

MEDIATION



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Legal approach to US Mediation in the
Lebanese - Israeli maritime border
dispute

11 - 04 - 2022

The dispute over the demarcation of the maritime borders between Lebanon and Israel is not new. However, over the past few years, many negotiators³ have tried to converge the different points of view of the representatives of the two parties to the dispute in order to find a joint agreement that would be beneficial both on a geostrategic and economic scale.

To contextualize the situation, it is essential to note that the contentious issues were both substantive and formal. On the substance, Lebanon and Israel have been in a State of war since 1948. As a result, on the one hand, there is no diplomatic relationship between the two countries and, on the other hand, there is no clear demarcation of their land and sea borders. On the form, the contentious issues concerned, for example, the appointment of the negotiator, the place where the negotiations will be held, the timetable setting out the steps to be followed during the process of the talks, etc.

2020 marks the resumption of mediation efforts under the auspices of the UN with the presence of an American mediator, after many years of disruption. The importance of the establishment of an Israeli-Lebanese maritime agreement is, first and foremost, due to the economic stakes involved. The natural gas market is experiencing a growing demand on an international scale; however, the supply has been considerably reduced following the Ukrainian crisis. The exploitation of the Mediterranean reserves opens the way to gas exports to Europe, thus being analyzed as an opportunity for both Lebanon and Israel.

It is clear that the attempts to resolve such a maritime dispute are serious this time, as evidenced by the latest written proposal sent by the American mediator, which both parties have accepted. In this respect, the following question arises: what will be the legal implications of the outcome of such a mediation carried out under the aegis of a third-party negotiator/mediator?

To answer such a question, it is essential first to trace the chronological development of the maritime dispute, then to evoke the reasons that led the two parties to the conflict to opt for mediation. Finally, it is a question of analyzing the various stages that preceded the agreement in order to deal with its consequences from a legal point of view.

³ Frederic HOF, David SATTERFIELD, David SCHENKER and currently, Amos HOCHSTEIN.

Chronological evolution of the dispute

Any mediation requires the existence of a conflict beforehand. In this case, the conflict leading to the implementation of a mediation process is the consequence of two factors. The first is the discovery of natural gas reserves in the eastern Mediterranean. In contrast the second is a difference in geographical coordinates between the two parties regarding the demarcation of their maritime borders.

The object of this article is limited solely to the maritime context, and it is, therefore, inappropriate to dwell on the political reasons behind the State of war between the two States. To this end, the question of maritime borders has emerged as a new source of conflict, adding to a multitude of sources that have been present over the years.

Geological discoveries have revealed vast reserves of natural gas and oil deposits in the eastern Mediterranean basin, with estimates of up to 122 trillion cubic feet of recoverable gas⁴. As a result, countries like Lebanon and Israel have been encouraged to explore the prospects of their hidden marine resources⁵. Lebanon thus signed in 2017 a gas exploration and production agreement with a consortium composed of the multinationals *Total*, *Eni* and *Novatek* for gas blocks 4 and 9⁶. Israel, meanwhile, has accelerated plans to explore the main gas fields in its waters, such as Tamar and Leviathan.

However, the consortium has indicated to the Lebanese State that it will not resume its exploration and extraction operations in block 9 for one reason: part of it lies in waters disputed by Israel, which invests to be made very risky from a political point of view. It is obvious that no investor will take the risk of embarking on such an exploration process until the maritime dispute is resolved⁷.

⁴ C. J. SCHENK, M. A. KIRSCHBAUM, R. R. CHARPENTIER, T. R. KLETT, M. E. BROWNFIELD, J. K. PITMAN, T. A. COOK, M. E. TENNYSON, *Assessment of undiscovered oil and gas resources of the Levant Basin Province, Eastern Mediterranean*, U.S. Geological Survey Fact Sheet 2010-3014, 2010. <https://pubs.usgs.gov/fs/2010/3014/>

⁵ M. O. ABD EL-AZIZ, *Will Lebanon and Israel finally end their maritime border dispute?*, The Cairo Review of Global Affairs. <https://www.thecaireview.com/essays/will-lebanon-and-israel-finally-end-their-maritime-borders-dispute/>

⁶ D. SABAGHI, *Explained: Renewed Israel-Lebanon maritime border dispute*, Middle East Eye, 11 June 2022. <https://www.middleeasteye.net/news/explained-israel-lebanon-maritime-border-dispute-renewed>

⁷ R. EL CHAMI, *Natural Gas Issues in the Eastern Mediterranean: The Case of the Israeli Lebanese Conflict*, Fondation pour la Recherche Stratégique, Septembre 2, 2022, Note n°34/22.

<https://www.frstrategie.org/sites/default/files/documents/publications/notes/2022/202234.pdf>

This brings us to the second factor generating the maritime conflict, namely, the delimitation of the maritime borders.

In this regard, it is important to note that this factor is the result of a bilateral agreement on the demarcation of maritime borders between Lebanon and Cyprus dating from 2007, which is contentious and a source of various problems. Under this agreement – which has not entered into force because the Lebanese parliament has not ratified it – a certain point "1" was identified as the southernmost point of Lebanon's EEZ.

In 2009, aware of a technical error in the demarcation of maritime boundaries⁸, the Lebanese government identified by a decree (6433/2011) point "23" as the southernmost point of the Lebanese EEZ. However, in the meantime (in 2010), Israel and Cyprus signed a bilateral agreement on the demarcation of their maritime borders considering point "1" as the northernmost point of Israel⁹.

This discrepancy in the respective geographical coordinates created a disputed maritime zone of 860 square kilometers between Lebanon and Israel.

Mediation to resolve the dispute

The problem of demarcating Lebanon's borders with Israel has prompted the United States (USA) to conduct mediation between the two countries since 2011¹⁰. Several negotiators have succeeded each other for eleven years, but the actual indirect negotiations took place in 2020. At the time, David SCHENKER led the first phase of indirect negotiations under the auspices of the UN in the presence of the two Lebanese and Israeli delegations. These were having failed, it is Amos HOCHSTEIN who takes over in 2021 to resume the mediation process.

Why mediation to resolve such a conflict? Is it the only option in this case? Or is it simply the most effective way to resolve interstate disputes?

First, the use of mediation in this maritime boundary dispute has its roots in factors intrinsic to the dispute itself. Third-party mediation was not the primary option for Lebanon, which preferred a conflict resolution mechanism under the auspices of the UN. However, this is not feasible

⁸ M. NASH, *Points of Contention*, NOW Lebanon, 13 July 2011, "Mohammad KABBANI, head of Parliament's Public Works and Energy Committee told NOW Lebanon that using point 1 was a mistake".

⁹ D. AMELLEM, *Les problématiques des réserves gazières au large d'Israël, de Gaza, de l'Égypte, du Liban et de Chypre*, Observatoire du monde arabo-musulman et du Sahel, Fondation pour la Recherche Stratégique, June 2018, p. 14-15.

¹⁰ C. SKAFF, *Liban-Israël : enjeux des négociations qui portent sur 1 800 km2*, L'Orient Le Jour, January 9, 2021. <https://www.lorientlejour.com/article/1247495/liban-israel-enjeux-des-negociations-qui-portent-sur-1-800-km2.html>

because the major obstacle is that Israel is not a party to the Montego Bay Convention on the Law of the Sea – United Nations Convention on the Law of the Sea of 1982 (UNCLOS). Therefore, the International Tribunal for the Law of the Sea established by the said Convention cannot subsequently be seized because Israel is not subject to its jurisdiction.

While the rules of such a Convention are generally regarded as binding under customary international law¹¹, any claim by Lebanon under the provisions of the Convention - concerning to demarcation – will be reduced to a mere argument.

Finally, the United Nations has refused to interfere in the dispute on the grounds that the mandate of the United Nations Interim Force in Lebanon (UNIFIL) is only to verify the implementation of Resolution 1701 adopted on August 11, 2006, by the Security Council and not to demarcate maritime boundaries.

The most viable method to resolve such a conflict is, therefore, mediation.

Secondly, the recourse to mediation in this dispute is due to the fact that it is by far the most common form of management of inter-state conflicts¹². Indeed, if the state legal systems have sufficient means to guarantee the execution of the obligations created on their territories in accordance with the regulatory provisions, the resolution of inter-state conflicts occurs on an international scale without guaranteed application mechanisms¹³. A probable unsteadiness in the balance of power between the states in a conflict situation can also aggravate the intensity of the dispute.

To this end, mediation, which is an approach based on the search for common interests through negotiation conducted by a third party, appears to be the most appropriate method for managing and resolving inter-state conflicts¹⁴.

The conduct of the third-party mediation process

1. Definition. Mediation of an international dispute is a process by which the conflicting parties use a third party to reach a mutually acceptable agreement. In the case of an inter-state conflict, mediation takes place when the conflicting states request assistance or accept an offer of

¹¹ J. MACARON, *Prospects of US Mediation in the Lebanon-Israel Border Talks*, Arab Center Washington DC, October 14, 2020. <https://arabcenterdc.org/resource/prospects-of-us-mediation-in-the-lebanon-israel-border-talks/>

¹² See J. BERCOVITCH, S. S. GARTNER, *International conflict mediation: new approaches and findings*, Routledge, 2009, p. 5.

¹³ R. AXELROD, *The evolution of cooperation*, 1984, p. 174.

¹⁴ S. S. GARTNER, *Third-Party Mediation of Interstate Conflicts: Actors, Strategies, Selection, and Bias*, 6 Y.B. Arb. & Mediation, 2014, p. 272.

assistance from an individual, group, state, or organization to resolve a conflict without resorting to force or invoking the rule of law¹⁵.

2. The different positions of the two parties. The terms "positions" and "interests" are frequently discussed in amicable dispute resolution. In the early stages of any dispute, the parties are usually entrenched in their respective positions, each with a disparate perspective of the other on what constitutes an appropriate solution to the dispute¹⁶. Thus, the positions affirm what each party claims to want as an outcome. At this point, they are unable to identify the "why" of such a position and, thus such an outcome. The challenges to effective dispute resolution will therefore increase.

At this stage of the Lebanese-Israeli conflict, two parties' positions were as follows: On the Lebanese side a new claim has emerged (point 29) in addition to the original 860 km² of disputed waters (point 23). This Lebanese position was based on a study conducted by the Lebanese Army and approved by the British Hydrographic Service indicating that Lebanon has the right to claim not 860 km² but 1430 km². This new claim would place the northern half of the *Karish* gas block in Lebanese maritime territory, thus aggravating the original conflict.

On the Israeli side, the refusal was not only limited to the new Lebanese position to annex the Karish block but also extended to the original Lebanese attachment to point "23". The Israeli position in this regard was quite clear in that it recognizes as the only point of demarcation of the two borders the point "1" initially provided for in the HOFF compromise. This position, therefore, clearly negates the regulatory provision provided by the Lebanese decree n° 6433/2011, adopting point "23" as the demarcation point of the maritime borders.

The failure of previous negotiations was caused by the parties focusing on their respective positions without looking for interests that would satisfy their real needs. Indeed, the parties may have common interests or different interests that are not in conflict, facilitating a collaborative solution. Hence the important role of the mediator at this stage of the process.

¹⁵ J. BERCOVITCH, « The Structure and Diversity of Mediation in International Relations », in *Mediation in international relations*, Jacob Bercovitch & Jerry Rubin eds., 1992, p. 8.

¹⁶ C. NOBLE, *Mediation Positions vs. Interests*, Mediate.com, December 7, 2013. <https://www.mediate.com/mediation-positions-vs-interests/>

3. The strategy adopted by the mediator. The latter is a determining factor in the success or effectiveness of inter-state mediation¹⁷. If there are several strategies, each may affect the outcome differently. In this respect, the degree of intervention will differ from one strategy to another¹⁸. The first form of intervention (known as the *Communication-Facilitation strategy*) can be described as passive, in which there is no substantial contribution from the mediator. The mediator is simply a communicator between the parties with the aim of organizing interactions and facilitating cooperation between them. The second form of intervention (known as *Procedural-Formulative strategy*) involves the adoption of procedural strategies by the mediator to create an environment conducive to the management of the conflict in question. The final form of intervention (known as *the Directive strategy*) involves the mediator participating in the negotiations substantively. In this case, the conflict not only hinders communication between the parties but also prevents the solutions. Such a strategy requires a maximum degree of involvement by the mediator by becoming part of the solution to bring the parties to an agreement.

In the present case, we can analyze the mediator's intervention as belonging to the last form of intervention mentioned above. Indeed, on the one hand, the initial political conflict generating the State of war between the two parties prevents any kind of communication during the mediation process. On the other hand, the American mediator made several written suggestions and proposals to both parties. The last written offer that he presented on October 1, 2022, to the leaders of both sides established the final agreement. To do so, it was necessary to bypass the political and ideological commitments that constrain both parties. Therefore, the intervention of the mediator in a substantial way changed the deal, first by bringing ideas and secondly by thinking of means to support these same ideas.

This high level of involvement on the part of the mediator was reflected in the following tactics. The first was to make the parties aware of the costs of a non-agreement. Indeed, such an agreement benefits both parties equally on an economic scale. For Israel, it is a matter of continuing the exploitation operations that have already begun. Such an agreement, therefore, provides the legal and political security so coveted by foreign investors. For Lebanon, whose economic situation continues to deteriorate, such an agreement will mark the beginning of exploration and exploitation operations in the border blocks. The second tactic was to change the

¹⁷ See J. BERCOVITCH, A. HOUSTON, "The Study of International Mediation: Theoretical Issues and Empirical Evidence", in *Resolving international conflicts: the theory and practice of mediation*, Jacob Bercovitch ed., 1995.

¹⁸ M. E. YILMAZ, *Third-Party Intervention in International Conflicts: Peacekeeping and Peacemaking in The Post-Cold War Era*, Uluslararası İlişkiler, Volume 3, No 11, 2006, p. 25-44, p. 35.

perceptions of the parties to achieve greater results¹⁹. Thus, unlike his predecessor Frederic C. HOF – who approached the problem of maritime boundary demarcation from the perspective of a single border dispute – Amos HOCHSTEIN approached the conflict in an energy context and not by limiting it to a simple frontier dispute requiring drawing a dividing line.

It should be pointed out, however, that the effectiveness of these various tactics implies analyzing the influence that the mediator can exert in the management of the conflict in order to identify the leverage effects that he can generate. This requires an examination of the mediator's status to identify the sources of his power²⁰. Thus, the choice of the mediator's strategy depends largely on the mediator himself. For example, international powers can be effective mediators in managing intense conflicts because they are generally able to generate sufficient leverage²¹.

This high capacity of leverage in the present case is thus due to the fact that the third party in question – namely the USA presented by Amos HOCHSTEIN – has a certain interest in such a conflict for economic and strategic reasons. To this is added the presumption of partiality of the person of the mediator himself – as he is of Israeli origin – which can be analyzed as a factor of incentive for the latter to succeed in the mediation.

4. Convergence towards interests. Interests do not reflect only what is important to the parties but rather why they are important. To achieve mutually acceptable solutions to a dispute, the effort to be made by the parties is for each to identify their interests and articulate them with the expected outcome. This tends to open the door to various possibilities that are otherwise limited by holding positions firmly.

Thus, if the positions of the two parties were clearly manifested by a desire to extend their marine territories as much as possible in order to benefit from the greatest number of cubic meters of gas possible, in this case, no amicable solution can emerge. Nevertheless, if these same parties made their respective interests prevail, in this case the amicable solution is more likely because they would apprehend the situation from a win-win perspective rather than a win-lose one.

Lebanon's needs were to have a sufficient maritime territory allowing it to exclusively exploit a gas field that would help it generate foreign investment and put an end to the electricity crisis.

¹⁹ J. BERCOVITCH, S-M. LEE, *Mediating international conflicts: examining the effectiveness of directive strategies*, International Journal of Peace Studies, Vol. 8, No. 1 (Spring/Summer 2003), pp. 1-17.

²⁰ J. BERCOVITCH, A. HOUSTON, *Why Do They Do It like This? An Analysis of the Factors Influencing Mediation Behavior in International Conflicts*, The Journal of Conflict Resolution, Apr. 2000, Vol. 44, No. 2, pp. 170-202, spec. p. 180.

²¹ See L. REID, *Examining Leverage in Civil War Mediation: A Dynamic Theory of Mediator Leverage*, p. 5.

Israel's needs were to have a secure certain boundary line that would provide stability to allow it to continue the extraction of gas and expand exploitation to the border blocks.

It is therefore by shifting the attention of the parties from their points of view and the desired results to their interests²² and their real needs that the mediator was able to reach a final agreement.

Conclusion

After several months of negotiations, both sides accepted the latest proposal of the US mediator and signed the mediated agreement to end the dispute over the demarcation of maritime borders.

However, a major problem is the binding force of this mediated agreement and its enforceability. On the one hand, there is no mechanism at the international level to ensure the enforcement of an agreement resulting from an interstate mediation. On the other hand, political upheavals in both states may cause one or both parties to break with the commitments made in the agreement. It should be noted that the agreement is not legally binding, as it is not the subject of an upstream contract between the two parties.

The only way to guarantee legal certainty for this agreement would therefore be to focus on its purpose. As the latter is the demarcation of maritime borders, it is therefore a matter of changing the coordinates of the borders of the two states' maritime spaces and then notifying this change to the United Nations Secretariat.

On 27 October 2022, delegations from both sides presented their signed agreement for the delimitation of their maritime border to the US mediator in a ceremony held at UNIFIL's premises in Naqoura, southern Lebanon. The agreement took the form of two separate letters, one from Lebanon to the US and the other from Israel to the US. Finally, the coordinates from Lebanon and Israel were presented to the UN Special Coordinator for Lebanon for deposit with the UN Secretariat²³.

²² M. PEL, *Interests in mediation*, Kluwer Mediation Blog, March 29, 2012.
<http://mediationblog.kluwerarbitration.com/2012/03/29/interests-in-mediation/>

²³ Note to Correspondents: Lebanon-Israel maritime agreement, United Nations, Secretary-General, 27 October 2022.
<https://www.un.org/sg/en/content/sg/note-correspondents/2022-10-27/note-correspondents-lebanon-israel-maritime-agreement>