerit of this view will be further scrutinized in the following section.

Based on the above analysis, one may arrive at the conclusion that all of these geographical features (the islands and the semi-circle land boundaries of Kuwait) constitute relevant circumstances⁽²²⁾ that should

(20) The Dorra Offshore Gas Field is not far away from this boundary delimitation. It is located in the marine boundary between Iran, Kuwait and the Kingdom of Saudi Arabia, 43 M.E.E.S., at A 10-11 (No.21, 22 May 2000).

(21) Colson. IV, *International Marine Boundaries*, op.cit., n. 17, p.2830.

(22) Cf., M. D. Evans. *RCSand Maritime Delimitation*, (Clarendon Press Oxford 1989), p.131; Symmons, *The Maritime Zones of Islands in International Law*, the (Hague, Nijhoff 1979), p.62 ff.

have justified the deviation from the application of the principle of equidistance for the benefit of Kuwait. This is accomplished by assigning to these RCS some effects on the demarcation of the northern marine boundaries to avoid any encroachment on Kuwait's sovereignty over these islands and to reach the standard of equitable principle as a recognized principle of international law in this case⁽²³⁾.

3. Effects on The Division of the Submerged Area Adjacent to the Partitioned NZ: Article 1 of the 2000 Agreement contains the methods and principles agreed upon to divide the marine areas that are adjacent to the NZ and located between the southern and northern offshore boundaries between the two states. The Article depends on the agreed upon geographical coordinates to demarcate this dividing line, some parts of which are inequitable and constitute an infringement on the sovereignty of Kuwait over its islands. For instance, although the Kuwaiti islands of Garu and Umm al-Maradim are located in the submerged area adjacent to the NZ but outside its territorial waters and those of the two states, this article does not regard these islands as equidistance base points, and the parties have chosen not to give these islands any effects in favor of Kuwait, in this demarcation process, not on the bases of their geographical features, or legal status, as mentioned above, but because of their economic value.

Thus, the dividing line starts at point (G) on the coast, as established by the 1969 Supplementary Agreement partitioning the ZN into two equal parts, and extends eastward along four segments according to an equidistance line measured from the low-water line at the mainland base point. This dividing line is re-routed around Umm al-Maradim Island, leaving it and Garu Island within Kuwait's area without giving them any marine areas. Although Article 1 of the 2000 Agreement applies the principle of equal sharing of the natural resources of the submerged area by referring at its end to Annex 1 of the agreement like Article 2, Article 1 defines "the line dividing the submerged zone adjacent to the divided

(23) M. Miyoshi. *Considerations of Equity in the Settlement of Territorial and Boundary Disputes*, (Martinus Nijhoff Publishers 1993), p.129 ff.

zone, which represents the border between the two countries...”, this dividing line is based on the equidistance criterion; but in some areas, the line is based on simplified equidistance lines, and in other areas, these equidistance lines are developed from only chosen base-point configurations for the benefit of the Kingdom of Saudi Arabia.

In that, Article 1 of the Agreement does not apply the criterion of proportionality and the principle of equity in the definition of the dividing line of the adjacent zone to assign effects to the RCS related to Kuwait; it applies the principles to their full extent only with respect to the sharing of natural resources in the northern marine boundaries of Kuwait. For instance, Article 2 of the 2000 Agreement establishes a northern limit, and Article 3 of this Agreement adjusts this northern limit to a half of its original size. The three lines, as defined by Article 1, 2 and 3, are subject to the principle of equal rights only in sharing the natural resources of these areas, as emphasized in the annex to the 2000 Agreement. This annex reaffirms that the natural resources of the offshore ZN are to be "jointly shared", including the islands of Garu and Umm al-Maradim and the area between the lines established by Article 2 and Article 3, all of which are Kuwaiti marine areas.

The full effects given to the Failaka island by Article 3, through which the parties aimed at establishing practice supporting Kuwait's position in any future marine boundary delimitations between Kuwait and Iran, are not significant compared to the economic values of these islands taken by the Kingdom of Saudi Arabia in this case. The agreement in general and, for instance, Articles 1, 2, and 3, aggravates and does not mitigate this disadvantageous position of Kuwait. In short, Iran would *mutatis mutandis* impart, or try to impart, whatever it required on the methods and principles accomplished in these three articles.

IV. Conclusion: The three islands of Garu, Umm al-Maradim and Failaka are relevant to the marine boundary delimitations between the Kingdom of Saudi Arabia and Kuwait. The effects of the three Kuwaiti islands on the marine boundary definition between the two states were

treated differently by the 2000 Agreement defining the marine boundaries between the Kingdom of Saudi Arabia and Kuwait.

An examination of this Agreement, as has been performed by a similar study elsewhere⁽²⁴⁾, which shows that economic and geographical considerations constitute substantial motives in drafting such an agreement. Moreover, economic considerations in this agreement appear to have had a direct influence not only on the choice of the delimitation method but also on the actual location of the boundary lines. This is not to suggest that the other geographical and non-geographical factors of an inland, such as the island's size, population, and disputed status, and even the timing of the conclusion of the 2000 Agreement, did not also influence the demarcation of the southern and northern boundaries and the dividing line of the submarine area adjacent to the NZ.

The southern offshore boundaries between the Kingdom of Saudi Arabia and the NZ are defined in Article 4 of the Agreement. Through such a definition, the parties have chosen to assign the economic factors more weight than any other legal or geographical effects. This has been performed not on the basis of the equal sharing of natural resources, as has been seen in other articles, but only for the benefit of the Kingdom of Saudi Arabia and even contrary to the pre-existing practice of the two states and the principle of the definition of the northern marine boundaries between the NZ and Kuwait, as stated in Article 2 of this Agreement,

In Article 2, economic, not geographical or even legal, factors have also played substantial roles in the Agreement's draft to the advantage of one party, namely the Kingdom of Saudi Arabia, at the expense of the other in demarcating the marine boundaries from the low-water mark of the mainland of Kuwait. Moreover, the article does not relegate any effects to the Kuwaiti islands of Garu and Umm al-Maradim. This article applies the principle of equal distances from the low-water line to share

(24) B. Kwiatkowska. *Economic and Environmental Considerations in Marine Boundary Delimitations*, *International Marine Boundaries*, (1993), vol.1, p.75 ff.

equally the natural resources deposited in this marine area, which were supposed to be exclusively Kuwaiti.

According to international law, as stated above, all these islands constitute RCS that justify the deviation of the application of the principle of equidistance by giving these RCS some influence on the demarcation of the northern marine boundaries to avoid any encroachment into Kuwait's sovereignty over these islands and to reach the standard of equitable principle as a recognized principle of international law.

The full effect relegated by Article 3 to Faylakah Island, which is far away from this boundary line, does nothing to mitigate this inequitable result nor does it prevent the 2000 Agreement influence on any future delimitations of marine boundaries between Kuwait and Iran because the present agreement assigned these effects before any other agreement, as described regarding Article 2 and Article 1 above.

In dividing the marine areas, which are adjacent to the ZN and located between the southern and northern offshore boundaries between the two states, Article 1 adopted the same economic, not legal, principles embodied in Article 2. Some parts of the dividing line are inequitable and constitute an infringement on the sovereignty of Kuwait over the Garu and Umm al-Maradim islands because this article does not regard these islands as equidistance base points and does not assign to these islands any effects on this demarcation process.